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THE CONSTITUTIONAL RIGHT TO ADEQUATE HOUSING: WHAT CAN TANZANIA LEARN FROM SOUTH AFRICA?

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Abstract

This article aims to examine the possibility of incorporating the right to adequate housing as a fundamental right in the Bill of Rights of the Constitution of the United Republic of Tanzania (Tanzanian Constitution). Specifically, the article argues that the current strategy for protecting and fulfilling this right is ineffective and inefficient. This is due to the Constitution's classification of the right under the so-called directive principles of state policy, rendering it unenforceable. The article acknowledges and addresses various critiques and perspectives that maintain that social and economic rights (SERs) are challenging to recognize as fundamental rights, complicating their judicial enforcement due to their intricate nature, content, and scope. On the other hand, the right to adequate housing is an example of those socio-economic rights that South Africa has successfully included in its Constitution. South Africa has also established a strong body of jurisprudence on the enforcement of such rights. In doing so, South Africa has demonstrated that SERs can indeed be recognized as fundamental rights and enforced in court. In light of South Africa's experiences in the protection of socio-economic rights including the right to adequate housing, this article explores the lessons that Tanzania can learn from South Africa, focusing on the reasonable and meaningful approaches adopted by the South African Constitutional Court in enforcing the right of access to adequate housing.

Keywords: ***Constitution, socio-economic rights, housing, reasonableness, meaningful engagement, Tanzania, South Africa.***

1. INTRODUCTION

Access to housing presents a formidable challenge in Tanzania. Current estimates indicate that approximately 70% of the Tanzanian population resides in informal settlements that lack proper sanitation facilities (Mosha, 2017). Approximately 11.7% of the population lacks toilet facilities (Mosha, 2017). In the city of Dar es Salaam, which is the largest city in Tanzania, informal settlements account for a significant portion of the housing stock. The majority of these buildings do not meet building and land use standards. The infrastructure is inadequately maintained, and public services are inadequate (Bender, 2021: 48). Most houses are situated in areas that are prone to risks or are unsuitable for habitation. Additionally, the insecurity of tenure is a pervasive issue, largely attributed to the absence of legal titles (World Bank Group, 2015: 7). For example, "more than 70 per cent of the houses built in urban areas are located in unplanned settlements that lack most of the basic infrastructure and social services" (UN-Habitat, 2010). In rural areas, houses are built using locally available materials, such as mud, grass, poles, or dried earth blocks, and they lack electricity, water supply, sanitation, and security of land tenure (Bender, 2021: 48). A 2021 World Bank report indicated that "40 per cent of the urban population in Tanzania live in slums" (World Bank, 2024).

The complexities attached to living in a slum cannot be overstated. Slum-dwellers are negatively affected by the lack of safe water, poor sanitation, no electricity, poor social services,

and insecurity of tenure. In addition, the future situation of housing in Tanzania remains uncertain due to rapid urbanisation (World Bank, 2024). The search for greener pastures, population growth, and natural disasters caused by climate change, such as droughts, have also influenced the rate of urbanisation. As a result, megacities like Dar es Salaam continue to experience rapid population growth. According to projections, "the population of Dar es Salaam will exceed ten million by 2030" (Bender, 2021: 48). Furthermore, according to UN Habitat for Humanity, the housing deficit in urban Tanzania is approximately 1.2 million units (Lamtey, 2022). Because of this deficit, a huge number of Tanzanians live in inadequate housing facilities. Tanzania ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 11 June 1976 and the African Charter on Human and Peoples' Rights (ACHPR) on 18 February 1984.

These instruments respectively provide for the right to adequate housing (under Article 11(1) of the ICESCR and a combination of Articles 14, 16, and 18(1) of the ACHPR) as ascertained in the case of Social and Economic Rights Action Center and the Center for Economic and Social Rights vs. Nigeria (Communication N0. 155/ 96). The instruments impose obligations on Tanzania to respect, protect, and fulfil the right to adequate housing. The state obligation to protect this right requires Tanzania to domesticate and enact laws for that purpose. Article 2(1) of the ICESCR states that a member state has an obligation to "take steps...including particularly the adoption of legislative measures" to give effect to the rights enshrined in the Covenant. Furthermore, Article 1 of the ACHPR obliges "parties to recognise the rights, duties and freedoms enshrined in the Charter" and obliges parties to take "legislative or other measures to effect them." The Committee on Economic Social and Cultural Rights (CESCR) specifies that "legislative measures" are to be considered because they give national courts the jurisdiction to order "judicial remedies in case of a violation" of the right (CESCR General Comment 3, Paragraph 5: CESCR General Comment 9 Paragraph 2).

Although Tanzania ratified the instruments mentioned above, the right to housing has not been domesticated in the Constitution but is merely included in the directive principles of state policy of the Tanzanian Constitution. These principles are unenforceable by the court. Because there are no other legislative measures in place to give effect to housing rights in Tanzania, the protection of the right is quite difficult. It is for that reason that an argument is made for Tanzania to learn from South Africa's experience of the inclusion of the right to housing in the constitution and its enforcement through the courts.This article focuses on constitutionalising the right to adequate housing, as there is no better constitutional guarantee of the right to housing than under a Bill of Rights in the Constitution. Given that the Tanzanian Constitution does not guarantee the right, this article argues that there are lessons that Tanzania can learn from South Africa, under whose Constitution the right is adequately protected. The lessons to be learnt focus on the enforcement of the right of access to adequate housing, concentrating on the reasonableness approach and the meaningful engagement approach applied by the South African Constitutional Court. The rest of the approaches applied by the Constitutional Court are beyond the scope of this article.

South Africa was chosen due to its strong commitment to protecting the right to access adequate housing. The country has developed advanced housing laws, policies, and programs and has an impressive body of jurisprudence on the right. The South African Constitution is widely recognised as being one of the most progressive in the world, as it recognises all categories of human rights, including the right to access adequate housing. The country has a proven track record of enforcing this right through court rulings, which is a significant achievement. Moreover, South Africa has been enforcing this right since 1996, giving them ample experience in implementing it. South Africa's experience can serve as an excellent example for other countries to follow. The article begins by explaining the legal mechanism relating to the right to adequate housing in Tanzania, pointing out the inadequacy of the laws and policies in protecting the right. The second section elaborates on the rationale behind the proposed inclusion of the right to adequate housing as a fundamental right. The constitutionalising of the right to adequate housing

and the foundational understanding of the right from the South African Constitution are both explained in the third section. The final section details the lessons Tanzania can learn from South Africa's Constitutional Court's interpretation of the right to adequate housing by utilising the reasonableness approach and meaningful engagement approach. This is followed by the conclusion and some recommendations.

2. RESEARCH METHODOLOGY

Due to the nature of this study, the research methodology adopted was the doctrinal research method. This is a "methodology that primarily involves the study of existing legal materials, such as statutes, case law, regulations, and legal commentaries. It focuses on analysing, interpreting, and synthesising these sources to answer legal questions or develop legal theories" (Sepaha, 2023). The main advantage of a doctrinal research methodology is that it is quite suitable for a comparative study. In this case, it is most suitable and appropriate for comparing the legal approaches of different jurisdictions such as Tanzania and South Africa on a specific legal issue such as the constitutional protection of the right to housing.

In addition to the doctrinal methodology, the study employed desktop and library-based research. This involves obtaining information from both primary and secondary sources. Primary sources included international, regional, and national laws, encompassing international treaties, United Nations human rights instruments, and case law. The sources consulted for this information included Google Scholar, Taylor and Francis, Wiley Online Library, Science Direct, and ResearchGate. Keywords used for the search included the right to housing, Constitution of South Africa, Constitution of the Republic of Tanzania, socio-economic rights, reasonableness, meaningful engagement and judicial enforcement. Secondary resources included books, articles, and online scholarly publications. Both physical and online libraries were used to gain access to information for the study.

3. DISCUSSION

3.1 The Tanzania legal mechanism relating to the right to adequate housing

This section aims to examine the laws and policies of Tanzania that relate to the right to adequate housing. It is important to note that no legislation provides for the right to housing in Tanzania. The Tanzanian Constitution only recognises the CPRs and the right to work as fundamental rights, thus enforceable. The rest of SERs, including the right to adequate housing, are provided under the Fundamental Objectives and Directive Principles of State Policy. Unlike the fundamental right, the provisions under the directive principles of state policy are unenforceable. The exclusion of SERs, including the right to housing, from the Bill of Rights of the Tanzanian Constitution can be traced back to its adoption and subsequent incorporation in the Fifth Amendment to the Constitution in 1985. Since its independence in 1961, Tanzania has had five constitutions. The fifth and last was the Constitution of the Republic of Tanzania of 1977, which is still applicable to this day. The current constitution has undergone thirteen amendments (Shivji, 2006: 91). The Fifth Amendment passed in 1984, was the most important and noteworthy, as it introduced the Bill of Rights. It consisted of civil and political rights, excluding socio-economic rights, except for the right to work.

The Bill of Rights was excluded from all previous constitutions because its incorporation was seen as detrimental to the country's economic progress. The rationale was based on the limited resources for realising the rights, as it was the time after the war with Uganda and a strike of hunger in the country (Shivji, 2006: 91). The other reason for excluding the Bill of Rights was a lack of pressure from the British for its inclusion (Mwaikusa, 1991: 681). When Tanzania, by then a British colony, received laws from the British, the incorporation of the Bill of Rights in the Constitution was deemed undesirable because it was absent in the British Constitution and had not eroded the rule of law in Britain. The same reasoning was applied to exclude SERs from the

Constitution even at a later stage (Mwaikusa, 1991: 681). Friction between the judiciary and other state organs also contributed to the exclusion of the Bill of Rights from the Constitution.

Around 1985, the high court had expatriate judges who were perceived as being unsympathetic to the nationalistic cause due to their foreign origin. As a result, there was fear or worry that those judges would use the Bill of Rights to impede the government's progress and create tensions with other state organs (Mwaikusa, 1991: 685). The inclusion of the Bill of Rights in the Tanzanian Constitution in the fifth amendment, as noted earlier, included the CPRs, excluding the SERs. There was a significant reluctance to recognise SERs as a part of fundamental human rights for several reasons. One of the reasons stems from the positive obligations created by the SERs. These obligations require states to take action and allocate resources to enforce these rights (Rosenfeld, 2021, 793). For instance, the right to adequate housing requires governments to ensure their citizens have access to adequate housing, which comes with financial and resource implications. The positive obligation argument is often associated with the expensive argument, highlighting the scarcity of resources to fulfil SERs. The enforcement of SERs can be costly, particularly for developing countries with limited state resources. However, this argument is flawed because CPRs also create negative and positive obligations as they impose an obligation to fulfil. Therefore, both SERs and CPRs impose positive duties on states (Dzamashvili, 2015: 314).

Enforcement of SERs is often deemed unattainable due to their vagueness and impreciseness (Qureshi, 2018: 309). The content and elements of SERs are uncertain, which makes it difficult for courts to enforce them. This affects the realisation of the right to housing. Courts cannot rule based on ambiguous laws, which makes it harder for states to fulfil their obligations imposed by SERs (Lindau, 2012: 194). As O'Neill puts it, "without clear obligations, there is no right" (O'Neill, 2005: 427). SERs should match the obligations set in place, and if they appear vague or uncertain, they are categorised as aspirations and not fundamental rights. The vagueness of SERs can be attributed to the non-immediate duty imposed on states. The timeline imposed on states for compliance is also a significant reason for not subjecting SERs to adjudication (Lindau, 2012: 194). Thus, critics argue that for the judiciary to enforce a right, clarity on the extent and nature of the obligation, as well as the timeline, is paramount (Brennan, 2009: 70). In a democratic government, democracy mandates the separation of powers between three branches of the government - the executive, legislature, and judiciary. Each branch has specific and distinct responsibilities.

The legislature creates laws, the executive implements laws, and the court interprets laws. SERs are argued to have budgetary implications that require the legislature to initiate programmes which the executive implements. Judicial enforcement of rights would interfere with the powers of the legislature and executive, thereby violating established democratic principles (Camarasa, 2016: 216). Budget and resource allocation is the duty of the executive and legislature. Therefore, the enforcement of SERs affects checks and balances on the justiciability of SERs. Realising the rights empowers judges to interfere with the powers of the executive and legislature on resource allocation and budgeting (Dzamashvili, 2015: 318). On the contrary, the enforcement of SERs does not violate the balance of powers between the branches of government. Instead, the courts ensure that the legislature and executive take action prescribed by law. Again, courts do not impose directives on using allocated resources but rather evaluate the reasonability and compatibility of implemented activities (Dzamashvili, 2015: 319).

Davis has argued the expectation argument that the inclusion of SERs, including the right to housing, will elevate the people's expectations and thus increase public demand for the provision of the rights (Davis, 1992: 484). An argument has been raised that constitutionalising SERs may promote welfare dependency and discourage self-reliance. Technically, a need to raise awareness of the status of first and second generations of human rights exists. The awareness should be based on the fact that the CPRs and SERs should be treated equally and subjected to technical constitutional legal review (Davis, 1992: 484). The above reasons set the stage for the non-

inclusion of SERs including right to adequate housing into the Constitution. Consequently, the current Tanzanian Constitution recognises access to housing as a directive principle of state policy under the Fundamental Objectives and Directive Principles of State Policy.

The directive principles under this part of the Constitution are unfortunately unenforceable. The inclusion of access to housing and other SERs under the directive principles is binding in a political and moral sense and not in a legal sense (Mureinik, 1992: 464). The main effect of the directive principles is that they cannot compel a government to implement the provisions that are regarded as principles. Directive principles have no constitutional jurisprudence as they are laid down as guidelines for legislative formulation (Davis, 1992: 486). They are "objective legal norms that still need to be converted into subjective claims" (Viljoen, 2005: 7). There are controversies surrounding the application of the directive principle approach. O'Cinneide argues that the principles are merely a vacuous platitude and an impasse, given that they are aspirations and are treated as the underlying framework of constitutional principles (O'Cinneide, 2015: 264).

The incorporation of socio-economic rights (SERs) as directive principles has been criticised by Weis for being unable to establish legal-social norms and has been deemed a flaw in constitutional design (Weis, 2017: 919). The principles have been blamed for rendering fundamental social values unenforceable (Weis, 2017: 928). However, although directive principles are non-justiciable, they may be implemented on political grounds. Nevertheless, this approach is believed to be the least effective way of safeguarding SERs. It is therefore contended that the directive principles approach, as a safeguarding mechanism, is ineffective in protecting the right to adequate housing. The directive principles require the legislature to enact laws that ensure specific rights, but there are currently no legislative provisions that give effect to the right to housing in Tanzania. The enforcement of this right has been entrusted to majoritarian policies and has been entirely disregarded. Consequently, the preferred and suggested approach is to include the right as a fundamental right.

The Tanzanian Constitution requires that all state authorities and their agencies ensure that human dignity and other human rights are respected. To fulfil this requirement, the National Human Settlement Development Policy was adopted in 2000. It sets out the government's goals, strategies, and actions for human settlement. The policy focuses on broad aspects of settlement rather than just housing. The ultimate vision of the policy is to create well-organized, efficient, healthy, safe, secure, and aesthetically sustainable human settlements. According to the National Human Settlement Development Policy of 2000, the future vision of the policy is to establish human settlements with adequate, affordable, durable, healthy, safe, legally secure, and accessible shelter that matches the occupants' cultural and living habits. However, despite its good intentions, this policy is now outdated. It was adopted two decades ago and includes strategies that are no longer applicable to the housing sector. Therefore, it is an ineffective tool for addressing the current housing situation in Tanzania. The Land Act 19 of 1998, among other things, provides for some housing rights aspects, especially tenants' rights, where rented houses are required to be fit for human habitation (Section 88(1)(b)).

The Act also establishes the factors to be considered by the court to ensure that a lessee is not left homeless after the "termination of the lease agreement" Section 108(1)(g)). The Act barely addresses critical factors to the enjoyment of the right to housing, such as "affordability, habitability, security of tenure, cultural adequacy, and accessibility" (as per CESCR General Comment No. 4). In any case, not all house occupations or acquisitions are subject to lease agreements. A discrepancy seems to exist between housing rights and land rights enshrined under the land laws of Tanzania. As much as land laws partially provide for housing rights, the rights provided are distinct. The right to adequate housing is far more comprehensive since it goes beyond land owners and non-owners and seeks to ensure that everyone lives in peace and dignity (as per CESCR General Comment No. 4) Summarily, the current Tanzanian laws inadequately protect the right to adequate housing. Although the Tanzanian Constitution has recognised the right, it has only been included in the directive principle of state policy, which means that it cannot be enforced by

the courts. Instead, the responsibility of protecting this right lies with the executives and legislators who have adopted the National and Human Settlement Development Policy, which is over two decades old and contains outdated provisions. However, this policy has not been effective in addressing contemporary housing issues. The objective of including the right in the directive principle of state policy was to encourage the executive and legislature to create policies and laws that would protect the right to adequate housing. Unfortunately, there are currently no effective policies or laws in place to achieve this goal. Therefore, this article claims that the right to adequate housing should be considered a fundamental right that can be enforced.

3.2 Rationale for constitutionalising the right to housing in Tanzania

The inclusion of the right to adequate housing as a fundamental right in the Tanzanian Constitution is of paramount importance as it creates constitutional duties to protect, respect, and fulfil the rights enshrined in the constitution. It entails the government's commitment to performing its duties, including imposing duties on parliament to adopt legislation and mandating the judiciary to enforce the rights and provide remedies in case of violations. Additionally, inclusion compels the government to act and give effect to the right and holds the government accountable for non-compliance or violation of constitutional provisions (Chilton, Versteeg, 2017: 717). It enhances the guiding role of constitutional commitment, as it compels political actors to plan for enforcement and guarantees the constitutional protection of the right, given that the constitution is the highest law.

It gives citizens basis to claim housing benefits. This does not necessarily include the demand to build houses for every citizen but includes the provision of a conducive environment to access adequate housing. It also includes revisiting policies on the protection of rights for advancement (King, 2012: 56). As the Constitution is the primary legal document and the fundamental law of the land, citizens expect remedies in case of violations (Tushnet, 2008: 234). The Constitutional provision mandates the judiciary to provide recourse in cases of rights violations and grants the court flexibility in dispensing remedies to ensure that the provisions are enforced. Additionally, constitutionalising the right to housing prevents judicial activism (Kumar, 2022: 1282). In this regard, the right provides courts with the opportunity to broadly interpret state responsibilities and remedies victims are entitled to when their rights are violated. Therefore, courts are given the mandate to interpret the right as provided in the constitution.

Constitutionalising the right to adequate housing is important in protecting policies and programmes from attacks by litigants who lodge cases for commercial reasons, as illustrated in the case of *Minister of Public Works and Others v Kyalami Ridge Environmental Association and others* [2002] 1 LRC 139. Constitutionalising also acts as a "voice for the voiceless" (Yusuf, 2012: 767). In other words, it establishes grounds on which the marginalised can obtain remedies for violations of their rights. Constitutionalising SERs also protects the constitution from "becoming an instrument of human abandonment and neglect" (Davis, 1992: 476). It should be remembered that SERs "have important social and economic ramifications as most of them reflect specific areas of basic needs or delivery of particular goods and services" (Mubangizi, 2013: 4). Response to popular demands necessitates the protection of SERs, because necessities of life, including food, water, housing, and medical services, must be availed to the citizens (Kumar, 2022: 1280). It is stated by Davis, that "a vote without food, association without a house, freedom to pray without any access to medical care makes a mockery of a bill of rights which claims to promote democracy and detracts from a claim that government works in the interests of the impoverished" (Davis, 1992: 476).

Failure to meet the popular demands of people affects the relationship between individuals and the political community, and individuals might challenge a social order that fails to protect fundamental interests (Bilchitz, 2018: 127). When SERs are constitutionalised, they can be subjected to enforcement, and they do not depend on political directives or the political will of the government for realisation (Camarasa, 2016: 217). However, it may be argued that the right to

adequate housing is directly linked to the right to life, health, and other civil and political rights, as human rights are interdependent and indivisible (Mubangizi, 2013: 4). There may not be a need to expressly guarantee the right to housing in the Constitution as the right may be derived from other rights, such as the right to life. According to Mavedzenge, if a constitution provides for the right to life as the "right to live" or the "right to life," it can be broadly interpreted to include access to adequate housing (Mavedzenge, 2020: 349). This is because the right to life can be interpreted to encompass the right to a dignified life, which is intertwined with the right to a secure place to live. Therefore, the enforcement of the right to adequate housing can be possible even without an express provision in the constitution. This paper argues that while the Tanzanian Constitution guarantees the right to life in Article 14, it is important to explicitly provide for the right to adequate housing. Interpreting the right to life, including access to adequate housing, may lead to a broad and subjective interpretation of the constitutional right, which could go beyond its original intent. Considering the historical background of Tanzania and the hesitance to include the Bill of Rights in the constitution and exclude the SERs, as explained previously, due to economic and political reasons, it appears that the Bill of Rights was intended to be limited. Lastly, fundamental rights create a push towards legal institutionalisation and social realisation (Bilchitz, 2018: 128). They are meant to be action-guiding as they can change the *status quo* of a community. Although the article argues in favour of constitutionalising housing rights in Tanzania, it is conceded that the Tanzanian Constitution cannot by itself bring about change in the housing sector. Other "non-legislative measures," as provided under Article 2(1) of the ICESCR, including but not restricted to "administrative, financial, educational, and social services," are vital for the realisation of the right (CESCR General Comment 3).

3.3 Constitutional protection of the right of access to adequate housing in South Africa

The Bill of Rights in the Constitution of the Republic of South Africa of 1996, provides for, among other rights, the "right of access to adequate housing" under section 26 and over the years, the Constitutional Court of South Africa has developed jurisprudence on the enforcement of this right through cases such as *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Residents of Joe Slovo Community v Thubelisha Homes Occupiers* 2010 (3) SA 454 (CC); *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 SA 208 (CC), *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*, (2001) 7 BCLR 652 (CC), and *Port Elizabeth Municipality v. Various Occupiers* 2004 (12) BCLR 1268 (CC). The Court has held that the right is judicially enforceable, despite past and current debates that socio-economic rights are positive rights that relate to resource allocation, with which the court has no power to interfere as dictated by the "principle of separation of powers" (Chenwi, 2015: 77). The Constitutional Court has, however, enforced the right through various interpretative approaches, such as the reasonableness test, meaningful engagement, and the competing interests approach as reflected in the cases mentioned above. The history of housing in South Africa has to be understood in the context of the legacy of colonialism and apartheid. Under that legacy, black people were only allowed to live in townships or in impoverished rural areas. The inclusion of the right of access to housing in the Constitution therefore, was associated with assisting the poor and the vulnerable to have access to housing. The right is provided for under section 26 which states as follows:

(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of the court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

The provision of section 26 imposes four types of obligations upon the state: the obligations to respect, protect, promote and fulfil. The obligation to respect entails the state refraining from intervening directly or indirectly with the enjoyment of the right. This prohibits states from

adopting laws or measures that do not conform to the protection of the right (Ssenyonjo, 2009: 23). In relation to the obligation to protect the right to adequate housing, the state is compelled to prevent non-state actors from interfering with the enjoyment of the right. The state may adopt legislation and other measures to ensure that private actors, landlords, developers, and corporations comply with human rights standards. This obligation demands states to take necessary policy, legislative, regulatory, judicial, inspection, and enforcement measures to prevent violations of the right by non-state actors (Qureshi, 2018: 298). The obligation to promote involves the duty of raising awareness of the right through teaching, education, and publication, as rights must be known to be protected. Lastly, the obligation to fulfil is the actual realisation of rights by taking appropriate measures, including legislative, administrative, budgetary, judicial, promotional, and other measures to fully realise the right with prioritisation and particular attention to vulnerable and marginalised groups. As elaborated by Yacoob J in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), the right of access to adequate housing as per section 26(1), entails more than bricks and mortar. "It requires available land, appropriate services, such as the provision of water and the removal of sewerage, and the financing of all these, including the building of the house itself. For a person to have access to adequate housing, all of these conditions must be met" (Para 35). The accessibility and availability of land are important since the right is associated with such availability (Sihlangu, 2021: 314). Adequate housing entails the availability of a dwelling with access to all basic services. The right of access to housing was further interpreted by Sachs J to be "more than just a shelter from the elements…it is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world..." (*Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) para 17).

It is also connected other rights such as access to land, the right to health care, life, water, dignity, equality, food, and social security. The South African Human Rights Commission also states that "the right to adequate housing is one of the most important human rights that provides shelter from the elements, a place to eat, sleep, relax and raise a family" (SAHRC, n.d.) The right is connected to the "dignity of a person;" thus, amenities of life are necessary to live a dignified life (Mashiane, Odeku, 2021:151). Section 26(2) provides for positive state obligations embodying three elements. First, the "obligation to take reasonable legislative and other measures" is a positive duty imposed upon the government to adopt reasonable measures to enforce rights effectively. The Constitutional Court has interpreted the reasonableness of these measures in the case of *Grootboom* case and established that reasonableness must pass the test and the measures must be comprehensive, coherent, coordinated, and capable of facilitating the realisation of the right. An established programme must be flexible and appropriate for the short, medium, and long term. The test of reasonableness also requires that the programme be "reasonably formulated and implemented to provide for the needs of those in the most desperate situations by providing relief to people in crises. Lastly, for a measure to be reasonable, it must pass the test of offering immediate amelioration of the problem (*Grootboom* case paragraph 40-43).

The reasonable measures adopted must be guided by the availability of resources. The question of available resources was also raised in the case of the *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* [2011] ZACC 33. And in the *Blue Moonlight* case the Supreme Court held that the "reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may have resulted from a mistaken understanding of constitutional or statutory obligations (Para 72). In simple terms, budgetary constraints cannot justify the violation of rights. The fact that South Africa has insufficient resources to meet all housing needs in the country requires prioritising the distribution of the resource. The most needy, including the poor, disadvantaged, and marginalised, should be prioritised. In addition, resource constraints should not constrain the state from providing hazard-free housing to the occupiers (Mashiane, Odeku, 2020: 109). To realise the right, the state must take steps expeditiously and effectively to accomplish the goal. The steps include legislative,

administrative, as well as budgetary measures. The measures taken must be directed towards the progressive implementation of the right (*Grootboom* para 41). Section 26(3) creates a negative duty on the state to prohibit arbitrary evictions. The provision does not prohibit evictions based on development projects or evictions connected to non-payment of rent or other misbehaviour by the tenant. It allows eviction but requires the government and other agents to obtain a court order before eviction. The provision ensures the security of occupants' tenure and prohibits tenants' subjection to arbitrary evictions.

It prohibits authorities from demolishing houses without a court order. In eviction situations, the interests of the poor and marginalised are to be protected (Mashiane, Odeku, 2020: 106). There are several lessons that Tanzania can learn from South Africa's inclusion of section 26(3) in its Constitution. On several occasions, the government of Tanzania has destroyed homes and rendered people homeless. To protect the right to adequate housing in Tanzania, a provision in the Constitution prohibiting eviction without a court order would be of paramount importance. In addition, a provision in the Constitution enunciating the obligations of the state to respect, protect, promote, and fulfil the rights of Tanzanians, similar to section 7(2) of the South African Constitution is essential, as it would oblige Tanzania to take measures to protect the right to adequate housing, among others. Furthermore, it would prohibit the state from direct or indirect interference with the benefit of the right. It would also mandate the judiciary to enforce the rights and order judicial redress in cases of infringement.

From South Africa, it may also be learned that the inclusion of the right of access to adequate housing as a fundamental right imposes an obligation on the legislature to fulfil the obligations enshrined in the constitution. To give effect to section 26 of the South African Constitution, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, The Extension of Security of Tenure Act 62 of 1997, The Housing Act 107 of 1997, The Rental Housing Act50 of 1999, The Social Housing Act16 of 2008, and the Home Loan and Mortgage Disclosure Act 63 of 2000, were enacted. These statutes create a legislative framework that enhances the protection of the right of access to adequate housing in South Africa – a framework that Tanzania can learn from. It has been a challenge to recognise the enforcement of SERs, including the right to adequate housing, as part of fundamental rights due to the positive nature of the rights and their interference with the separation of powers. However, it is possible to respect the right to adequate housing despite its positive nature while also respecting the separation of powers. This can be achieved by adopting the "reasonableness approach" and the "meaningful engagements" approach, as demonstrated by the South African Constitutional Courts as elaborated below.

3.4 Approaches of the Constitutional Court of South Africa

Although the Constitutional Court of South Africa has applied a number of approaches in enforcing the right of access to adequate housing, including the reasonableness test approach, conflicting interest approach, and meaningful engagement approach, the primary focus of this discussion is the reasonableness test and the meaningful engagement approaches. This section examines some of South Africa's Constitutional Court decisions on the right of access to adequate housing and the lessons Tanzania may potentially draw from these decisions and approaches.

3.4.1 Reasonableness test approach

The Constitutional Court developed the reasonableness test approach through several cases including *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); *Minister of Health v Treatment Action Campaign* (No 2) 2002 (5) SA 721 (CC); *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC); *Mazibuko v City of Johannesburg* 2010(4) SA I (CC); and *Nokotyana v Ekhurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC). Regarding the right of access to adequate housing, the reasonable test approach was first conceptualised in the landmark case of *Grootboom.* The issue before the

Constitutional Court was whether the actions taken by the state to provide housing to the applicants were resonable. The Court held that the state's obligation to fulfill the right of access to adequate housing does not have to be met through direct provision of shelter to those without it, but in accordance with section 26(2) of the Constitution, through "reasonable legislative and other measures, within its available resources." Although the Court lauded the accomplishments of the national and provincial housing programs, it found that they ignored the short-term needs of the very poor in the interests of medium and long-term objectives. "A programme that excludes a significant segment of society cannot be said to be reasonable," the Court said (Para 34), and held that the state had failed to meet the obligations placed on it by section 26. It was further held that, for a government plan to qualify as reasonable, it must be "flexible and balanced and make proper accommodation for addressing housing crises and short, medium, and long term demands" (Para 43). A considerable segment of society must be represented, and the programmes must undergo ongoing assessment instead of remaining static. The programmes must also be able to provide shelter for those who need it most urgently and desperately, and everyone must be treated with "care and concern" (Para 44).

The issue of government acting reasonably within the meaning of section 26 of the South African Constitution was also considered in the case of *Residents of Joe Slovo Community, Western Cape vs Thubelisha Homes, and Another* [2009] ZACC 16. In determining whether the project was reasonable, the Court considered the programme's benefits, the disruption to residents' lives, the opportunities available to a significant number of residents, the alternative accommodation available, the criteria used to determine who would or would not return, and the need to make equitable provision for residents in need of housin (*Joe Slovo case* paragraph 380). The Court held that, although there were defaults in engagement with the residents, the project and the implementation plans were reasonable (*Joe Slovo case* paragraph 384 & 387). If Tanzania had the right of access to adequate housing in its Constitution, its courts would benefit from applying this approach, which interprets the right to adequate housing in a way that demonstrates the judiciary's independence from the other branches of government. Thus, the reasonableness approach is beneficial because it considers the roles played by the executive and the legislature, preserves the separation of powers, and rebuts the lack of judicial legitimacy argument made by those against the enforcement of socio-economic rights. According to Yacoob J in the *Grootboom* case:

A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question will be whether the legislative and other measures taken by the state are reasonable. It is necessary to recognize that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met (Para 41). The court will therefore enforce the right of access to adequate housing through the reasonableness approach. It will not probe the best measures that would have been adopted or how best the budget would have been spent, because this is the obligation of the executive and legislature. As argued by O'Regan J in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC), "courts should be slow to interfere in the legitimate policy choices made by the government in determining the plan" (Para 295). Therefore, with the reasonableness approach, the judiciary looks at the reasonability or the alignment of the implementation measures adopted by the executive and legislature in keeping with the constitution and does not interfere with the allocation of government resources and budgetary implications.

The reasonableness approach may adapt to various circumstances since it is flexible and dynamic rather than rigid and static. The court will have to examine the reasonableness of the state's implementation mechanism, which can be construed on an individual case basis, as it is believed to be responsive to complex circumstances (Liebenberg, 2014: 166). Adopting the reasonableness approach by Tanzanian courts would be beneficial, because it is adaptable to interpreting varied cases with varying facts. The *Grootboom* case, which informed the

establishment of the reasonableness approach, has provoked criticism for being an unsatisfactory demonstration of legal reasoning. The argument against the approach is that it seeks to maintain harmony between the legislative and executive branches of government while falling short of public expectations. Pieterse argues that the Constitutional Court has taken a proceduralist approach to socio-economic rights to the point of denuding them to concrete remedial potentials (Pieterse, 2022: 45), meaning that the approach has focused on the adherence to the standards of good governance ignoring the needs of the victims of housing, thus leaving those in need disgruntled. The reasonableness approach has further been criticised for its likelihood of leaving the government and civil society uncertain about their obligations and entitlements (Liebenberg, 2014: 168). Since the court evaluates the reasonability of the measures taken by the state, it leaves state and non-state players in limbo, with uncertainty about measures to be taken to mitigate inadequate housing. Despite the criticisms of the approach, it is submitted that the courts in Tanzania would learn from the South African Constitutional Court by applying the reasonableness approach in interpreting the right to housing if, as mentioned earlier, the right were to be included in the Tanzanian Constitution.

3.4.2 Meaningful engagement

This approach entails having a dialogue with the people who will be impacted by the decision as well as with the government. It is "a mandatory consultation process between the parties to a case, ordered by courts in the course of enforcing housing rights" (Chenwi, 2015: 78). The meaningful engagement approach was devised in response to evictions and the constitutional requirement outlined in sections 26(3) and 152(1)(e) of the SAC, which promotes community participation in local government issues. The foundation of the meaningful engagement approach was laid in the case of *Port Elizabeth Municipality v Various Occupier* 2004 (12) BCLR 1268 (CC) where the Constitutional Court considered the most dignified and effective mode to solve the dispute to be for the parties to engage in a proactive and honest endeavour to find mutually acceptable solutions. The Court addressed the prospect of discussion or mediation involving a third party. The convoluted purpose of the engagement was to avoid the parties engaging in "arm's-length combat" (*Port Elizabeth* case para 39).

The court also stressed the value of mandatory mediation, citing its ability to lower litigation costs, prevent the escalation of tensions brought on by forensic conflict, and promote mutual concessions. These helped the parties relate to one another reasonably and practically. It was further found that it would not "generally be just and equitable to order the eviction if due conversation and mediation have not been attempted" (*Port Elizabeth* case para 42). The meaningful engagement approach was elaborated on further and detailed in the case of *Occupiers of 51 Olivia Road v City of Johannesburg* [2008] ZACC 1. In deciding the case, the Court described "meaningful engagement" as a "two-way process" that involves meaningful dialogue between the city and those on the verge of homelessness. The engagement process with the occupiers was to be done individually and collectively or through representatives (*Occupiers of 51 Olivia Road* Para 13). The court identified the objectives of the engagement process, including determining the consequence of eviction; the assistance to be provided to alleviate the results; rendering the buildings concerned safe and conducive for an interim period; the responsibilities of occupiers; and the period and mechanism for the fulfilment of duties (*Occupiers of 51 Olivia Road* para 14). The process was to take place before litigation and the engagement agreement was to be submitted to the court to inform judgment decisions (Paras 5 and 30).

The court also held that there was a need for "structured, consistent and careful engagement" when a municipality's strategy, policy, or plan was expected to impact a substantial portion of the community (Para 19). Additionally, the court held that the meaningful engagement process should be characterised by the willingness of the parties regarding the application of reasonability and that the parties were expected to act in good faith. Civil society organisations should also be involved in the facilitation of meaningful engagement (Para 20). It was also held

that the "meaningful engagement process should be open and transparent (Para 21). The meaningful engagement approach was made a requirement for each eviction case in *Residents of Joe Slovo Community v Thubelisha Homes and Others* [2009] ZACC 16.

The Constitutional Court ordered an "ongoing process of meaningful engagement between the residents and respondents" about the time, manner and relocation process, and conditions for relocation (Para 5). The court held that "meaningful engagement is a pre-requisite of an eviction order," and the failure to engage the residents reflects a broken promise on the part of the government (Para 167). Additionally, the time and approach of meaningful engagement were observed in the case of *Abahlali Basemjondolo Movement SA & Another v Premier of the Province of KwaZulu-Natal & Others* [2009] ZACC 31. The courts held that "meaningful engagement must occur before," not following, the eviction decision (Para 114). It was further noted that no evictions should occur until the results of the proper engagement process are known and that proper engagement would include considering the wishes of the people who are to be evicted. This entails that an eviction that may render people homeless cannot take place unless there was meaningful participation with the victimsm (Pieterse, 2022: 53).

The worthiness and dignity of the persons participating in the meaningful engagement were discussed in the case of *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Others* 2013 1 BCLR 68 (CC). In this case, Froneman J stated the importance of engagement without preconceptions about the "worth and dignity of those participating in the engagement process" (Para 46). The court also recognised the importance of the parties' involvement in resolving conflicts of interest. Lastly, the court ruled that there must be meaningful participation "at every stage of the re-occupation process" and that the court must govern it (Para 51). It can be inferred from the aforementioned cases that a meaningful engagement approach is appropriate, mostly in eviction situations and other situations where the occupier's housing rights are infringed. Thus, the applicability of the meaningful engagement approach may be adopted by the Tanzanian courts in enforcing the right to adequate housing that involves eviction. There are incidences of unlawful evictions that have rendered communities homeless have been reported in Tanzania (Legal and Human Rights Centre, 2018: 136). Thus, the engagement of the government with the affected occupants would be beneficial. Moreover, the meaningful engagement approach is flexible and may therefore also be applicable to other cases of housing violations and not necessarily only to those relating to evictions.

The meaningful engagement approach would be crucial and pertinent for Tanzanian courts to use in upholding the right to adequate housing if it was included in the CURT. This is because it allows those impacted to express their opinions on what should be done and gives the government a chance to demonstrate its capabilities in reaching an agreement. As a result, it assists in resolving the differences and difficulties between the parties, thus acting as a dispute resolution mechanism whose agreement would later be endorsed by the court (*Olivia Road* case para 5). In that case, Yacoob J. observed that: Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage, and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side (Para 15).

Engagement is a time- and cost-effective process. Although victims are often vulnerable, reasonable attempts must be made to demonstrate the worth and human dignity of the affected occupants, as was observed in the S*chubart* case. The procedure must be carried out cautiously and sensitively to reach a decision. Finding a jointly acceptable solution to the parties' issues is the goal of meaningful engagement. However, the parties do not necessarily have to agree on every aspect.

Instead, "good faith, willingness, and reasonableness are critical" (*Joe Slovo* case para 244). As held by Ngcobo J. in the same case, "individual engagement shows respect and care for the dignity of the individuals" (Para 238). It is further noted that meaningful engagement can promote "localised and contextual solutions (Liebenberg, 2012: 19). Additionally, since all three branches of government are involved in the court's judgment, the meaningful involvement approach aids in easing tensions not only between the state and the impacted population, but directly between them (Liebenberg, 2014: 312). It also encourages administrative and political reforms by facilitating community engagement, which aids dispute resolution, and thus contributes to creating policies and beneficial programmes (Liebenberg, 2012: 26).

The criticism of the enforcement of Social and Economic Rights (SERs) posits that the courts lack the requisite competence to interpret these rights due to a deficiency in specialized knowledge concerning the allocation of state resources, which necessitates the employment of skilled personneln (Bilchitz, 2018: 137). Accordingly, an effective remedy is a participatory approach, as it addresses this concern by involving various participants with diverse skill sets and backgrounds. This approach facilitates the court's ability to be informed and deliberate on the matter with the appropriate information. The Tanzanian courts can learn useful lessons from the South African Constitutional Court's approach of involving occupants affected by the state's decision to engage in a consultative process outside of court. In the cases mentioned earlier, the Constitutional Court held that the method of meaningful involvement requires communication between the state and the affected residents. In addition, it can be conducted with people, as a group, or through representatives. The parties must be willing, and the process must be open, reasonable, and performed in good faith.

The argument put forward by those who criticise the enforcement of the right to adequate housing is that it lacks democratic or political legitimacy since it is likely to conflict with the balance of powers (Camarasa, 2016: 216-217). On the contrary, adopting the meaningful engagement approach fosters cooperation between the legislature, the executive, those impacted, civil society, and interested organisations. A settlement reached through meaningful engagement must be submitted to the court for endorsement (*Joe Slovo* case paras 7, 122, 139, 175). Therefore it counters the criticism of the lack of democratic legitimacy by those opposing the enforcement of SERs (Liebenberg, 2014: 318-319). The implementation of the meaningful engagement approach is hindered by the issue of unequal negotiating power. The engagement process must occur before litigation, but there is no guarantee that authorities will uphold the outcomes due to the power disparity between the government and local communities.

Marginalized groups without legal representation or support from non-governmental organizations are particularly vulnerable. The engagement process may result in an unprincipled dispute settlement process if the court does not exercise proper supervision over the agreements reached by the parties. This is especially concerning for impoverished and evicted occupiers. To mitigate this challenge, it is recommended that the courts exert control over the engagement process to ensure adherence to normative standards and objectives. Liebenberg suggests that the court should harness and deepen the meaningful engagement approach to promote fairness and equal bargaining power among all participants (Liebenberg, 2014: 170). One main concern, however, is that the Constitutional Court's application of the reasonableness and meaningful engagement approaches through litigations has been considered ineffective in achieving social change. The Court tends to decide cases narrowly and limits factual findings to factual contexts, leading to a reputation for "judicial minimalism." Therefore, multilateral approaches such as social mobilization, advocacy, and education must be used in conjunction with the engagement process. As stated by Sachs J, "meaningful engagement between authorities and those who may become homeless due to government activity is essential to the reasonableness of the government's action" (*Joe Slovo* case para 378). It is critical to implement a combination of the reasonableness and meaningful engagement approach on a case-by-case basis.

4. CONCLUSION

Tanzania can draw valuable lessons from South Africa's approach to protecting the right to adequate housing by incorporating it into the Bill of Rights. In particular, Tanzania could take heed of the Constitutional Court's approach to and interpret the right to include both positive and negative obligations of the state. Given the prevalence of evictions in Tanzania, it is crucial to prohibit eviction without a court order, which can be achieved through a constitutional provision. In addition, Tanzania – like South Africa – should broaden the definition of the persons with locus standi for the enforcement of the right to housing, which is currently limited to those who are personally affected. Constitutional inclusion of the right will also mandate the enforcement of the right in the competent courts. In this regard, Tanzania can learn from South Africa's Constitutional Court on enforcement approaches, including the reasonableness approach and the meaningful engagement approach. However, constitutional inclusion and judicial enforcement alone are not sufficient to achieve the desired outcome of progressive realization of the right. Collaboration between the executive, the legislature, and non-state actors is crucial. Non-state actors, such as civil society organizations and non-governmental organizations, can play a pivotal role in politically mobilizing and pressurizing the legislatures to enact laws and influence housing programs. Furthermore, raising awareness of housing rights is essential, and Tanzania must promote such rights through education and publication. The Commission of Human Rights and Good Governance and non-state actors have a crucial role to play in this regard. Collaboration between various stakeholders is crucial and raising awareness of housing rights is essential. Tanzania can achieve these goals by either amending the existing Constitution or passing a new one that explicitly recognises socio-economic rights including the right to adequate housing.

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