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Dissertation topic: Constitutional Protection of the Right to Education in Tanzania and South Africa: A Comparative Study

A dissertation submitted in partial fulfilment of the requirements of the Degree LLM (Human Rights and Democratization in Africa) at the Centre for Study on Human Rights, Faculty of Law, University of Pretoria, South Africa.

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DECLARATION

I, **Mathias Omar**, declare that **The Constitutional Protection of the Right to Education in Tanzania and South Africa: A Comparative Study** is my work and that it has not been submitted for any degree or examination in any other university or institution. All the sources used, referred to or quoted have been duly acknowledged.

Mathias Omar

Signed.....

28 October 2010

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DEDICATION

To my beloved father Kisegu Lushinge and mother the late Maryciana Nzoobhe Lubereja, as did all they could as semi illiterate peasants in the countryside, sometimes in the most challenging of circumstances, for me to go to school.

List of abbreviations

ABET	Adult Basic Education and Training
ACPHR	African Charter on Peoples' and Human Rights
ACRWC	African Charter on Rights and Welfare of the Child
AG	Attorney General
AIDS	Acquired Immune Deficiency Syndrome
CA	Court of Appeal
Cap	Chapter
CC	Constitutional Court of South Africa
CCM	Chama Cha Mapinduzi
CDE	Convention against Discrimination on Education
CESCR	Committee on Economic, Social and Cultural Rights
CODESA	Convention for Democratic South Africa
CRC	Convention on Rights of the Child
DPP	Director of Public Prosecution
EFA	Education for All
FET	Further Education and Training
GET	General Education and Training
GPI	Gender Parity Index
HE	Higher Education
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
LHRC	Legal and Human Rights Centre
MINEDAF VII	Seventh Conference of Ministers of Education of African Member States
MP	Member of Parliament
MPNP	Multi-Party Negotiation Process
NEC	National Executive Committee
NEPAD	New Partnership for African Development
NQF	National Qualification Framework
PEDP	Primary Education Development Plan
RSA	Republic of South Africa

SAPs	Structural Adjustment Programmes
SAQA	South African Qualification Authority
SEDP	Secondary Education Development Plan
STD	Standard
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children' Fund
URT	United Republic of Tanzania
US\$	United States Dollar
USAID	United States Agency for International Development
WB	World Bank
WEF	World Forum on Education
WHO	World Health Organisation

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CHAPTER I

INTRODUCTION AND OVERVIEW OF THE STUDY

1. 1 Background to the study

Strong defines the term “constitution” as a framework according to which a political society is structured, where permanent institutions with specific and pre-determined functions and rights are created, through law.¹ The main functions of a constitution include satisfaction of the demands of citizens of a state that their rights will be protected and that the government power will be limited; guarantee that both the rights and responsibilities of the citizen and of the government are exercised according to fixed stipulations to prevent arbitrary decision-making and actions.² The constitution also guarantee the political order that develops in a state, and according to which the governing function will take place, is structured and is in the interest of all concerned; and satisfies demands and expectations of separate communities that form a political unit concerned.³ A constitution therefore establishes legality and legitimacy of a political system and government of a state. The constitutional stipulations must be valid and generally acceptable. The political processes must run concordantly with the stipulations to attain its objectives such as improvement of its citizens’ well being socially and economically through protection of their rights.

Human rights are provided for in the international bill of human rights which includes the Universal Declaration of Human Rights (UDHR),⁴ the International Covenant on Civil and Political Rights (ICCPR)⁵ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁶ The human rights provided in these instruments are binding upon contracting States. In clearly binding terms, the ICESCR provides for the right to education for every individual.⁷ The obligations of contracting states flowing from this right include taking appropriate, but preferably legislative measures to implement it.⁸ The advocacy of the international implementing agencies of the right to education therefore, focuses on its inclusion in constitutions and other national legislations.⁹

¹ CF Strong *Modern Political Constitutions* (1972) 126.

² As above.

³ As above.

⁴ Done in 1948.

⁵ Done in 1966

⁶ Done in 1966.

⁷ Articles 2(1) and 13(1) ICESCR.

⁸ Article 2(1) ICESCR & Article 1 ACRWC.

⁹ UNESCO’s Mid-term Strategy (2002-2007).

The international bill of rights was incorporated into the United Republic of Tanzania Constitution (1977 URT Constitution) in 1984 and into the Republic of South Africa Constitution (1996 RSA Constitution) in 1996. The right to education is not justiciable under the 1977 URT Constitution while it is justiciable under the 1996 RSA Constitution.

1.2 Statement of the problem

In 1984, the Bill of Rights was included in the United Republic of Tanzania Constitution of 1977 (the 1977 URT Constitution) that is in operation at present. The 1977 URT Constitution has divided the Bill of Rights into two parts; part one is unenforceable and part two is enforceable. The objectives of the 1977 URT Constitution, *inter alia*, oblige the state to function towards developing, protecting and utilizing the national wealth and natural resources to the interest of the public.¹⁰ It makes it clear that all government policies and activities shall ensure the use of national wealth and natural resources is focused on the development of all citizens with a particular attention to “elimination”¹¹ of poverty, ignorance and diseases¹². It further provides that all economic activities shall not be conducted in a manner that would lead to misappropriation of national wealth, natural resources nor the means and forces of production put in hands of or to the interest of few private individuals.¹³

Tanzania’s performance in implementing the right to education is poor. Meanwhile, in its reports to the UN implementing agencies it claims to have adopted legislative measures to implement the right to education. To that effect, it mentions the 1977 URT Constitution as one of the legislations that safeguard the right to education in Tanzania. This study focuses particularly on the constitutional protection of the right to education as provided for in the 1977 URT Constitution in a comparative analysis with the 1996 RSA Constitution in this regard.

1.3 Research questions

Based on the foregoing background, the following questions arise:

1. What is education, its nature and content and does education amount to a justiciable human right?
2. Do the 1977 URT Constitution and the 1996 RSA Constitution guarantee the protection of the right to education?
3. Does inclusion in a constitution and making it justiciable undermines or enhances the implementation of the right to education?

¹⁰ Article 9(c) 1977 URT Constitution.

¹¹ Kiswahili version of 1977 URT Constitution which is authentic and authoritative uses the term ‘kuondosha’ equivalent of ‘elimination’.

¹² Article 9(i) URT Constitution.

¹³ Article 9(j) URT Constitution.

1.4 Literature Review

While there have been major studies almost in every aspects of socio-economic rights in Tanzania, there has been very little analysis of the ideas underpinning the right to education. Most of the studies have been done from a political science perspective which has not addressed the legal nexus of the right to education in particular, for it to be enshrined in a constitution and made justiciable.

This study draws much from the introduction of socio-economic rights into the 1996 Constitution of the Republic of South Africa (1996 RSA Constitution) and its experience in these rights' justiciability. Much reliance is dwelt on the book by Dan Brand and Christof Heyns (eds).¹⁴ In this book a detailed discussion is made by Danie Brand on how the socio-economic rights were introduced in the South African constitution generally whilst Faranaaz Veriava and Fons Cooman discuss the right to education in particular in Chapter Two. Klaus Dieter Beiter¹⁵, himself dwelling much from the work of Douglas Hodgson¹⁶ analyses numerous international instruments which protect education as a human right. This work also gives guidance on states in their endeavours to comply with the international instruments concerned. Matthew Craven¹⁷ discusses the state obligation under the ICESCR. He gives the nature of the obligation, the obligation to respect, protect and fulfil, by all appropriate means, including particularly the adoption of legislative means, progressive achievement and full realization. Magdalena Sepulveda¹⁸ work has been very important to this study as she expounds on the Covenant in a contemporary international environment as she discusses the state obligations and the CDESCR's interpretation of these obligations and clarifies the normative content of the covenant. The book by Ian Currie and Johan de Waal is also of magnificent importance to this study it has separate chapters that discuss constitutional development, the Bill of Rights and justiciability of socio-economic rights in the 1996 RSA Constitution context.¹⁹ Other documents reviewed include the constitutions of Tanzania and South Africa, reported and unreported cases of relevance to the right to education.

The Afrobarometer reports provide a reliable source of statistical analysis and gauging indicators ranging from social, political and economic arenas in African countries including Tanzania²⁰.

¹⁴ D Drand and C Heyns (eds) *Socio-Economic Rights in South Africa* (2005).

¹⁵ KD Beiter *The Protection of the Right to Education by International Law* (2005).

¹⁶ D Hodgson *The Human Right to Education* (1998).

¹⁷ C Matthew *The International Covenant on Economic, Social and Cultural Rights: A perspective on its Development* (1995).

¹⁸ M Sepulveda. *The nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2002).

¹⁹ I Currie and J de Waal *The Bill of Rights Handbook* (2005).

²⁰ <http://www.afrobarometer.org> (accessed on 11 October 2010).

1.5 Objectives of the study

The study has three major aims: 1. To give a detailed discussion of the right to education making a comparative analysis between the Tanzanian and South African constitutions in three thematic areas; constitution-making and constitutionalism; enshrinement of right to education in these constitutions; and justiciability of right to education in both constitutions; 2. To discuss the law relating to the right to education at the international and regional level in the jurisprudence of two countries; Tanzania and South Africa. The emphasis is placed on to explore how better a constitution shall incorporate the right to education for individuals to be able to litigate against their governments at a national level. The study establishes a need for other African countries like Tanzania to emulate the South African model that would makes a government more accountable to citizens in realising socio-economic rights in general and right to education in particular; and 3. To establish a link between non-inclusion in a constitution or other national legislations and making the right to education unjusticiable results into poor performance in implementing it.

Realisation of the right to education gives impetus to understanding the opportunities to realize other rights and freedoms. Realisation of other civil and political rights depends much on the “minimum level of education”.²¹ It is a legitimate hope that this work will be a stimulus to prospective researchers with interest in the area covered by this research. It also compliments to studies already done in this area.

1.6 Research Methodology

The study adopts both the descriptive and analytical approaches and depends on both library use and desktop research methods. The descriptive approach is adopted to inform the descriptive approach for a broad understanding of the subject matter. The study mainly adopts a comparative approach in relation to the two countries’ constitution and the process of implementation of the right to education adopted.

The reports of the UN implementing agencies findings on the implementation of the right to education in both two countries have been examined on a comparative note to concretize the findings of this study. The findings of the implementing agencies are guided by relevant international and regional instruments on the right to education, general comments of technical agencies, declarations and resolutions.

²¹ F Veriava and F Coomans, ‘The Right to Education’ in D Drand and C Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 57.

The study draws the Tanzania experience in constitution making, constitutionalism and enshrinement of socio-economic rights that is juxtaposed to the South African experience. This juxtaposition is supported by some relevant cases from both countries relevant to the constitutional law, administrative law and justiciability of socio-economic rights.

The devise adopted by the CESCR uses availability, accessibility, acceptability and adaptability to gauge failures and achievements on the implementation of the right to education. This study adopts the similar approach on assessing whether and how Tanzania and South Africa have failed or achieved on the implementation of the right to education.

1.7 Outline of the study

This study is divided into five chapters: Chapter One is an introduction and general overview of the study and covers the following issues; background to the study, statement of the problem; aims of the study; literature review; research methodology; limitations of the study; and outline of chapters.

Chapter Two gives a detailed discussion of education as a human right. This part gives the historical development of the right to education in the context of international human rights law. The Content of the right to education under international human rights law is discussed in detail in this part. At this stage, a discussion is given on how the right to education is implemented at the international level. It follows a discussion on the state obligations flowing from the right to education.

Chapter Three makes a comparative analysis of the right to education as provided in the 1977 URT Constitution and the 1996 RSA Constitution. The 'constitution' being a 'mother law' in Tanzania as well as in South Africa, a discussion is given on what it means by a 'constitution', through which process a 'constitution' ought to have been made from and under what conducts and practices a state should claim adherence to the principles of constitutionalism. If one agrees that a constitution is a safest place where fundamental rights and freedoms are either enshrined or entrenched, is this a case for Tanzania and South Africa. This chapter examines on how the right to education is enshrined in the 1977 URT Constitution in comparison to the 1996 RSA Constitution. This investigation is followed by addressing the issue whether the right to education is justiciable in Tanzania as a case is in South Africa. The aim is to establish a need for other African countries, like Tanzania to emulate the approach that would make governments more accountable to their citizens to realize socio-economic rights including the right to education.

Chapter Four analyses the implementation of the right to education. The analysis uses the availability, accessibility, acceptability and adaptability criteria in concluding the findings.

Chapter V draws the general conclusions by bringing together all major findings made in different chapters of the study. Finally, it makes general recommendations on a way forward on how Tanzania should better implement the right to education.

1.8 Limitation of the study

This study does not purport to be exhaustive. It is only limited to books, periodicals, journals articles and other materials in libraries and desktop research to access information posted on to the internet. It is practically impossible to conduct face-to-face interviews with the judiciary, parliamentarians and other stakeholder in Tanzania, South Africa or elsewhere to have their informed views with regard to the protection and implementation of the right to children.

Under the 1977 URT constitution, most of the socio-economic rights are not justiciable. Due to time limit and workload, this study cannot cover all these rights hence the focus is only on the right to education. The obligation for States parties to implement the right to education requires adoption of appropriate measure, particularly legislative measures. States parties have discretion to adopt other measures including administrative and financial measures. This study focuses mainly on the legislative measures undertaken by Tanzania and South Africa.

CHAPTER II

EDUCATION AS A HUMAN RIGHT

2.1 Development of the Right to Education

This section deals with the definition of the term 'education' and gives a historical development of the right to education in international law.

2.1.1 Definition of the term "education"

Education in a general sense is any act or experience that has formative effects on the mind, character or physical ability of an individual. In its technical sense, education is the process by which the society deliberately transmits its accumulated knowledge, skills and values from one generation to another. Rosado adds that, true education is the harmonious development of the physical, mental, moral (spiritual), and social faculties, the four dimensions of life, for a life of dedicated service.²²

Two approaches have been developed to define the term education; one is referred to as a "broad approach" and the other as a "narrow approach". In the broad approach, education means "all activities by which a human group transmits to its descendants a body of knowledge and skills and a moral code which enable that group to subsist".²³ The UNESCO replicated this understanding and added that individuals and social groups learn to develop consciously within and for the benefit of, national and international communities²⁴. This approach includes the informal and unstructured systems of imparting knowledge.

In a narrow approach, education refers to formal institutional instruction of knowledge within a national, provincial or local education system²⁵. It refers to a formal and structured system both in public and private sectors. This requires an education institution; a school, seminary, college, university or other educational establishment. This does not include only buildings but also grounds necessary for the achievement of the complete span of educational instruction, including anything indispensable to mental, moral and physical development.

This study adopts the narrow approach in the context of human rights. It is from this point of view that education can be claimed as a matter of right from the government by individuals. The protection of the right to education in international instruments refers basically to education

²² C Rosado 'The Meaning of Education or Why Do We Do What We Do?' Keynote Address at the Family Literacy Conference for the California State Department of Education on 6 March 2000 in San Francisco, California.

²³ Beiter (n 15 above) 18-19.

²⁴ Article 1(a) UNESCO Recommendations Concerning Education for International Understanding, Co-operation and Peace Education relating to Human Rights and Fundamental Freedoms 1974.

²⁵ G Mialaret *The Child's Right to Education* (1979) 11.

provided in formal teaching or instructions in primary schools, secondary schools, colleges and higher learning institutions.

Therefore, education must involve acquisition of knowledge and skills aiming at the intellectual development and full development of human the personality. The importance and function of education was enunciated in *Brown v. Board of Education of Topeka*²⁶ where the court expounded at least four important concepts. Firstly, education is amongst the most important functions of the state and local governments, demonstrated by providing education, increased school attendance laws and great expenditure to education. Secondly, a state can only get personnel to discharge public responsibilities if it provides education. The third concept connotes that, education is a basement for a state to have good citizens as it prepares children to know their cultural values and later on undergo professional training that would enable them to adjust to their environment and eventually make an impact on the general development of the society as well as lead successful lives. Lastly, whenever the state undertakes to provide education, the principle of non discrimination has to be adhered to throughout.

The state is the main education provider for its citizens. It designs the education system, provides the regulatory structure and allocates substantially budgetary resources to the education system²⁷. A brief discussion on how education came into being as a right obliging the state to protect is discussed hereunder.

2.1.2 Historical development of the right to education in international law

At the international level, the right to education started to receive an appreciation immediately after the First World War following the formation of the League of Nations in 1919. During this period, the redrawing of international borders especially in Europe necessitated the conclusion of treaties²⁸ to protect the welfare of minority groups not to be discriminated from acquiring education and to have such education through the medium of their own language. In 1924, the League of Nations adopted the Declaration of the Child²⁹, although the right to education was not expressly provided, but education was implied through its operative principles in that; the child must be given the means requisite for its normal development, the backward child must be helped and every child must be put in a position to earn a livelihood.³⁰ The International Labour Organization (ILO) and the United Nations Educational Scientific and Cultural Organization (UNESCO) established in 1919 and 1946 were both mandated as specified agencies and deal, *inter alia*, with educational functions. They liaise on various educational matters including the

²⁶347 U.S. 483 (1954).

²⁷ Article 13 ICESCR.

²⁸ Principal Allied and Associated Powers and Poland, 112 Great Britain Treaty Series 232.

²⁹ Also known as the Declaration of Geneva adopted in nature of a Charter of Child Welfare.

³⁰ Principles I, II & IV.

elimination of illiteracy, the human rights education of the youth and the eradication of discrimination in education. The United Nations International Children Emergency Fund (UNICEF) established in 1946 was initially mandated to help the welfare of children affected by war, drought, famine and other conflicts and emergencies. Its mandate was expanded in 1961 to cover education and vocational training in Third World countries. The right to education has been recognised by several international instruments including; the Universal Declaration of Human Rights (UDHR);³¹ the UNESCO Convention against Discrimination in Education (CDE);³² the International Covenant on Economic, Social and Cultural Rights (ICESCR)³³ and the Convention on the Rights of the Child (CRC).³⁴

2.2 The Nature of the Right to Education

The philosophical basis and justification for education to be recognized as a human right stem from several rationales including; the principle of social utilitarianism argument; an argument that education is a prerequisite for individual development; individual welfare; and that education is man's inherent dignity. The right to education is also an empowerment right. The discussion on these arguments follows hereinafter:

2.2.1 Public Interest Perspective

The public interest perspective argument is commonly referred to as a social utilitarian principle. Under this principle education is seen as the most important tool for the development of the society.³⁵ The society comprises complicated fabrics in social, economic and political areas. These areas require skilled manpower to perform particular and professional functions for people to receive their necessities and meet their diverse demands as well as the society development in general. The utility of education therefore becomes very imperative that performance of public responsibilities and state's obligation to confer rights to its citizens would otherwise become a failure. The provision and delivery of goods and services to the society, whether done as a public function or carried out by private individuals, without education or technical know-how, it proves difficult to attain any meaningful achievement. It had been proved that, the development of humankind from one stage to another has always been associated with correlating advancement of education manifested in the development of the means of production.

The state is obliged to respect, promote, protect and fulfil civil and political rights to its citizens. This obligation would be more difficult to discharge without good citizenry. Good

³¹ Done in 1948.

³² Done in 1960.

³³ Done in 1966.

³⁴ Done in 1989.

³⁵ Principle 7 Declaration of the Rights of the Child 1959.

citizenry derives from a minimum level of competence gotten from a certain level of education. This results in effective understanding and exercising the rights as well as valuable participation in the political activities. Democratic structures and ideals are favourably nurtured in a society with a reasonable level of education. Without such level of competence, neither the state would be able to discharge its obligation nor the citizens will effectively takeover their opportunities to participate in governance and realise their basic and fundamental rights. Therefore, education is a precondition for the exercise and understanding of other rights.³⁶

From the definition given above, apart from being a process of an enlightening experience, education has proved to be an indispensable tool under which important values in societies are transmitted from one generation to another.

2.2.2 Education as a requirement to individual development

Under this principle, the argument advanced envisages that, education is a prerequisite for an individual to develop. In this regard, development is attributed to personal advancement as well as the ability of an individual to realise his potentials in the society. This enables the individual to become a fully functioning member of the society.

At the international level, human rights instruments recognizes this role like the UDHR which expressly provides that education shall be directed to the full development of human the personality.³⁷ These words are echoed and developed further in specific terms in the CRC that education shall be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential.³⁸ The ICESCR³⁹ and the Declaration of the Rights of the Child⁴⁰ stress that children shall be given education that enables them to develop their abilities, individual decisions, and more important, develop a high sense of moral and social responsibility.

2.2.3 Education as an individual welfare right

Welfare rights are necessities to be provided by the community in case an individual is unable to meet them without being assisted. The mostly known welfare rights include food, basic medical care and shelter. It is argued that education is also an integral part of welfare rights. In most societies education cannot adequately be accessed by individuals without assistance from the community. In this case, individuals are able to claim education as their right from the state. The great fear is the significant and irreparable damages individuals would suffer without at least a

³⁶ n 31 above, 57.

³⁷ Article 26(2) UDHR.

³⁸ Article 29(1) CRC.

³⁹ Article 13(1) ICESCR.

⁴⁰ Done in 1959.

basic standard of literacy and numeracy as would not function properly in different spheres of life in their societies. Education has succeeded in enabling individuals to secure work and access basic needs such as food, shelter and health care by their own.⁴¹ An individual with education knows the ways and values of his or her society thus can communicate and be able to exist independently.

2.2.4 Education as a prerequisite to individual dignity

Man's inherent dignity is the basis of human rights. As seen above, education is a prerequisite to realize other rights. The UDHR makes a clear recognition of the inherent dignity and of the equal and inalienable rights of all individuals and all nations. The human rights mentioned in this declaration include the right to education.⁴² The ICESCR also establishes a link between education and dignity in more obvious terms that education shall be directed to the human development of the human personality and the sense of its dignity.⁴³ This human rights instrument directs that education is imponderable for the existence of one's dignified life. It is a requirement for there to be human dignity that such an individual should receive knowledge and skills in a logical thought and reasoned analysis. In any society where education is provided but not to some of the members of such society, those who are made not accessible to education have been deprived of a right thus have no dignity.

Education is an empowerment right as it provides the individual with control over the course of his or her life and protection against the encroachment of the state. The following are the reasons for the right to education to be designated an empowerment right:

Education is a liberation tool.⁴⁴ Education and its institutions foster creativity and autonomy and promoting personal liberty. In most cases, it is in education institutions where ideas are developed and where individuals are enabled to think critically about life. Solutions to problems come from close examination of issues for possible courses of actions and making rational decisions.

Politically, an individual becomes effective participant in the society upon attaining a minimum level of education.⁴⁵ The political rights can be accessed with those who know than those who know not. In Tanzania for instance, in every political position, a minimum level of education is required⁴⁶. It has been alleged that many oppressive governments are not interested

⁴¹ Beiter (n 15 above) 27.

⁴² Article 26 UDHR.

⁴³ n 27 above.

⁴⁴ J Donnelly and R Howard "Assessing national human rights performance: A theoretical framework (1988) 10 *Human Rights Quarterly* 235.

⁴⁵ F Coomans *The international protection of the right to education* (1992) 270-272.

⁴⁶ Under the 1977 URT Constitution, all political positions at all levels require literacy.

to invest in education because well-educated and critical citizens are threats to oppressive regimes.

The socio-economic rights are better accessible by individuals with at least a minimum level of education: information and campaigns on health issues would be easily absorbed by individuals with a certain level of literacy and numeracy; Securing and storage of food education would be understood and utilized by educated individuals; and educated individuals are capable of participating fully in the economic sphere of the society.⁴⁷ In Tanzania, like in many other countries, education is amongst the few avenues a poor child has to follow to attain a better future life.

The link between education and cultural rights is clearly discernible from the fact that education is the most important tool for preserving one's cultural identity and one's exercise religious, linguistic and ethnic related rights.

A good summary of all the above arguments is captured by the general observation of the CESCR on the Economic, Social and Cultural Rights (CESCR) when commenting on the right to education that:

Education is a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is a primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguard children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling the population growth. Increasingly, education is recognised as one of the best financial investment States can make. But the importance of education is not only practical: well educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.⁴⁸

In the subsection hereunder, follows a discussion on the content of the right to education at the international level as well as the regional level.

2.3 Right to education in international human rights law

This sub-section discusses the right to education as provided for in international instruments including the UDHR, ICESCR, ICCPR and the CRC. It also discusses regional instruments dealing with the right to education including the ACPHR and the African Charter on the Rights and Welfare of the Child (ACRWC).

⁴⁷ Beiter (n above) 236.

⁴⁸ CESCR General Comment No. 13 (Twenty First Session, 1999) [UN Doc.E/2000/22].

2.3.1 Right to education in international instruments

International instruments are divided into two broad categories of treaties which are international agreements legally binding states party thereto; and non-binding instruments commonly known as soft law. The soft law category includes declarations, recommendations and general comments made by technical, supervisory or implementing bodies. Although there are no legal penalties for non-compliance to soft law, States subscribe to political and moral commitment to implement them.

The right to education is firstly provided for in the international bill of human rights. The international bill of human rights includes the UDHR, the ICESCR and the ICCPR.

In the UDHR, Article 26 states:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial and religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior to choose the kind of education that shall be given to their children.

The above provision is repeated in Article 13 of the ICESCR but adds to the aims of education that is should not only refer to development of human personality but also to his dignity and should enable all persons to effectively participate in a free society.⁴⁹

The ICCPR is also relevant to the protection of the right to education. Article 18(4) of the ICCPR is in *pari materia* with Article 13(3) of the ICESCR and both cover the freedom aspect of the right to education by respecting liberty of parents and, in some cases, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The UNESCO Convention against Discrimination in Education specifically addresses the issues related to discrimination in the field of education by making a broad definition, providing the grounds and clarifies the implications of discrimination in education.⁵⁰ There are international instruments protecting individuals against forms of discrimination in the field of

⁴⁹ P Gebert (1996) *The right to education in Article 13 of ICESCR and its effect of the Swiss education* 329-330.

⁵⁰ Article 1 CDE.

education in respect of religion, race and gender.⁵¹ There are also international instruments dealing categorically with rights of the child in which the right to education is given protection.⁵² The right to education is also protected in international instrument protecting rights of other vulnerable groups including refugees,⁵³ stateless persons⁵⁴, internally displaced persons⁵⁵ and persons caught up in armed conflicts.⁵⁶ International instruments protecting disabled persons⁵⁷, older persons⁵⁸, minorities⁵⁹ and indigenous people,⁶⁰ detained people⁶¹ and migrant workers⁶² also protect the right to education. The first international development goal is universalising primary education in all countries by 2015 as it was set at the World Education Forum (WEF) in Dakar in 2000.⁶³

2.3.2 Right to Education in Regional Instruments

At the regional level the right to education is provided under Article 17 of the ACHPR that ‘every individual shall have the right to education’. Article 11 of the African Charter on the Rights and Welfare of the Child (ACRWC)⁶⁴ provides for the educational rights of the child comprehensively. It recognizes that ‘every child shall have the right to an education’. It goes further that ‘States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular provide free and compulsory basic education.’⁶⁵ It should be noted that the commitment at the World Education Forum held in Dakar in 2000 to provide free and compulsory primary education emanates from this ACRWC.⁶⁶ The ACRWC was reaffirmed at the Ministers of Education in African Member States held in Durban 1998. A Framework for Action in Sub-Saharan Africa: Education for African Renaissance in the Twenty-first Century, adopted by the Regional Conference on Education for All for Sub-Saharan Africa held in Johannesburg⁶⁷ reaffirms that “education is a

⁵¹ Declaration on the Elimination of All Forms of Discrimination Based on Religion or Belief of 1981; Declaration of the Elimination of All Forms of Discrimination of 1963; the Convention on the Elimination of All Forms of Racial Discrimination of 1965; the Declaration of the Elimination of Discrimination against Women and the Convention on the Elimination of All Forms of Discrimination against Women of 1979.

⁵² The Declaration on the Right of the Child of 1959 and the Convention on the Rights of the Child of 1989.

⁵³ The Convention Relating to Status of Refugees of 1951 and the Protocols thereto.

⁵⁴ The Convention Relating to the Status of Stateless Persons of 1954.

⁵⁵ The Guiding Principles on Internally Displaced Persons of 1998.

⁵⁶ The Four Vienna Conventions on the Law of Armed Conflicts of 1948.

⁵⁷ Declaration on the Rights of Disabled Persons of 1975.

⁵⁸ Principles for Older Persons of 1991.

⁵⁹ Declaration on the Rights of Person Belonging to National of Ethnic, Religious or Linguistic Minorities of 1992.

⁶⁰ ILO Conventions Nos. 107 and 169 on Indigenous People.

⁶¹ Rule 77 of the Standard Minimum Rules for the Treatment of Prisoners.

⁶² The International Convention on the Protection of Rights of All Migrant Workers and Members of their Families of 1990.

⁶³ UNESCO ‘Round table discussion on constitutional and legal basis of the right to education as a fundamental human right MINEDAF VIII, Dar es Salam, Tanzania, December 2002 (Discussion paper).

⁶⁴ Adopted in 1990.

⁶⁵ Article 11(3)(a) ACRWC 1990.

⁶⁶ UNESCO (n 63 above).

⁶⁷ Held in 1999.

basic right and a basic need for all African children, youth and adults, including those with disabilities, as recognized in the international instruments, including the UDHR, the ACHPR and the CRC.⁶⁸The first international development goal of universalizing primary education in all countries by 2015 is also reflected in the New Partnership for African Development (NEPAD) objectives.⁶⁹

2.4 Implementation of the Right to Education

The United Nations put mechanisms in place for supervision of international human rights instruments to ensure that human rights are properly implemented. The implementation of the economic, social and cultural rights is entrusted to the CESCR of the ICESCR. The CESCR derives its power from Article 16(1) of the ICESCR. The CESCR has two functions referred to as review and normative tasks. It is an obligation of every contracting state to submit a report to the CESCR on how the rights in the ICESCR have been implemented within a reporting state. During the review function the CESCR has the task of considering these state reports and give Concluding Observations. The normative function entails the CESCRs' practice of holding Days of General Discussion in which General Comments are given to emulsify normative contents of some of the provisions in the ICESCR. With regard to the right to education, of particular importance are the General Comments Nos. 3, 11 and 13.

Along with the CESCR, the UN under its Charter further recognizes the need for an international co-operation in solving international problems of an economic, social and cultural or humanitarian character⁷⁰. In promoting international co-operation on cultural and education development, the UNESCO is a designated specialized agency that collaborates with states to coordinate educational activities and to advance the ideal of educational opportunities⁷¹.The agency undertakes a broad range of activities including international exchange of human and material resources between states. In this regard the agency has concluded several agreements to facilitate easy surge of books, publications and educational, scientific and cultural materials between States.⁷²

Education is a long-term and high priority investment because it develops human resources as an asset in the processes of national development.⁷³ This means that education expenditure is

⁶⁸ UNESCO (n 63 above).

⁶⁹ <http://www.nepad.org> (accessed 23 September 2010).

⁷⁰ Article 55 UN Charter 1945.

⁷¹ Article 12(c) UNESCO Constitution.

⁷² Article 28 CRC.

⁷³ http://oecd.org/wiki/human_capital (accessed 22 September 2010).

an investment in human capital as development will not occur without education.⁷⁴ UNICEF collaborates and assists States to invest in education.

The ILO, since its inception during the existence of the League of Nations as a specialized UN agency has been, to a great deal, overseeing enforcement to the right to education.⁷⁵ With the core mandate of improving the labour standards in State members it adopts conventions that have legal effects on States signatories thereto. ILO obliges the States to ensure that there are adequate local conditions for the progressive development of broad systems of education, vocational training and apprenticeship, with a view to effective participation of children and young persons of both sexes for useful occupation.⁷⁶ ILO has made tremendous contribution to abolition of child labour⁷⁷ and significant promulgations on the field of education rights pertinent to indigenous people.⁷⁸ Like many other African countries, Tanzania denies the presence of indigenous people in its territory, consequently a big population of indigenous peoples as described by ILO conventions are technically denied their right to education as it is described in the Chapter Three below.

2.5 State obligations flowing from the right to education

The nature of State obligation in any treaty stems from Article 26 of the Vienna Convention on the Law of Treaties⁷⁹ which elucidates a principle that treaties are binding upon the parties to them and must be performed by the parties in good faith. The obligation for implementing the ICESCR by contracting States is provided for in Article 2 (1) which gives that:

Each State party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

This provision comprises various elements that need to be discussed separately although they are mutually reinforcing. The first element is the obligation for “States to take steps”. Article 13 of the ICESCR gives a list of steps to be taken by States. These steps include: provision of primary education that is free and compulsory; provision of available and accessible secondary education and vocational training free of charge; provision of equally accessible and progressively made free higher education; and establish a system of fundamental education for persons who did not

⁷⁴ World Bank (1988) *Education in Sub-Saharan Africa*.

⁷⁵ Established under Part XIII Treaty of Versailles 1919.

⁷⁶ Article 15(1) ILO Convention Concerning Basic Aims and Standards of Social policy 1962.

⁷⁷ The Abolishing of Child Labour and Protecting the Right to Education: The Minimum Convention of 1973 and the Worst Forms of Child Labour Convention of 1999.

⁷⁸ The Convention Concerning Indigenous and Tribal peoples in Independent Countries of 1989, several other Conventions followed thereafter like ILO Conventions No. 107 and 169.

⁷⁹ Done in 1969.

receive or complete their primary education level. The government needs to set goals and benchmarks upon which an assessment for achievement can be based upon. Analysis and evaluation of statistics on literacy, enrolment on primary and fundamental education, adult and continuing education, dropouts and graduation rates at all levels are essential tools for assessing achievement. More important, the States must take steps to ensure that all forms of discrimination are eliminated in the course of education provision at all levels. The quality of the teaching staff and materials resources should be in compliance with minimum international standards.⁸⁰ The States shall ensure that the number of schools and colleges is proportional to the need of the population. As far as international assistance and co-operation is concerned States shall take steps to ensure that these opportunities are exploited to the maximum for the protection of the right to education.

The second element is the words ‘individually and through international assistance and co-operation, especially economical and technical’. It is an obligation of States to seek assistance from the international community and other member States if they cannot realise the Covenant rights on their own for lack of sufficient resources.⁸¹

Thirdly, is the ‘to the maximum of its available resources’ element in the provision. The resources referred here are those relevant to the realization of the rights in the Covenant which includes money, natural resources, human resources, technology and information.⁸² A wide interpretation of the ‘available resources’ does not restrict only to government controlled resources but also privately owned resources and those available from the international and donor communities.⁸³

The fourth element envisages the phrase ‘with a view of achieving progressively the full realisation of the rights recognized in the present Covenant’. It is appreciated that realization of socio-economic rights is dependent on resources which are generally scarce thus it takes time to achieve the full realization thereof. This reflects the real world’s distribution of resources and material well-being of societies.⁸⁴ Progressive achievement to full realisation shall not be considered negatively to impair the whole process but States shall observe the obligation to move as expeditious and effectively as possible towards the goal of full realisation of the Covenant rights and shall avoid retrogressive measures.

⁸⁰ Recommendations regarding the Status of Teachers adopted on 5th October 1966 by the Special Intergovernmental Conference on the Status of Teachers, convened by UNESCO.

⁸¹ General Comment No.3 CESCR read together with Article 55 UN Charter.

⁸² R Robertson, ‘Measuring state compliance with the obligation to devote ‘maximum available resources’ to realizing economic, social and cultural right’ in *Human Rights Quarterly* (1994) 693-714.

⁸³ D Turk *The Realization of the Economic, Social and Cultural Rights* (1992) 16.

⁸⁴ M Craven, ‘The domestic application of the International Covenant on Economic, Social and Cultural Rights’ in *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) 129-134.

The fifth and last element is deductible from the phrase “by all appropriate means, including particularly the adoption of legislative measures”. Appropriate means is a State discretion but which is not absolute as the State report to the CESCR requires not only to show which measures were taken but also under which circumstances these were considered to be the most appropriate in that given circumstances.⁸⁵ There is a call for incorporating State obligations under existing instruments into national legal system for their effective implementation. This was brought in focus during the 28th session of the CESCR under the auspice of UNESCO in 2002 as a follow up on the implementation Dakar Framework for Action adopted at the WEF. It was observed that Articles 13 and 14 of the ICESCR, Article 29(1) of the CRC shall be reflected in national legal systems especially in constitutions and other legal bases for reinforcement. The debate on more effective implementation of Convention against Discrimination in Education in 2002 also recognized the significance of the right-based approach in monitoring. The same was considered earlier in 2001 on the implementation of the Convention on Technical and vocational Education and was recommended that:

when developing and improving technical and vocational education, Member States should take whatever legislative may be required to give effect, within their respective territories, to the principles set forth in this Recommendation.⁸⁶

At the regional level, Article 1 of the ACHPR requires States parties ‘shall adopt legislative or other measures to give effect’ to rights contain therein. The ACRWC have similar obligation to contracting States⁸⁷ Generally UNESCO is advocating that a determinant factor in achieving the right to education is whether such a right has its foundation in constitutions and national legislations.⁸⁸ Developments in constitutional and legislative bases of the right to education, covered in several Country Reports on Education for All (EFA) Assessment presented to the WEF in 2002.⁸⁹

For assessing compliance to respect, promote, protect and fulfil the right to education, the 4-A scheme comprising availability, accessibility, acceptability and adaptability elements has been endorsed by the CESCR and requires that education in all its forms and at all levels shall exhibit those elements.⁹⁰ This emanates from the obligation to States parties created under Article 13(2) of the ICESCR.

⁸⁵ General Comment No. 3 CESCR & 20 Limburg Principles.

⁸⁶ Done in 1989.

⁸⁷ Articles 1 & 43 ACRWC .

⁸⁸ UNESCO (n 63 above) 5-6.

⁸⁹ As above, 8.

⁹⁰ CESCR General Comment No. 3, Para. 6.

On making education available, schools must be established by both governments and private individuals and must not be closed. Properly qualified teachers must be available with their rights in labour and trade unions guaranteed. There must be academic freedom and institutional autonomy ensured. The central issues on accessibility of education rest on non-discrimination, physically reachable by learners and affordability. Affordability stresses the need for primary education to be free and the higher education should also be made progressively free. Education is acceptable if meets minimum standards of quality and in conformity with parent's religious and moral convictions. The issues of school discipline, language, methods of instruction, content of textbooks and teachers' conduct must respect human rights and dignity values of which the learners are expressly the bearers. Education is considered adaptable only if is flexible to the needs of the constantly changing society like the opposing pressures of globalization and localisations, and further addresses the needs of minority and indigenous communities, disabled, working children, separated children and children in armed conflicts.⁹¹

2.6 Conclusion

In order to understand that education is a justiciable human right, this Chapter has defined the term education, and surveyed the embryonic development of education as a human right. The Chapter attempted to give the known justifications on why education shall be treated as a human right. It is a public interest perspective or social utilitarianism principle making education inevitable for general development and social welfare of the entire society that makes education an unalienable human right. Further it is indispensable for an individual development and a prerequisite for individual dignity, yet an individual welfare right. It is proved that education is a key for realization of other socio-economic and civil and political rights.

The right to education has been recognised and enshrined in international and regional human rights instruments. It is a duty bearable by the State to provide education to its citizen. The right to education under the ICESCR and the UN Charter has implementation mechanisms in place and contracting States are obliged to comply. The obligation of States flows from the right to education and requires contracting States to guarantee that education is available, accessible, acceptable and adaptable by means prescribed in the international and regional instruments. Although States can adopt other measures but the most preferable is to take appropriate legislative measures to implement the right to education. The CESCR and UNESCO

⁹¹ K Tomasevski 'Human rights obligations: Making education available, accessible, acceptable and adaptable' (2004) *Right to Education Primers No. 3* 13-16.

reiterates that States parties to international and regional instruments enshrine the right to education in their constitutions.⁹²

That takes this study to the next Chapter for a comparative analysis of the appropriate constitutional and other legal measures taken by Tanzania and South Africa for the protection of the right to education.

⁹² 28th session of the CESCR in co-operation with UNESCO held 14 May 2002.

CHAPTER III

COMPARATIVE ANALYSIS OF THE PROTECTION OF THE RIGHT TO EDUCATION IN TANZANIA AND SOUTH AFRICA

3.1 Introduction

During the World Education Forum⁹³ Tanzania provided an assessment report which indicated that amongst appropriate measures adopted to implement the right to education include legislative measures. To that effect, the 1977 URT Constitution was referred to. This chapter presents a discussion on the right to education by critically analysing the relevant provisions in the 1977 URT Constitution in comparison with provisions in the 1996 RSA Constitution. The discussion attempts to show whether the two constitutions have provisions for effective protection of the right to education. There are differences between the two constitutions with regard to protection of the right to education as required by international law. The reasons for such differences stem from the nature of these two constitutions especially on how they were made, how the right to education is provided and how the two governments adhere to the principles of constitutionalism.

3.2 The right to education in the 1977 URT Constitution

The 1977 URT Constitution does not provide that education is a right to every individual. Because of this, neither the constitution nor other laws subordinate thereto give the nature and content of this right. In Article 11 this constitution provides:

- (1) The state authority will establish a relevant system in place to enable the realization of a person's right to self-acquire education. Without prejudice to these rights; the state authority will put a system in place that ensures that every person earns his own livelihood.
- (2) Every citizen has the right to self education, and every citizen is free to pursue education in any field of his or her choice up to the highest level according to his or her merits and ability.
- (3) The government shall endeavour to ensure that there are equal and adequate opportunities to all individuals to enable them to acquire education and vocational training at all levels and schools and other learning institutions.

The original 1977 URT Constitution is written in the national language Kiswahili⁹⁴. The judiciary has maintained that the Kiswahili version is authentic and authoritative and the English version is a mere translation.⁹⁵ The Kiswahili version only requires the state to put in place a mechanism that will enable individuals to self educate using their own means and

⁹³ Held in Dakar in 2002.

⁹⁴ Chapter 2 of Tanzania Revised Laws of 2002.

⁹⁵ *D.P.P. v Daudi Pete* (1993)TLR 22.

abilities. The provision is silent on what kind of mechanism the state is to put in place. The wording of the provision does not suggest a mandatory obligation for the state as it does not use words like 'shall' or 'must'. Tanzanian scholars are of the view that during the constitution making the government adopted an avoidance language on this provision to exclude justiciability of the right to education.⁹⁶ The government had a view that realisation of socio-economic rights was not supported by available resources.

The provision of Article 11 of the 1977 URT Constitution is not in accordance with any of the international and the regional human rights instruments. From Article 26 of UDHR and Article 13 of ICESCR the following are salient features to the right to education: everyone has the right to education; elementary and fundamental education must be free; elementary education must be compulsory; technical and professional education must be made generally available; and higher education must be equally accessible to all based on merits. Although Article 17(1) of the ACHPR provides in a short formulation that “[e]very individual shall have the right to education”, the elements in UDHR and ICESCR are well captured in Article 11 of ACRWC. The 1977 URT Constitution misses almost all these elements except in Article 11(3) the government pledges to ensure equal and adequate opportunities for all individuals in all levels of education. The 1977 URT Constitution ought to have captured the provision that entails its obligation to the international and regional instruments to respect, provide, protect and fulfil the right to education.

3.3 The right to education in the 1996 RSA Constitution

Section 29 of the 1996 RSA Constitution provides for the right to education and states that:

1. Everyone has the right to-
 - a. a basic education, including adult basic education; and
 - b. To further education, which the state through reasonable measures, must make progressively available and accessible.
2. Everyone has the right to receive education in an official language or language of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all educational alternatives, including single medium institution, taking into account-
 - a. equity
 - b. practicability; and
 - c. the need to redress the results of the past racially discriminatory laws and practices
3. Everyone has the right to establish and maintain, at their own expense, independent educational institutions that-
 - a. do not discriminate on the basis of race;

⁹⁶ JE Ruhangisa, *Human Rights in Tanzania: the Role of the Judiciary* (1998) 129.

- b. are registered with the state; and
 - c. maintain standards that are not inferior to standards at comparable public educational institutions
4. Subsection (3) does not preclude state subsidiaries for independent educational institutions.

Section 29(1)(a) creates a right to basic education in positive terms that it shall be provided to everyone.⁹⁷ The legislature's intention is that the state is obliged to provide basic education to its citizens. The terms of this provision are slightly comparable to that of Article 13(1)(a) of the ICESCR providing that "primary education shall be free and available to all". Unlike other socio-economic rights, basic education is unqualified right and absolute in a sense that it does not require adoption of reasonable legislative and other measures, for progressive realisation within the state's available resources.⁹⁸ However section 29 does not expressly mention that education shall be free and compulsory and the judiciary is yet to interpret and invigorate the scope and content or emulsify the nature and extent to which the state is obliged to respect this right.⁹⁹

According to section 29(1)(b) the right of everyone to further education is dependent on the progressive realisation by adoption of reasonable legislative and other measures. On rights qualified by "progressive realisation" the Constitutional Court elucidated that:

The term 'progressive realisation' was contemplated that the right could not be realised immediately. But the goal of the Constitution is that basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined, and where possible, be lowered with time.¹⁰⁰

The decision above shows that, although the right to further education is qualified, as long as it is a constitutional right, measures taken by the state to make qualified rights available and accessible are effective and reasonable and shall not be unnecessarily delayed.

3.4 The constitutional protection of the right to education

While the constitutional development in Tanzania is characterised by decisions of the government without involvement of the population and lack of constitutionalism, the 1996 RSA Constitution is a product of a more democratic process that involved most of the stakeholders including the population. South Africa constitutionalism is institutionalized in the Constitution which clearly provides for separation of powers as is shown below.

⁹⁷ *Ex Parte Provincial Legislature in re: Dispute Concerning Constitutionality of Certain Provisions of the Gauteng Education Bill of 1995* 1996 4 BCLR 537.

⁹⁸ Veriava & Coomans (n 17 above) 62.

⁹⁹ As above, 61-62.

¹⁰⁰ *The Government of the Republic of South Africa v Grootboom* 2001(1) SA 46 (CC).

3.4.1 Constitution making and Protection of Human Rights in Tanzania

At the dawn of independence the British colonial rulers pressed for incorporation of a bill of rights in the Independence Constitution of 1961 in order to protect interests of their remaining subjects.¹⁰¹ This idea was rejected by the new government by the suggestion that greater emphasis should be placed on economic development and political stability of the country. Another reason was that a bill of rights once enshrined in a constitution is as potentially rebellious of authoritarianism as it tends to limit the autocratic powers of a state to violate human rights.¹⁰² It was also believed that a bill of rights tells the Executive what it cannot do to its people and strengthens as well the judiciary's position in relation to parliament and the presidency.¹⁰³ The state feared that as the judiciary at the time being was mainly staffed by white expatriates, they would take advantage of the presence of a bill of rights in the Constitution to frustrate the efforts of the new government by declaring many of its actions unconstitutional.¹⁰⁴ As Peter argues, 'it is in this context that the then Prime Minister Rashid Kawawa characterised a Bill of Rights as a luxury which merely invites conflicts'.¹⁰⁵

Although the general rule was to grant political independence to every British colony with a bill of rights enshrined in its constitution, finally Tanganyika was granted independence with a constitution without a bill of rights.¹⁰⁶ As has been stated by Peter:

Such a *lacunae* left the population at the mercy of the ruling party and its government. For instance, it could have been impossible to declare a one-party political system because that would have been a violation of the right of the people to organise. It is both strange and laughable to talk of democracy in a one-party State... Therefore, it is clear that (the) absence of the Bill of Rights in a Constitution is a *conditio sine qua non* for the smooth functioning of a one-party system. In such a situation an undemocratic regime can freely do whatever it likes without the people having opportunity to contribute to the issue concerning their welfare. That is exactly what has been happening in Tanzania for more than (40) years.¹⁰⁷

The 1984 amendment made to the 1977 URT Constitution, though intended to ingrain therein a bill of rights, did not incorporate all of human rights, particularly socio-economic rights, in the 'enforceable' Part III of Chapter One of the Constitution¹⁰⁸ save the right to work¹⁰⁹ and earn

¹⁰¹ CM Peter, 'Five Years of the Bill of Rights in Tanzania' (1991) *East African Law Review* 148.

¹⁰² A Mughwai, 'Forty Years of Struggles for Human Rights in Tanzania: How Far have we Travelled?' in Mchome, SE (ed.) *Taking Stock of Human Rights Situation in Africa* (2002) 57.

¹⁰³ BRN Lobulu *Citizens' Rights in Tanzania: Selected Essays* 42.

¹⁰⁴ CM Peter *Human Rights in Africa: A Comparative Study of the African Charter on Human and Peoples' Rights and the New Tanzanian Bill of Rights* (1990) 2.

¹⁰⁵ Tanzania National Assembly 'Parliamentary Debates (Hansards)' 3rd Meeting 28 June 1962.

¹⁰⁶ CM Peter *Human Rights in Tanzania: Selected Cases and Materials* (1997) 3.

¹⁰⁷ CM Peter (n 106 above) 3-4.

¹⁰⁸ Acceded ICESCR on 11th September 1976.

¹⁰⁹ Article 22 1977 URT Constitution.

commensurate remuneration,¹¹⁰ and the right to own property.¹¹¹ The rest of the socio-economic rights as provided for in the ICESCR were relegated to the ‘unenforceable’ part¹¹² that contains Fundamental Objectives and Directive Principles of State Policy.¹¹³ The main socio-economic rights that are contained in Part II of Chapter One of the 1977 URT Constitution include the right to education.

There are no empirical reasons given for excluding socio-economic rights from the Bill of Rights during the constitutional amendment in 1984.¹¹⁴ Ruhangisa observes that this seems ‘a deliberate omission since history had shown that the government was against the idea of having a justiciable Bill of Rights’¹¹⁵ in the Constitution completely. Ruhangisa’s observation has been supported by conformist views held by some of the senior government legal experts in those days, who have supported this omission. For example, the then Chief Justice, the late Francis Nyalali, once argued that if the entire provisions of the UDHR, particularly socio-economic rights, were included in the Bill of Rights and made justiciable rights, the country would be thrown into frequent conflicts that could undermine national stability.¹¹⁶

This view was also held by the then Attorney-General Andrew Chenge, who argued that as the implementation of socio-economic rights depends on the economic capacity of a respective country, it was apt for the Bill of Rights to exclude them as justiciable rights. According to Chenge:

Article 11(1) of the Tanzanian Constitution makes it clear in the most explicit terms that, so far as the social policies referred to in Part II are concerned, they too are dependent on the economic capacity of the State to provide them. It must follow therefore that as a matter of common sense that rights set out in Part II of Chapter One of the 1977 URT Constitution cannot be justiciable in a court of law. On the other hand, it is the general practice to include in a Bill of Rights those rights which are set out in the ICCPR [Emphasis added].¹¹⁷

Arguing from a conformist perspective, Chenge justified his contention by saying that, for states like Tanzania the rights set out in the ICCPR ‘create a very different category of obligations’ from those set out in the ICESCR. On the rights in the ICCPR Chenge states:

¹¹⁰ Article 23 1977 URT Constitution.

¹¹¹ Article 24 1977 URT Constitution.

¹¹² Article 7(2) 1977 URT Constitution.

¹¹³ CJ Mashamba ‘Using Directive Principles of State Policy to Interpret Socio-Economic Rights into the Tanzanian Bill of Rights’ (2009) *The Law Reformer Journal* 81-104.

¹¹⁴ CJ Mashamba, ‘Casting the Net Wide: Litigating Socio-Economic Rights Beyond the Bill of Rights in Tanzania’ (2008) *The Justice Review* 37-102.

¹¹⁵ J E Ruhangisa (n 96 above) 129.

¹¹⁶ F Nyalali, ‘The Bill of Rights in Tanzania’ (1991) *University of Dar Es Salaam Law Journal* 2.

¹¹⁷ AJ Chenge ‘The Government and Fundamental Rights and Freedoms in Tanzania’ in Peter, CM & Juma, IH (eds.) (1998) *Fundamental Rights and Freedoms in Tanzania* 4.

To be effective, these rights must give to the individual citizen a right of recourse to the courts. This category of rights is contained in Part III of Chapter One of the Tanzanian Constitution.¹¹⁸

It was this kind of legal opinion given in public by government's principal legal advisers that led policy and decision makers to see socio-economic rights as mere policy statements that could not be enforced in courts of law. This is quite contrary to contemporary human rights stance, which has widely accepted justiciability of socio-economic rights in courts of law.¹¹⁹ This stance derives its authority from the consensus that all human rights are indivisible, inter-related, mutually reinforcing as well as interdependent; and as such, they cannot be promoted, guaranteed or protected differently in a legal system.¹²⁰

Ndumbalo¹²¹ concludes on constitution making in Tanzania that, the independence constitution of 1961 was basically adopted by involving only the colonial rulers and nationalist leaders to the exclusion of the general public. The Republican Constitution followed in 1962 was again the product of nationalist leaders without the general public participation. The National Assembly constituted by members of one party converted itself into a Constitutional Assembly. The 1965 Interim Constitution that proclaimed Tanzania as a single party state was largely adopted without public debate. In making the permanent 1977 URT Constitution, the National Executive Committee (NEC) of the ruling party Chama Cha Mapinduzi (CCM) 'debated the bill behind closed doors'.¹²² It was made a private business of the ruling party than a public business. During the amendment of the 1977 URT Constitution to include the Bill of Rights in 1984, the government through the National Executive Committee of the ruling party prepared a package of what should be included in the amendment. The general public was never consulted instead, were confronted with a *fait accompli* without being given an opportunity to say what changes they felt were necessary in their constitution.¹²³ A Bill of Rights was not in contemplation.¹²⁴ Tanzania was able to adopt these exclusionary politics because during the cold war, in a country dominated by one of the superpower ideologies, the enjoyment of human rights was exclusive to the supporters of the ruling regime.¹²⁵ Until the 1980s 'Tanzania had a relatively strong economy

¹¹⁸ As above.

¹¹⁹ CJ Mashamba 'Are Economic, Social and Cultural Rights Judicially Enforceable?' (2007) *Open University Law Journal* 99-136.

¹²⁰ Vienna Declaration and Programme of Action (1993) adopted at the World Conference on Human Rights, Vienna.

¹²¹ L Ndumbalo (2003) *The state of constitutionalism in Tanzania* 3.

¹²² As above, 4.

¹²³ Report of the Department of Propaganda and Mass Mobilization 'NEC Proposals for Changes in the Constitution of the United Republic and the Constitution of the Revolutionary Government of Zanzibar' in Dodoma: CCM 1983.

¹²⁴ C M Peter (n 133 above) 11.

¹²⁵ L Ndumbalo (n 131 above).

which enabled the government to have a relatively strong bargaining position vis-à-vis donors¹²⁶ There was and still there is no strong opposition, weak civil society and general poor citizenry.¹²⁷

3.4.2 Constitution making and Protection of Human Rights in South Africa

By words of Mohammed, during the apartheid regime the minority whites reserved to their own 'all control over the political instruments of the state'.¹²⁸ He went to say, 'the legitimacy of law itself was deeply wounded as the country haemorrhaged dangerously in the face of this tragic conflict which had began to traumatize the entire nation'.¹²⁹ In apartheid times the constitution was dominated by the doctrine of parliamentary sovereignty.¹³⁰ The release of Nelson Mandela in 1990 was a result of negotiations to end apartheid and this freed all political activities. All party negotiations led to adoption of the interim Constitution in December 1993 and came into force in April 1994. This constitution led the 1994 elections that officially marked the end of apartheid and a government of national unit was formed.

The interim Constitution was replaced by the 1996 RSA Constitution. In his addressing remarks at the beginning of making the 1996 RSA Constitution the Chairperson of the Constitutional Assembly said:

It is therefore important that as we put our vision to the country, we should do so directly, knowing that people out there want to be part of the process and will be responding, because in the end the drafting of the constitution must not be the preserve of the 490 members of this Assembly. It must be a constitution which they feel they own, a constitution that they know and feel belongs to them. We must therefore draft a constitution that will be fully legitimate, a constitution that will represent the aspirations of our people.¹³¹

The constitution making process invited all political parties to take part in an open media for public scrutiny.¹³² To create a platform for political parties' debate, the Convention for Democratic South Africa (CODESA) was formed but collapsed shortly and was replaced by the Multi-Party Negotiation Process (MPNP).¹³³ This was a formal mechanism of ensuring public involvement in the process. About 26 political parties were involved, traditional leaders, homeland government representatives and more important, it was made mandatory that in every three representatives at least one of them must be a female.¹³⁴

¹²⁶ As above.

¹²⁷ ARD Inc *Democracy and Governance Assessment in Tanzania: Transition from a Single-Party State* (2003).3.

¹²⁸ *AZAPO v President of the Republic of South Africa* 1996 (4) 671 (CC).

¹²⁹ As above.

¹³⁰ I Currie & J de Waal *The Bill of Rights* (2005) 3.

¹³¹ Opening Speech by Cyril Ramaphosa, Chairperson, Constitutional Assembly, 24 January 1995.

¹³² C Barnes and E De Klerk (2002) *South Africa's Multiparty Constitutional Negotiation Process* 1-10.

¹³³ As above.

¹³⁴ As above.

3.5 Constitutionalism

The right to education, like other human rights, can be respected, protected, promoted and fulfilled preferably in a state that adheres to principles of constitutionalism. This means that political processes and institutions must be structured in accordance with a constitution. Not only is the formal pattern of political institutions determined, but the political norms of the community are also embodied in the constitution. Constitutionalism also refers to perceptions of those who wish to maintain or establish a supreme power of a constitution in a specific state, where the constitution will protect the citizens against arbitrary government, and where political relations will be arranged constitutionally.¹³⁵ The assumption is that the sovereign people draw up a constitution, by the terms of which a government is created and given powers.¹³⁶ Therein comes checks and balances, the institutional arrangements enabling different branches of government to protect their independence through specific involvement in each others' activities; judicial review, where courts rule on the constitutionality of statutory law, executive action and the decisions of lower courts.¹³⁷ The following subsections discuss constitutionalism and separation of powers in Tanzania and South Africa vis-à-vis protection of the right to education.

3.5.1 Constitutionalism and separation of powers in Tanzania

Despite the fact that Article 4 of the 1977 URT Constitution provides for the three arms of the state with their functions, namely the executive, the legislature and the judiciary, it does not forbid interference of one arm by the other. As Shivji shows, the Ministers who are part of the executive are also members of parliament; the president who heads the executive is also part of the parliament and has power to elect 10 members of parliament.¹³⁸ Under the constitution, it is possible for a non-parliamentarian to be elected a speaker of the Parliament. The speaker is a leading figure in controlling all activities of the parliament and represents the entire parliament in other activities out of the house.¹³⁹ As long as this figure is also subject to the approval of the president, the speaker's impartiality in the political command is questionable. In 2008 the Speaker suspended a very critical opposition's MP from any sessions for one year for criticizing government policies, a decision that was vastly condemned unfair and biased¹⁴⁰. The executive have an overarching and uncontrolled power in budgetary matters.¹⁴¹ Both the legislature and the judiciary depend on resources allocation decided exclusively by the executive. Although the

¹³⁵ GK Roberts *A dictionary of political analysis* (1971) 48-49.

¹³⁶ JC Plano *Political Science Dictionary* (1973) 82-83.

¹³⁷ JR Rudolf 'Constitutional governments' in Magill, FN (1996) *International encyclopedia of government and politics* 299.

¹³⁸ IG Shivji *Debating constitutional amendments in Tanzania* (2003) 2.

¹³⁹ Article 84 of the 1977 URT Constitution.

¹⁴⁰ 'Zitto Kabwe silenced' *Daily News*, 28 November 2008.

¹⁴¹ Articles 135 & 136 1977 URT Constitution.

legislature has a mandate to oversee the executive, it remains neither transparent nor accountable.¹⁴²

During the single party system the legislature was minimized to a rubber stamping machinery, as Chris Maina Peter points out, 'a show piece to the international community, a token for existence of democracy in Tanzania'¹⁴³. Today, the Speaker is not necessarily an MP but appointment to this post must be approved by the President. Secondly, the Secretary of the Parliament is also an appointee of the President¹⁴⁴. The President, Ministers and MPs together form the Cabinet. The President is empowered 'to dissolve the Cabinet at any time, amongst other things, if the Cabinet rejects to pass any budgetary bill'¹⁴⁵. This means the MPs would automatically lose their seats in the parliament. No MP can present a private bill unless the same has been endorsed by a political party.¹⁴⁶ It is contended that mainly bill of interest to the executive reaches the house because majority of the MPs are from the ruling party which the President is also a Chairperson.¹⁴⁷ With all the above-mentioned limitations coupled with lack of sufficient resources, the legislature remains a weak institution similarly to a rubber stamping machinery.

When the Bill of Rights was introduced in the URT Constitution in 1984, the judiciary became at the forefront in promoting human rights by annulling unconstitutional statutes and provisions. For instance, in *DPP v Daudi Pete*,¹⁴⁸ the AG defended the creation of numerous non-bailable offences for being in public interest, a plea the Court of Appeal rejected. In *AG v Lohay Akonaay and Another*,¹⁴⁹ the AG unsuccessfully urged the Court of Appeal to quash an order of the High Court that had struck out from the statute books certain provisions of the *Regulation of Land Tenure (Established Villages) Act (1992)*. The Court of Appeal held that a court has inherent power to make a consequential order striking out an invalid statute from the statute book. In *Rev. Christopher Mtikila v AG*, the late Justice Lugakingira observed that:

Fundamental rights are not gifts from the State. They inhere in a person by reason of his birth and are therefore prior to the State and the law. Modern constitutions like our own have enacted fundamental rights in their provisions. This does not mean that the rights are thereby

¹⁴² IG Shivji (n 138 above) 3.

¹⁴³ CM Peter 'The Struggle for Constitutionalism and Democracy in East Africa: The Experience of Kenya and Tanzania' *East African Journal of Peace and Human Rights* (1996) 166-167.

¹⁴⁴ Article 87(7) 1977 URT Constitution.

¹⁴⁵ Article 90(2) 1977 URT Constitution.

¹⁴⁶ ARD Inc. Report Submitted to USAID/Tanzania (2003) 24.

¹⁴⁷ <http://www.parliamentgo.tz/bunge> (accessed on 20th October 2010).

¹⁴⁸ [1993] TLR 22 (CA).

¹⁴⁹ [1995] TLR 80 (CA).

created; rather it is evidence of their recognition and the intention that they should be enforceable in a court of law.¹⁵⁰

His Lordship was of the view that what modern constitutions do is to translate the fundamental rights into written codes, called bills of rights.

It is observed that the legislature halted this judicial liberalism by introducing the Basic Rights and Duties Enforcement Act of 1994 in order to contain reformist judges.¹⁵¹ The independence of the judiciary is further subjected to constant attacks by both the executive and the legislature. Exemplifying this, in 1994 the High Court ruled in favour of some politicians who wanted private candidates to contest in general Elections.¹⁵² The Court further ruled against the requirement of a political party to seek and obtain police permits to hold political rallies. The legislature hastily made amendments in the Constitution and in the Political Parties Act to oust the Court's decision.¹⁵³ In 2002 the Court of appeal ruled against the requirement of depositing US\$ 5000 by a person to challenge election results. The legislature retrospectively passed a legislation to nullify this decision.¹⁵⁴ Criticizing this tendency, the retired first President of Tanzania J. K. Nyerere had this to say:

This is very dangerous. Where can we stop? If one section of the Bill of Rights can be amended, what is to stop the whole Bill of Rights being made meaningless by qualifications of, and amendments to, all provisions? I am saying that basic Rights of Citizens of this country must be regarded as sacrosanct. The right to participate in governance is essential to democracy. The Right to vote and the Right to stand for elective office are Rights of Citizenship.¹⁵⁵

The 1977 URT Constitution is silent on the issue of supremacy. Before 1992, Article 10 of the 1977 URT Constitution provided that CCM was supreme in all decisions in the United Republic. This Article was repealed in 1992 after the introduction of multiparty system and has never been replaced. This exacerbates the conflict as His Lordship retired Judge Mfalila remarked:

The Executive does not appear to be accountable to a Legislature composed of elected members and representative of the people. If the Executive was accountable to the Legislature as the Constitution says, composed of representatives of the people, how could they have been allowed to introduce and have passed such draconian legislations

¹⁵⁰ [1995] TLR 31.

¹⁵¹ CM Peter, 'The Enforcement of Fundamental Rights and Freedoms in Tanzania: Matching Theory and Practice' in Peter, CM & Juma, IH (eds.) (1993) *Fundamental Rights and Freedoms in Tanzania* 54

¹⁵² *Christopher Mtikila v Registrar of Political Parties and Others* [1993] TLR 31.

¹⁵³ The Political Parties Act 2002.

¹⁵⁴ Electoral Law (Miscellaneous Amendments Act) 2005.

¹⁵⁵ J.K Nyerere 'Our Leadership and the Destine of Tanzania' *African Publishing Group* (1995) 9-20.

like the Preventive Detention Act, 1962 which is still in statute books, the Land Tenure (Established Villages) Act, 1992 and the constitutional amendments which nullify court decisions? Who is supreme, is it the Executive or Legislature?¹⁵⁶

3.5.2 Constitutionalism and separation of powers in South Africa

The 1996 RSA Constitution expressly and specifically provides at the onset that the Republic of South Africa is one, sovereign, democratic state founded on *inter alia* values of constitutional supremacy and rule of law under multi-party system of democratic government that ensures accountability, responsiveness and openness.¹⁵⁷ The constitution provides that “this Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligation imposed by it must be fulfilled¹⁵⁸

Section 7(2) carries the aspirations of constitutionalism and provides that “the state must respect, protect, promote and fulfil human rights”. This means the state is obliged to refrain from interfering with the enjoyment of human rights. The state must not limit or take away people’s access to realization of constitutional rights including socio-economic rights. It is an obligation of the state to protect the constitutional rights against encroachment by a third party. The state has to promote the rights in a sense that it raises awareness on what the rights entail and the methods of accessing and enforcing them.¹⁵⁹ The duty to fulfil requires the state, in practical terms, to implement by adopting appropriate legislative, administrative, judiciary, promotional and other measures for individuals to realize the constitutional rights.

The 1996 RSA Constitution mandates the protection of the bill of rights to judicial authorities from the High Court, Supreme Court of Appeal and the Constitutional Court. The Constitutional Court is the highest court in all constitutional matters and also can decide on dispute between state organs, challenge the parliament or the president on a failure to fulfil a constitutional obligation.¹⁶⁰

3.6 Conclusion

Unlike South Africa, the constitutional development in Tanzania depicts the fact that the State has never followed any of the liberal theories of constitution-making process and constitutionalism, thus it does not effectively respect, protect, promote and fulfil human right in general, let alone the right to education in particular. The government of Tanzania does not want

¹⁵⁶ LMS Mfalila ‘Twenty Five Years of the Court of Appeal and the Independence of the Judiciary’ in Peter, CM & Kijo-Bisimba, H (eds.) (2007) *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal* 81.

¹⁵⁷ Section 1 1996 RSA Constitution.

¹⁵⁸ Section 2 1996 RSA Constitution.

¹⁵⁹ S Lienbenberg ‘The interpretation of socio-economic rights’ in Chaskalson, M *et al*, *Constitutional Law of South Africa* (2003) 6.

¹⁶⁰ Section 167 1996 RSA Constitution.

an enforceable bill of rights especially on socio-economic rights. The right to education is not provided as a constitutional right but just mentioned in the part of the constitution that is not justiciable. Other laws of the land subordinate to the constitution do not provide for education as a right. Consequently, there is no case-law in Tanzania that discusses the right to education. In Tanzania therefore, there is no constitutional protection of the right to education.

CHAPTER IV

COMPARATIVE ANALYSIS OF THE IMPLEMENTATION OF THE RIGHT TO EDUCATION IN TANZANIA AND SOUTH AFRICA

4.1 Introduction

This chapter adopts the 4-A tool device to assess implementation of the right to education as it was initially agreed in the World Conference on Education in Jomtien, Thailand in 1990. Both Tanzania and South Africa attended and made commitments to implement the Education for All (EFA) recommendations to ensure that all children have access to good quality education.¹⁶¹ This assessment attempts to show that in Tanzania where education is not a constitutional right, little has been achieved in ensuring that education is available, accessible, acceptable and available. The assessment shows that there is more commitment and much has been achieved by South Africa in respecting, providing, protecting and fulfilling the right to education that is attributed to enshrining this right in its constitution and that it adheres to the principles of constitutionalism.

4.2 Availability, accessibility, acceptability and adaptability of education in Tanzania

The lack of constitutional protection of the right to education has subjected it to the discretionary opinions of political leaders. It has never been stable but changes from better to worse or vice versa depending on political leadership. Education is considered as either a favour or a mere gift usually promised by politicians during election campaigns in exchange of votes from citizens. If elections were free and fair, ballot boxes would have been the only existing opportunity for at least few citizens to show recourse for their right to education as there is no legal remedy. The following hereinafter is a discussion on the impact of relegating education only into the hands of politicians.

4.2.1 Availability

The education system in Tanzania starts with seven years in primary school to complete 7 standards. Pre-primary schools are developing but are not very common outside urban areas. Between 15 to 19 per cent of those who complete standard VII continue with secondary education starting from Form I to Form IV. Of those that finish Form IV, about 24 per cent continue in Form V and VI. About 20 per cent find their way to public and private universities.

¹⁶¹ Education for All country Report: South Africa (2008) 1.

The teaching medium in primary school is Swahili while it is English in secondary and tertiary education.¹⁶²

Availability of functioning schools

At the primary level, almost in every village, save in villages inhabited by minority groups of pastoralists and hunter-gatherers, there is a structure to be called a school, whether under a big tree, in a grass-thatched hut or under a corrugated iron roof, with or without desks. The learning environment of these schools is appalling. There are awful or no sanitation facilities and drinking water. There is a serious lack of learning and teaching materials including essential textbooks, libraries and computers.¹⁶³ Under the Primary Education Development Plan (PEDP) the government goal of reaching a ratio of 1 textbook per pupil by 2010 remains at a ratio of 5 pupils per textbook. The capitation budget for 2001-2006 set at US\$ 10 per primary school pupil per year was reduced to US\$ 7.7 for 2007-2011 and later on reduced further to be US\$ 6.1 during the Medium Term plan for 2009/10 and 2011/12.¹⁶⁴ With this kind of budget and planning, it is not surprising many pupils leave Standard VII unable to read and write neither education acquired is complete to support any meaningful self reliance. For instance, half of pupils sat for the standard VII examinations failed in 2009.¹⁶⁵

Under the Secondary Education Development Plan (SEDP) the government embarked on construction of at least one or more secondary schools in every ward popularly known as 'sekondari za kata'.¹⁶⁶ This was otherwise a brilliant idea to meet the demand of enrollment at secondary schools as Tanzania 'has one of the lowest percentages (7 per cent) of people who have attended secondary school of any nation'.¹⁶⁷ This increase was poorly planned as there are no laboratories, libraries, computers, books and other critical teaching and learning materials. Drinking water and sanitation facilities especially in rural areas are unavailable. The government ought to balance the construction of more public secondary schools with provision of necessary facilities. School infrastructures are very important but without important facilities it is insufficient to provide quality education. Instead of actions the government makes rhetoric promises in political propagandas like 'provision of a clinic,¹⁶⁸ milk¹⁶⁹ and lunch in every school'.¹⁷⁰

¹⁶² M Qorro 'Does language of instruction affect quality of education?' (2008) *Working paper* 3-4

¹⁶³ '4,017 pupils sit on floor in classes in Dar es Salaam' *Mtanzania* 03 January 2009.

¹⁶⁴ J Moshia *Annual Education Sector Review* (2008).

¹⁶⁵ 'Half of pupils sat for STD VII exams fails' *Mwananchi* 11 December 2009.

¹⁶⁶ 'A total of 1,084 Secondary Schools built for every ward' *Habari Leo* 15 June 2007.

¹⁶⁷ J Benson, 'A complete education?' *Observation about the primary education in Tanzania* (2005) 1

¹⁶⁸ 'Clinics in secondary schools' *Nipashe* 9 February 2007.

¹⁶⁹ 'Milk in schools' *The Guardian* 22 February 2007.

¹⁷⁰ 'Meals in Schools' *Nipashe* 14 May 2007.

Availability of teachers

Quality education results from well-managed, sufficient and well-trained teachers with adequate, diverse and relevant materials and resources needed for them to perform their job well. The increased number of secondary schools added to already existing shortage of teachers, more acutely in rural areas. The government attempted to bridge the gap by introduction of teachers trained for 4 weeks only.¹⁷¹ The incompetence and lack of preparation of these newly recruited teachers is a mockery of the teaching profession. The government promised to increase the number of professional teachers since 2006.¹⁷² This promise remains unfulfilled.¹⁷³ The teachers are not only unwell paid but also are not paid on time and are always claiming arrears of their salaries from the government. The government promised in 2006 in the National Assembly to pay the entire due amount immediately.¹⁷⁴ In 2009 the teachers threatened to strike as their claims remained unresolved.¹⁷⁵ Another major and chronic hindrance to education in Tanzania is lack of housing to teachers. Teachers are unwilling to relocate or take up posts in rural areas where there are no public housings or standard houses to rent. As a result for instance at Hewe primary school in rural Morogoro district, a reporter found only two teachers for all subjects for the entire school.¹⁷⁶

4.2.2 Accessibility

In assessing accessibility of education in Tanzania, three overlapping dimensions impairing admission are discussed which are discrimination, physical inaccessibility and economic constraints.

Access without discrimination

There are two types of discrimination in education; active discrimination which entails categorical denial of education to a certain group of individuals and static discrimination attributed to lack of motivation for prioritizing education to some groups of individuals in the society. Active discrimination is a case in Tanzania to asylum seekers and refugees. For decades Tanzania has been hosting the largest portion of asylum seekers and refugees in Africa¹⁷⁷ but refugee children are limited to enrol in Tanzanian schools. Static discrimination is manifested at least in four areas; rural-urban disparities in enrolment and quality of education, gender imbalances, neglect of learners with special needs and marginalized groups.

¹⁷¹ 'Special training to solve the shortage of teachers' *The Guardian* 21 July 2006.

¹⁷² 'Meeting the demands of secondary schools' *The Guardian* 15 May 2006.

¹⁷³ Hakielimu, *Government Promises* (2009) 5.

¹⁷⁴ Hakielimu *Government Promises* (2006) 6.

¹⁷⁵ 'Teachers call for a strike on 30 June' *Nipashe* 18 May 2009.

¹⁷⁶ LHRC report (2009) 72.

¹⁷⁷ See UNHCR Country Report: Tanzania (2009).

Schools in urban areas have better infrastructure, relatively enough teachers and teaching and learning materials. The provision of social services like electricity, housing, water and public transport are concentrated in urban areas. The shortage of professional teachers is most felt in rural areas. Most of privately run schools with better quality education than public schools are also concentrated in urban areas. About one million children aging between 9 and 13 reportedly out of schools are mainly from rural areas.

A survey recently carried out shows that in many rural areas parents are still not motivated in taking their girl children to school on a belief that there is no economic rationale to invest in their daughters' education. The problems of pregnancy, dropouts and truancy are rampant. In one region for instance, it is reported that 93 per cent of girls do not continue with secondary education due to above problems.¹⁷⁸ The government reported a drop-out of 31,000 pupils in one district only within two years, most of whom were girls.¹⁷⁹ The government intervention on this matter is minimal despite its acknowledgement of the presence and magnitude of this problem.¹⁸⁰

The World Health Organisation (WHO) reports that about 1.6 million children with disabilities in Tanzania have special needs in education. The PEDP and SEDP have neither budgeted for nor addressed these special needs. A recent research indicates only 1 per cent of children with disabilities have access to basic education in Tanzania. In year 2009 their number of enrolment to secondary education dropped by 16 percent. During the celebration of the 40th Anniversary of independence, the message of the Association of People with Disabilities in Tanzania was 'for us, not yet independence'.¹⁸¹ The government acknowledges this problem and keeps on making rhetoric promises to deal with the matter.¹⁸²

In Tanzania there are communities, due to their occupation and use of a specific territory, voluntary perpetuation of cultural distinctiveness, which includes; the aspect of language, social organization, religion and spiritual values, modes of production, laws and institutions, exhibit to be minority groups. They experience subjugation, marginalization, dispossession, exclusion or discrimination. These include the Maasai, Mbulu, Ndorobo and Hadzabe. These are basically hunter-gatherers and nomadic. There is evidence that their children are technically ignored in the education sector as there are fewer or no schools in their communities. The government has

¹⁷⁸ 'Early Pregnancy a problem in Tanga' *Habari Leo* 15 August 2010.

¹⁷⁹ 'School drop-outs in Manyoni District' *Uhuru* 22 May 2007.

¹⁸⁰ 'President Kikwete and Gender Discrimination' *Habari Leo* 21 May 2007.

¹⁸¹ LHRC (n 176 above) 71.

¹⁸² 'People with disabilities and MKUKUTA' *The Africa* 24 May 2007.

failed to take special measures to address the peculiar problems of these societies in terms of education.¹⁸³

Physical accessibility

In some parts of the country schools are not within physical reach for learners to attend at a reasonably convenient geographical location and distance learning is an impossible option. Again, this has a larger impact on minority communities. For instance, the Hadzabe children would face a 40 km hike from Endajaj Ward to Mongo-Wa-Mono Sub location where they live, to attend schools.¹⁸⁴

Economic accessibility

During the first regime that ended in 1985 primary and basic education were free and compulsory to all, secondary and tertiary educations were also free for those who competitively qualified as a matter of national policy.¹⁸⁵ The second regime from 1985 to 1995 opted for the Structural Adjustment Programmes (SAPs) instigated by the World Bank. This introduced cost-sharing policy in the public sector as a condition for loan. In the education sector it was in terms of school fees to all levels. Enrolment decreased and 'illiteracy was increasing at the rate of 2 per cent per year'.¹⁸⁶ The third regime from 1995 to 2005 abolished payment of fees in 2001 at the primary level, minimized fees of secondary education and increased loans to tertiary education.¹⁸⁷ This led to gross enrolment rate increase by 75 per cent in 2002.¹⁸⁸ The current regime came into power in 2005, re-introduced school fees but with exemptions to parents who cannot afford it. However, the criteria for eligibility for this exemption are unclear.

4.2.3 Acceptability

Language of instruction is amongst the big challenges quality education. It is difficult to recognize the right to be educated in language of one's choice as there are about 127 languages spoken in Tanzania as mother tongues to different ethno-linguistic groups.¹⁸⁹ The second language is Kiswahili being spoken by 99 percent of the population.¹⁹⁰ Kiswahili is a national language and is a language of instruction in primary schools. The language of instruction from secondary to tertiary education is English. Neither teachers nor learners understand thoroughly this language.¹⁹¹ In 1982, the Presidential Commission on education recommended a change

¹⁸³ LRC (n 176 above) 76.

¹⁸⁴ As above.

¹⁸⁵ R Wedgwood *Post-basic education and poverty in Tanzania* (2005) 7-8.

¹⁸⁶ K Tomasevski *Education denied: Costs and remedies* (2003) 139.

¹⁸⁷ As above, 132.

¹⁸⁸ Benson (n 167 above) 4.

¹⁸⁹ E Sa *Language Policy for Education and Development in Tanzania* (2007)1.

¹⁹⁰ (n 189 above) 2.

¹⁹¹ As above, 4.

from English to Swahili starting 1985. This move was not implemented. Tanzania should have either started using English as a language of instruction from primary school level to tertiary education or use Kiswahili from primary to secondary school level. There is poor performance in using English as a language of instruction from secondary education and above. Whilst many acknowledge the need for English, the confusion is between ‘teaching English and teaching in English’.¹⁹² English should have been taught but not to be used as a language of instruction.

Defining pregnancy as a disciplinary offence is a violation of human rights.¹⁹³ The policy on this matter is still under debates. Furthermore, the government has not amended the Education (Corporal Punishment) Regulations, made under Section 60 of the Education Act, Cap.353 of the Laws of Tanzania. Rejection of corporal punishment may lead to exclusion from school. This punishment by striking pupils’ buttocks with a stick is not consonant with dignity and human rights and may lead to school drop-outs.

4.2.4 Adaptability

In 1960s the aim of primary education is captured from the following quote of the first President J.K. Nyerere:

It must also prepare young people for the work they will be called upon to do in the society which exists in Tanzania...a rural society where improvement will depend largely upon the efforts of people in agriculture and village development...it must produce good farmers; it has also to prepare people for their responsibilities as free workers and citizens in a free and democratic society, albeit a largely rural society...must therefore encourage the development in each citizen of three things: an enquiring mind; an ability to learn from what others do and reject or adapt it to his own needs; and a basic confidence in his own position as a free and equal member of the society, who values others and is valued by them for what he does and not for what he obtains.¹⁹⁴

While today agriculture remains a backbone of the country’s economy, practical farming ‘is no longer an integral part of the curriculum’.¹⁹⁵ The curriculum ‘no longer teaches the students to be good farmers, nor it helps with skills needed in the current globalized world’. Most of the curriculum only prepares students for secondary education. Due to limited number of secondary school enrolment many youths are not able to self-support in rural areas as a result the rural-urban emigration is unbearable.

A research conducted by Afrobarometer in 2002 revealed that, Tanzanians are uncritical citizens due to their acquiescence character even when things are obviously not in their favour.

¹⁹² Qorro (n 162 above) 4.

¹⁹³ UN Doc.E/CN.4/2000/6.

¹⁹⁴ <http://ibe.unesco.org/publications/Thinkerspdf/nyerere.pdf> (accessed on 20 October 2010).

¹⁹⁵ Benson (n 167) 9.

Tanzania is amongst countries leading in corruption¹⁹⁶ which Tanzanians are aware of, they live in severe poverty, nonetheless, they are not active in questioning about issues like corruption nor do they demand for social services lacking in their daily lives¹⁹⁷. This weakness is attributed to lack of quality education that prepares individuals to be critical thinkers to deal with their daily lives. Only 7 percent of the population of about 40 million people have attained secondary school education.¹⁹⁸ Lack of education impacts the realization of all other human rights. Most Tanzanians are unaware of most of their civil and political rights and do not participate fully in governance under 'the principles of inclusion, participation and transparency to facilitate increased legitimacy and national ownership'¹⁹⁹. Education would have helped the public to hold democratic attributes and values thus exhibit democratic behaviours through civic participation²⁰⁰.

The above narrative shows that Tanzanian performance in the right to education poor not only by comparing with South Africa but also many other countries in the region. It would be fair to comment that the steps taken by Tanzania are not deliberate, concrete and targeted towards the full realisation of the right to education.²⁰¹

Tanzania has sufficient resources to invest in education and make it available, accessible, acceptable and adaptable to many Tanzania children if not all. The following few examples prove the availability of public revenue but misdirected to spoliation, misused or mismanaged. Tanzania is amongst the countries whose military expenditure exceeds allocations for education for more than twice.²⁰² Robertson suggests that where a State party spends high amounts on its military compared to insignificant sums on the right to education, this points to non-compliance.²⁰³ Tanzania rank very high in the corruption index.²⁰⁴ The Auditor General has estimated that no less than 20 percent of the government budget is lost annually to corruption.²⁰⁵ Corruption amounts to inequitable and ineffective use of available resources, according to the Limburg Principles, the corrupted resources would have otherwise been directed to realization of the right to education.²⁰⁶

¹⁹⁶ <http://www.esrftz.org/anticorruption> (accessed 3 August 2010).

¹⁹⁷ A Chaligha et al "Uncritical citizens or patient trustees? Tanzanians' views of political and economic reform' (2002) *AfroBarometer* 1.

¹⁹⁸ J Benson (n 167 above).

¹⁹⁹ UN 'Guidance Note of the Secretary General on Approach to Rule of law Assistance' 3.

²⁰⁰ E Gyimah-Boadi and D. Armah Attah 'Are Democratic Citizens Emerging in Africa?' (2009) *Evidence from the AfroBarometer* 3.

²⁰¹ General Comment No.13.

²⁰² Tomasevski (n186 above) 12.

²⁰³ Robertson (1994) 709-713.

²⁰⁴ <http://transparency.org> (accessed 12 September 2010).

²⁰⁵ <http://www.business-anticorruption.com> (accessed on 08 August 2010).

²⁰⁶ Para.27 Limburg Principles on implementation of ICESCR.

An independent study by economic experts has revealed that due to poor taxation policy to foreign investments in the mining industry, Tanzania loses her revenue of approximately US\$ 1.7 billion per year.²⁰⁷ Between 2005 and 2007 a loss of revenue of approximately US\$ 39 billion was incurred due to illicit means and mispricing exports from Tanzania to the European union, United States and United Kingdom only.²⁰⁸ According to the Limburg Principles cited above, this amounts to unreasonably and ineffectively being inaccessible to available resources.²⁰⁹

Under the ICESCR a state is required to realise the rights in the Covenant individually and through international assistance and co-operation.²¹⁰ Therefore Tanzania is not to realise the right to education all on its own but may rely on international assistance. Tanzania co-operation with international assistance is doubted. For instance, UNESCO had this to say in 2006:

UNESCO cannot find the entry point for policy work on Early Childhood Care and Education, as it is the responsibility of five different ministries. It used NGOs as an entry point but was unable to carry the work further because the Ministries could not make the requisite resource commitments.²¹¹

This study advocates that the right to education shall be made justiciable, enshrined in a constitution and that the principles of constitutionalism must be adhered to. The study advances at least two theories that; if education is made a constitutional and justiciable right, one, the government will be triggered to become more responsible in revenue collection, more accountable against misuse and mismanagement of public resources and fight against corruption; two, an independent judiciary will be empowered to foresee reasonable and effective steps being taken by the government to enable the citizens realise this right.

4.3 Availability, accessibility, acceptability and adaptability of education in South Africa

Formal education in South Africa is organized in three categories namely; General Education and Training (GET), Further Education and Training (FET) and Higher Education (HE). The GET category comprises the pre-school, up to Grade 9, as well as an equivalent Adult Basic Education and Training (ABET) qualification. The FET category comprises Grades 10 to 12 in schools, as well as education and training within the National Qualifications Framework (NQF)

²⁰⁷ Policy forum, *An analysis of Tanzania's Budget Revenue Projections: How Much Money We are Losing? Tanzania Budget 2009/2010. Policy brief 3/2009.*

²⁰⁸ As above.

²⁰⁹ Para. 23 of the Limburg Principles on the Implementation of the ICESCR.

²¹⁰ Article 2(1) ICESCR.

²¹¹ Evaluation of UNESCO support for National planning for EFA: Synthesis Report (2006) 25

Levels 2 to 4, including the N1 to N6 qualifications in FET colleges. HE category covers university level and the equivalent. These levels are integrated with the NQF, as stipulated by the South African Qualifications Authority (SAQA).²¹²

4.3.1 Availability

South Africa is guided by the Norms and Standards for Schools Funding²¹³ for the implementation of the right to education. This statute provides guidance to the establishment of properly functioning education institutions and programmes. This enables the government to make a proportionate development of education systems in accordance to the educational needs of a particular area, from poorest to least poor, by taking into consideration of poverty indices.²¹⁴ This is a positive approach for making education available to all, despite the fact that the funding available remains inadequate to fully cover all the terms in this model. In 2007 the gross enrolment ratio was 105 per cent for primary education and 92 percent for secondary education.²¹⁵

4.3.2 Accessibility

Access without discrimination

The 1996 RSA Constitution generally prohibits unfair discrimination²¹⁶ and more specifically, the Schools Act²¹⁷ prohibits unfair discrimination in education. Due to the historical background of South Africa in which racial discrimination was institutionalized under the apartheid regime, the judiciary has made significant contribution by ruling out racial discrimination in the education sector even when an attempt to discriminate against other races to a school was made under the pretext that it wanted to maintain learners of a unique culture.²¹⁸

Gender parity is considered achieved when the Gender Parity Index (GPI) is between 0.97 and 1.03.²¹⁹ This has been achieved with slightly more male learners at primary education level and slightly more female learners at secondary education level.²²⁰

²¹² Act No. 58 of 1995.

²¹³ Government Notice No. 2362 of 1998.

²¹⁴ Veriava & Coomans (n 31 above) 66.

²¹⁵ Education for All Country Report: South Africa (2008) 13.

²¹⁶ Section 9 1996 RSA Constitution.

²¹⁷ Section 5 Schools Act.

²¹⁸ *Matukane & others v Laerskool Potgietersrus* 1996 3 SA 223 (WLD).

²¹⁹ Education for All Country report: South Africa (2008) 16.

²²⁰ As above.

Physical accessibility

Although some fewer learners were to walk about 8 kilometres a day to reach a school in 2002,²²¹ the situation has drastically improved by 2010 and most of the learning institutions are now physically accessible whilst the efforts for more improvement continues.²²²

Economic accessibility

The 1996 RSA Constitution does not expressly guarantee that basic education shall be free thus whenever there are budgetary constraints there is a system in place for parents to supplement the state resources by private fund raising and through payment of school fees. However, this system exempts parents who cannot afford. This implies that “no one should be denied basic education owing to lack of resources”.²²³ However, a concern was raised in 2002 by the Minister for Education that many schools were reluctant to exempt poor learners from paying school fees.²²⁴

4.3.3 Acceptability

In order to make education acceptable, the state is obliged to ensure that it meets minimum standards of quality and is in conformity with parent’s religious and moral convictions. The issues of school discipline, language, methods of instruction, and content of textbooks and teachers’ conducts are regulated under the Schools Act to ensure respect of human rights and dignity values of which the learners are expressly the bearers. The judiciary has ruled out administrative sanctions that encroach on the rights and dignities of minority learners.²²⁵ The challenge in court on ban of corporal punishment in schools sanctioned by the Schools Act was unsuccessful and the court maintained that “corporal punishment is inconsistency with the values underlying the Bill of Rights”.²²⁶ The right for everyone to receive education in language of his choice has been qualified by the court to be restrictively on official language of one’s choice only.²²⁷

4.3.4. Adaptability

To ensure that education is adaptable the South African education system is flexible to the needs of the constantly changing society like the increasingly presence of foreigners, learners with special need, the HIV/AIDS pandemic and adult learners. For instance, the Admission Policy for Ordinary Schools Act²²⁸ guarantees equal treatment of non-citizens in education, the National Policy on HIV/AIDS directs the provision of education that helps to manage the

²²¹ *The Star* 17 January 2002.

²²² Department of Education Annual Report, 2009.

²²³ Veriava & Coomans (n 21 above) 69.

²²⁴ Press Release, Ministry of Education (16 September 2002).

²²⁵ *Antonie v Governing Body, Settlers High School & Others* 2004 4 SA 738 CPD.

²²⁶ *Christian Education South Africa v Minister of Education* 2000 10 BCLR 1051.

²²⁷ *Mahe et al v The Queen in the Right of Alberta et al* 68 DLR 9(4th) 6984.

²²⁸ Sections 19-21 Admission Policy for Ordinary Schools Act.

pandemic whilst guaranteeing the rights of learners and teachers living with HIV/AIDS²²⁹. The Basic Adult Education foresees the provision of education to about 10 million adults in the country.²³⁰

4.4 Conclusion

Using the 4-As assessment tool, Tanzania is doing poorly in education compared to South Africa. The efforts to improve availability of primary education and secondary education are marred by lack of necessary learning and teaching materials and professional teachers. Accessibility is limited by technical gender, ethnic and economic status discrimination. Education is not readily acceptable due to language of instruction barriers and disciplinary actions that are against human right. Education in Tanzania has failed to facilitate learners to become self-reliant and adapt to changing environment of their societies due to unsuitable curriculum.

This study has established that Tanzania has not adopted legislative measures to implement the right to education. Whatever measure it has adopted has failed or is unreasonably slow to progressively achieve full realisation of the right to education. In the following concluding chapter therefore, much focus is given to recommendations for Tanzania to take steps for making education a right to be realized by its citizens.

²²⁹ Government Notice No. 1926 of 1999.

²³⁰ The National Department of Education's Policy Document on Adult Basic Education and Training of 1997.

CHAPTER V

CONCLUSION AND RECOMMENDATIONS

5.1 General Conclusions

Chapter Two of this study has established that education is a justiciable human right recognized in international and regional human rights instruments. Education is important for the interest of the public, is a requirement for individual's development as well as a welfare right. It is further established that education is a prerequisite to individual dignity and enables an individual to effectively participate in a free society. More important also is the notion that education is crucial for the realization of other socio-economic, civil and political rights.

International instruments require states parties to make this right realisable. It is worthy of noting that the state's obligation to realization of the right to education is to be achieved progressively. However, the steps taken by states to implement realisation of the right to education shall be to the maximum of their available resources. It should be understood that States parties are not required to make available more resources for realisation of the right to education than they can reasonably afford. However, in order for a State party to be able to attribute its failure to meet at least its minimum core obligation to lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. In determining whether adequate measures have been taken for the realization of the right to education attention must also be paid to equitable and effective use of and access to the available resources.

The ICESCR requires States parties to implement the realisation of the right to education by all appropriate means, including particularly the adoption of legislative means. Although States have the discretion to adopt other measures, it has been insisted by the implementing agencies that adoption of legislative measures is the most appropriate mean of implementing the right to education.

Chapter Three has established that Tanzania has not adopted legislative measures as it contended in its Assessment Report to the WEF in 2002. It has been shown that neither the 1977 URT Constitution falls within the democratic principles of constitution-making nor does the government adhere to the principles of constitutionalism. The right to education is stipulated in a meaning that does not correspond to the international obligations and formulated in a manner that renders it unjusticiable. Therefore Tanzania has adopted other means to implement the right to education other than legislative measures but there is no explanation given as to what basis the

measures that have been taken are considered to be the most appropriate. On the other hand, South Africa has adopted legislative measures to implement the right to education.

The United Nations implementation mechanisms oblige States to comply with the requirement to implement the right to education. The measurement of compliance devised by the CESCR adopted the availability, accessibility, acceptability and adaptability criteria. In Chapter Four these criteria have been used to assess the mechanisms adopted and achievements attained so far by Tanzania and South Africa as for the implementation of the right to education. In this assessment the study shows that Tanzania has only been using policies and not legislative measures to implement the right to education. The findings reveal that, education is not readily available and easily accessible to all; its acceptability is questionable and does not yield to adaptability of learners to the environment in their constantly changing societies. Generally speaking, education in Tanzania is below the minimum standards set by the UN implementing agencies of the right to education. On the other hand, South Africa which has adopted legislative measures to implement the right to education is in a better position as education is available to a highest percent, is accessible to most learners without discrimination and is acceptable as learners are able to learn in any of the 11 national languages and in accordance with the learner's parents customs and religious convictions. It is adaptable as learning and teaching materials and professional teachers are available to provide quality education relevant to the globalizing world and science and technological innovations. Therefore, the right-based approach of implementing the right to education is better than the policy mechanism adopted by Tanzania.

5.2 General recommendations for Tanzania

Tanzania is party to international and regional instruments on the right to education. According to Tanzania jurisprudence, a treaty becomes binding only if it is domesticated in national legislations. Tanzania has already demonstrated its interest in being bound by these treaties by being party thereto. It has further gone to report to the CESCR that the right to education is constitutionally protected whilst in fact, as shown in this study, it is not. Nonetheless, this shows Tanzania's acknowledgement that the most appropriate way of implementing the right to education includes taking appropriate legal measures. It should fulfil this requirement by actually adopting legislative measures to implement the right to education.

Since the WEF in 2002, UNESCO is implementing a project of assisting State members to adopt legislative measures to implement the right to education. Tanzania should take advantage of this project and utilize the material support to undergo this progressive legislative reform that will enable it to reach the Dakar Framework of Actions of universalizing primary education by year 2015. This has much to support the already existing measures in place.

The principles of constitution making shall be followed by an inclusive approach. The previous method of changing the constitution in a *fait accompli* style is not desirable as it erodes acceptability of the constitution itself and the legitimacy of the government. The time is also ripe for Tanzania to change the 1977 URT Constitution. A new constitution shall embody the principle of constitutionalism and separation of powers. It shall further put in place a mechanism for protecting the rights provided in the constitution. To this effect, the South African model is highly recommended.

If the right to education is made justiciable in a constitution that is supreme in Tanzania, the following are the likely advantages:

Unlike the situation now, a constitutional court will have power to question the government whether it is taking effective and reasonable measures to implement the right to education. Individuals will have access to the court to seek the protection of their rights to education as is the case in South Africa. Also, the government will be triggered to become more accountable to its citizens. This will be so because there will be an avenue for the public to seek recourse in an independent judiciary and the government would be held responsible.

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