

CHILD RIGHTS IN THE CONSTITUTIONS OF EAST AFRICAN COUNTRIES: A NEED FOR HARMONISATION

Kevin Mandopi¹

¹ *Commissioner at the Commission for Human Rights and Good Governance Tanzania, Lecturer - Institute of Judicial Administration Lushoto; Advocate of the High Court of Tanzania.*

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ABSTRACT

It is the principle of law that, each constitution overtly should recognise and protect the rights of the child as part of the fundamental human rights from the conception stage to the adulthood because the child is a vulnerable human being in the society; he needs special recognition and protection of his rights. However, the Constitutions of Rwanda and Tanzania do not expressly provide the rights of the child as it has been in Kenya and Uganda. The constitutions of Kenya and Uganda overtly recognise the child's fundamental human rights and provide the need of its protection. In addition, the Constitutions should guarantee the child with necessary services such as education, medical treatment, nutritious food and any other necessary services to the child as important elements for his growth. Thus, this article scrutinises the child fundamental human rights as enshrined into the Constitutions of Rwanda, Tanzania, Uganda and Kenya Constitutions. However, Burundi despite is a part of the East African Countries but has not been covered in this work due to the reason that, the researcher was not in the position to access the English Constitution version as the original Burundi Constitution is written into French language.

INTRODUCTION

Each of the East African Country such as Rwanda, Tanzania, Burundi, Kenya and Uganda, is having its own constitution. It is the principle of law that, each constitution overtly should recognise and protect the rights of the child as part of the fundamental human rights. This is due to the reason that, the child rights subsumes from human rights. Mchome (2003) provides that, this right is inherent rights to which the child acquires by virtue of birth. Shivji (2004) says, the child rights are not gifts from the State. But the States recognises in the constitutions provisions through the bill of rights. However, this does not mean that the rights are created by the constitutions but is an evidence of recognition and the intention that States should take active role in the process of enforcement when violated by any person through the court of law.

Therefore, despite human rights being inherent rights and having been recognised by constitutions of various countries in the world such recognition therefore signifies the willingness of various States to protect these fundamental human rights to people. Thus, due to the reason that, the child is a vulnerable human being in the society he needs special recognition and protection of his rights. This creates important that, the rights and welfare of the child should be recognised and protected by the constitutions like any other rights of human being. Likewise the child rights needs special mentioned into the respective constitutions of every State. The Constitutions of Kenya, Uganda, Rwanda and Tanzania contain articles providing and recognising fundamental human rights and freedom. These parts of the constitutions provide the fundamental human rights to which every human being is entitled to the recognition and protection. It is obvious that, enshrining these human rights provisions into the Constitutions makes these rights to be part of the constitutional rights. The basis of incorporating the provision relating to human rights is to recognise, respect, and protect these rights from any form of abuse whether from the individual person, the organisation or the State. Similarly, incorporating these rights in the constitutions establishes its enforcement as part of the constitutional rights enshrined into the parental law of the land.

However, the Constitutions of Rwanda and Tanzania do not expressly provide the rights of the child as it has been in other countries, such as Kenya and Uganda. The constitutions of Kenya and Uganda overtly recognise the child's fundamental human rights and provide the need of its protection. The Constitutions of Rwanda and Tanzania do not expressively provide the child rights but it is said that, as the child is a human being like any other person then, the human rights enshrined into the Constitutions

cover the fundamental human rights of the child. In addition, Singh (2001) provides that, the Constitutions should protect the child from the conception stage to the adulthood and should guarantee the child with necessary services such as education, medical treatment, nutritious food and any other necessary services to the child as important elements for his growth.

Thus this work scrutinises the child fundamental human rights as enshrined into the Constitutions of Rwanda, Tanzania, Uganda and Kenya Constitutions. However, Burundi despite is a part of the East African Countries but has not been covered in this work due to the reason that, the researcher was not in the position to access the English Constitution version as the original Burundi Constitution is written into French language.

THE CONCEPT OF CHILD RIGHTS IN THE CONSTITUTION

The concept of child rights originates from human rights. Lugakingira J., (as then he was), in the case of *Rev. Mtikila versus Attorney General* ((1995) T.L.R. 31) provides that;

“...fundamental rights are not gifts from the State. They inherent 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 created; rather it is evidence of their recognition and the intention that they should be enforceable in a court of law.”

The fundamental human rights are conferred to the person by virtue of being a human being. According to Lugakingira J., the fundamental human rights are conferred to the human being after birth. This perception is leaving out of the sphere the rights of the expected child or foetus who is into the womb of her mother. In case this interpretation is bought and dragged into the sphere of child rights, squarely it makes the offspring and foetus into the womb of her mother waiting to be born having no human rights protection. However, this kind of interpretation is wrong. In principle the expected child like foetus has rights, which calls to be protected while is into the womb of its mother. To this regard, the fundamental human rights cover the child and foetus expecting to be born alive and the child born alive and any other human being. Considering the protection of the expected child or foetus creates confidence that will be protected against abortion and other malpractice against the child or foetus while into the womb of its mother.

As provided before, human rights are inherent rights which began when the society emerged. But internationally and regionally the concept of human rights gains its momentum on enactment of the Universal

Declaration of Human Rights instrument. However, this does not mean that the rights are thereby created by the instrument rather it is evidence of their recognition and the intention that they should be protected and enforceable in a court of law. The Universal Declaration of Human Rights provides a number of human rights which include: The right to be free and equal in dignity; right to freedom; the right to life and security; the right against torture, cruel, treatment inhuman or punishment; the right to be equal before the law; the right to be provided with an effective remedy by the competent authority against the violation of the fundamental human rights granted to him by law; and the right to presumption of innocence until proved guilty according to law. The Universal Declaration of Human Rights does not specifically confer these human rights to the child. Thus, the child is human being like any other person. Hence, all these fundamental human rights fall directly and must be considered and enjoyed by the child too.

CHILD RIGHTS AS CONSTITUTIONAL RIGHTS

Despite human rights being inherent rights, these rights are always recognised by the constitutions of various countries in the world. This recognition signifies the willingness of States to protect all those rights to her people. Due to the fact that, the child is vulnerable in the society needs special recognition and protection of his rights. Thus, the welfare development of the child depends on the decision and willingness of the adults. This reason makes important that, the rights and welfare of the child should be recognised and protected by the constitution expressly like any other rights of human being. The incorporation of child rights in the constitution also maintains its recognition, protection and enforcement as part of the constitutional rights. Therefore, as provided above this work discusses the constitutional child rights position in East African Countries to include Rwanda, Tanzania, Uganda and Kenya Constitutions.

Child Rights in Rwanda Constitution

The Constitution of Rwanda (2003) provides expressly at its preamble that; recognises the rights of the child as it has been enshrined in its international and regional child legal instruments. The Constitution provides that, the State is responsible to protect the family, which is the natural foundation of Rwandan society. In protecting the family the State is responsible to put in place appropriate legislation and institutions for the protection of the family, the mother, and the child with the view of making the family flourishes. In respect of the protecting the child, this duty is also extended to the parents as well.

The Constitution of Rwanda recognises that, “every child is entitled to special measures of protection by his or her family, society and the State that are necessary, depending on the status of the child, under national and international law.” This means the family, society and the State is responsible to protect the rights of the child. However, such protection

seems to be provided in the segregate way as will depend on the status of the child. The international and regional child legal instruments prohibits offering “services to the child in respect of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.” Offering services on the bases of status or any other consideration is the violation of child rights. Therefore, despite the Constitution advocates offering services in accordance to the international and regional instruments but it has been noted that, violates the principles set in such instruments especially the principle against segregation. This constitution do not expressly provides the rights of the child but provides various rights in the general way in its various articles especially from article 10 to 51. These provisions provide the fundamental human rights and duties entitled to every human being. Therefore, as the child is a human being like any other person thus, the child is entitling to all rights enshrined in these articles. Such rights include those stipulated under the Rwanda Constitution (2003): The right to life, right to physical and mental integrity, right to equality before the law, right to movement, and right to education. However, the constitution do not provide at which stage the child begins to be protected whether at the conception stage or birth stage. Constitutional recognition of the child rights from the conception stage assist protecting the life of the expected child from the womb of its mother to the stage of birth and being protected until the child attains the age of majority. Making protection of the child at the stage of conception creates the existed of the child in the society.

Child Rights in the Tanzania Constitution

Tanzania Constitution contains articles providing fundamental human rights and freedom under Part III titled as “Basic Rights and Duties.” This part of the constitution provides the fundamental human rights to which every human being is entitled to it. By enshrining these human rights provisions into the constitution makes these rights to be part of the constitutional rights. Thus, must be enjoyed in the manner that they do not cause interference with the rights and freedoms of other persons, or of the public. Interference to other person's rights and interest is also the violation of constitutional fundamental human rights principles set into the constitution through the Bill of Rights. The rationale of incorporating the provision relating to human rights is to recognise, respect, and protect these rights from any form of abuse whether from the individual person, the organisation or the State.

The Constitution of Tanzania has 152 articles and two schedules within which there is no any provision providing specifically the rights of the child. Also the Constitution has no any single word “child” or any phrase identifying that, the child has rights. This does not mean however that the child has no rights. The child still has rights and entitled to enjoy to all rights enshrined into the Constitution through the bill of rights like any other person. This is due to the reason that, the child is a human being

therefore, the rights of him is subsumed within the constitution like any other person. Hence, need to be recognised having rights under the constitution. This makes clear that, the rights enshrined in the Tanzania Constitution covers the child. In other words, Bhoke (2008) provides that, there is a child rights subsumed in the Constitution of Tanzania as it has been provided at articles 12 to 29.

Child Rights in the Kenya Constitution

The Kenya Constitution 2010) has enshrined the Bill of Rights in its constitution. The Kenya constitution has recognised and protects human rights and fundamental freedoms with a view of preserving the dignity of individuals and communities. In protecting the rights of the child through the bill of rights, the court is provided with full mandate to develop the law to the extent that it does not destroy rights and fundamental freedom enshrined into the Constitution. In making its interpretation to various provision of law it should adopt the interpretation that most favours the enforcement of rights or fundamental freedom. In the process of interpretation the court must promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and the spirit, purport and objects of the bill of rights. This is done with a view of protecting the fundamental human rights and freedom to the people and the child of Kenya.

The rights and fundamental freedoms in the bill of rights belong to each individual person and are not granted by the State. The State just recognises via constitution and provides the mechanism of protection. The enshrining of the human rights into the constitution does not mean that the rights, which are not provided in it, are not protected. Such inherent rights are also protected despite not being included into the constitution. The Constitution of Kenya also makes free to every person to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened. This has been done with a view of showing its commitment of protecting the fundamental human rights and freedom as it has been enshrined into the constitution.

The Kenya Constitution (2010) provides an elaboration of certain rights to ensure human rights and fundamental freedoms are provided to certain vulnerable groups of persons including child group. The child has the right to a name, nationality; free and compulsory basic education; to basic nutrition, shelter and health care. Also the child has the right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour. These rights must be provided to the best interests of the child. The State organs and the public officers are duty bound to address the needs of the child. The needs of the child should be taken into board by enacting and implementing legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.

The child is entitled with rights not only that which have been provided under article 53 of the Kenya Constitution, but should be provided with all fundamental rights and freedoms enshrined into the Constitution under the bill of rights like any other person. Such rights are in alienated rights by either the State, individual person or the legal entity. Such rights can be explained to include:

The first right is the right to life. The right to life for human being begins at the conception stage. Therefore, this right needs to be protected at all stages. This means that, the constitution protects the child from the womb of her mother to the age of eighteen years. This is an absolute protection of child rights. In the process of maintaining the right to life, the law prohibits any person to deprive the life of another intentionally whether is about to be born or is born alive. To this regard, abortion is not permitted unless, in the opinion of a trained health professional. The permission of trained health professional will be taken if there is need for emergency treatment, or the life or health of the mother is in danger. This shows the dedication of Kenya Constitution to protect the life of the expected child within the womb of her mother to the stage of attaining the age of eighteen years. The Tanzania Constitution does not take this kind of restrictive means of the child protection. So long as the life of the child begins at the stage of conception it is for the best interest of the expected child that, the protection should begin at the stage of conception to the stage when the child born attain the age of majority.

The second right relates to the fact that, the child has the right of being determined his matters involving him fairly. The State is bound to ensure access to justice for all persons equally and payment of fee should not impede the child access to justice. The process of fair determination begins at the arrest stage. The arrested child must be informed promptly the cause of his arrest in the language that the child understands. The information should include; the reason for the arrest, the right and the process of defending during trial, the right to remain silent, and advantages of not remaining silent. The child also has the right to remain silent and to communicate with an advocate, and other persons. It is important to provide out that, the arrested child should not be compelled to make any confession or admission that could be used in evidence against him. During the entire period of investigation or trial the child should be released on bond or bail, on reasonable conditions. In case has not been released immediately after the arrest he should be held separately from adult and persons who are serving a sentence. The child when has been brought to court should be provided with the following rights; to be presumed innocent until the contrary is proved and fairly defending the matter arraigned against him in court.

The Constitution of Kenya provides the duty to all State organs and all public officers to address the needs of vulnerable groups within a society, including the child. After addressing the needs of the child, the State should enact and implement legislation to fulfil its international and regional obligations in respect of human rights and fundamental freedoms.

However, the child among other rights, has the following rights: To attain the highest standard of health, which includes the right to health care services; the right to be accessible and adequate housing, and to be provided with reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; right to clean and safe water in adequate quantities; to social security; and to education. Also the child has the right to be provided with the immediate medical treatment during the emergency cases. This aimed at protecting the child during the disaster occasions whereby the child needs urgent and an extreme medical assistance.

Child Rights in the Uganda Constitution

The Constitution of the Republic of Uganda, 1995 is constructed from the objectives and principles that guide all organs and agencies of the State, citizens, organisations and other bodies in the process of respect and promotion of fundamental rights and freedoms of the individual person. The Constitution takes the same view like Kenya Constitution which, provide the protection of the child right to life. The protection of the right to life begins to unborn child. Chakrabarti says that, the right to life of the child begins to be recognised and protected at the conception stage. Therefore from the conception stage no person has mandate to terminate the life of unborn child unless the law provides. To this regard it is true that, protection of the life of the expected child while in the womb of her mother is not absolute. In case the law allows for the determination of the life of the expected child then such life is terminated. The scrupulous men and women in conspiracy with medical experts use this loophole to make unintended abortions, which is prohibited under the law. By doing this destroys the intention of this provision in the Ugandan Constitution.

The Uganda Constitution has some flavours that appear in Kenya Constitutions by establishing a separate article 34 in its Constitution that recognises and protects the rights of the child generally. Through this provision the child has the right to know and to be cared for by their parents or other persons required under the law to take care of the child. This duty is paramount, as the child must be protected and provided with the necessary services by the parents and other relatives. The upbringing of the child depends much on the efforts and direction of these persons. The child also has many other rights which include: The right to basic education which is the responsibility of the State and the parents of the child; the right to protection from social or economic exploitation and must not be employed in or required to perform works that is dangerous to his health, physical, moral and social development or to interfere with his education. The right of the child is also extended to medical treatment, social and economic benefits. The child should not be provided such rights on the bases of religion or other beliefs. Thus, the child must be provided with all these rights and when the child has entered into the conflict with law should be handled carefully and in accordance with the systems of administration of juvenile justice. Within the system of juvenile justice,

the child is entitled to be kept in a lawful custody separately from adult offenders.

Despite the rights pointed out under article 34 of the Ugandan Constitution applicable to the child but still all other rights stipulated under the bill of rights squarely applicable to the child. Article 29 of the Uganda Constitution further provides that; “The rights and duties relating to fundamental and other human rights and freedoms specifically mentioned in the Constitution shall not be considered as excluding others not specifically mentioned.” This makes clear that, all inherent rights whether stipulated under the constitution through the bill of rights or not must be enjoyed by any Ugandan child. On top of the rights provided under article 34 still the child have the following rights: Right to personal liberty; right to protection from inhuman treatment; right to protection of property; right to privacy; right to a fair hearing; right to freedom of assembly and association; right to freedom of speech and expression; right to freedom of conscience and religion; right to freedom of movement; right to culture and similar rights; civic rights and activities; economic rights; right of access to information; and the right to fair treatment in administrative decisions.

The child rights enshrined in the constitution through the bill of rights are enforceable in court of law. The Uganda Constitution makes clear that:

“Any person who claims that a fundamental or other right or freedom provided for under the Constitution has been abused is entitled to apply to court for remedy, which may include compensation.”

Therefore, where there is the abuse of fundamental human rights against the child, action must be taken in court against the violators and claim can be made for remedy or compensation. However, the court cannot provide any remedy or compensation to a victim without proof. The person before demanding the remedy or compensation of violation of fundamental human rights in court, first he must satisfy that, has enough evidence which will be tendered in court to substantiate his claim. Without it, which, his matter will be dismissed. The right to sue also goes to any person or organisation to bring an action in court against the violation of another person’s or group’s human rights. This right of action goes under the public interest claim. Therefore, in case the children have been denied their rights any organisation or individual person can on behalf of the children sue in court for remedy. The right to sue gives the right to be provided the decision of the claim. Thus, in case any person to the matter is aggrieved by the decision of the court may appeal against the decision to the appellate court where will have the right to challenge the decision of the lower court. However, the motivation to appeal on the ground of dissatisfaction should be fully confined into the legal grounds and should not be motivated by social or moral values. The appeal based on moral or social consideration should be ended on dismissal.

HARMONISATION OF CONSTITUTIONAL CHILD RIGHTS IN EAST AFRICAN REGION

As provided above, the child has fundamental human rights. These rights need to be overtly recognised in the constitution of each State. The in East African region, each State Constitution has recognised child rights different from the other as provided above. The Constitution of Rwanda provides the obligation to the State to protect the family, and to put in place appropriate legislation and institutions for the protection of the family, the mother, and the child with the view of making the family flourishes. In respect of the protecting the child, this duty is also extended to the parents as well. The Constitution also recognises that, “every child is entitled to special measures of protection by his or her family, society and the State that are necessary, depending on the status of the child, under national and international law.” However, the constitution has not itemized the special rights to which the child is entitled to be provided. Likewise, the constitution is silence whether at which stage the protection begins whether at the conception or birth stage.

Tanzania Constitution despite contains articles providing fundamental human rights and freedom, but there is no any provision providing specifically the rights of the child. Also the Constitution has no any single word “child” or any phrase identifying that, the child has rights. Like the Constitution of Rwanda, the Tanzania Constitution as well has not pointed at which stage the rights of the child begin to be recognised and protected, whether at the conception stage or after birth. This constitution also has not expressly provided rights to which the child deserves. However, it is presumed that, the child rights are subsumed in the Constitution of Tanzania as it has been provided at articles 12 to 29.

The Kenya Constitution recognises and protects human rights and fundamental freedoms with a view of preserving the dignity of individuals and communities. This Constitution provides the rights of the child to ensure human rights and fundamental freedoms are provided to the child. Such rights include: The right to a name, nationality; free and compulsory basic education; to basic nutrition, shelter and health care. Also the child has the right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour. These rights must be provided to the best interests of the child. The State organs and the public officers are duty bound to address the needs of the child. The needs of the child should be taken into board by enacting and implementing legislation to fulfil its international obligations in respect of human rights and fundamental freedoms. But despite of the existence of article 53 of the Kenya Constitution, the child should be provided with all fundamental rights and freedoms enshrined into the Constitution under the bill of right. The child also is provided with the right to life. This Constitution protects this right from the conception stage. This means that, the constitution protects the child from the womb of her mother to the age of eighteen years. The

Constitutions of Tanzania and Rwanda do not take this kind of restrictive means of the child protection. So long as the life of the child begins at the stage of conception it is for the best interest of the expected child that, the protection should begin at the stage of conception to the stage when the child born attain the age of majority.

The Constitution of the Republic of Uganda, 1995 takes the same view like Kenya Constitution which, provide the protection to unborn child. This is to say, the right to life of the child begins to be recognised and protected at the conception stage. Therefore, from the conception stage no person has mandate to terminate the life of unborn child unless the law provides. The Uganda Constitution has some flavours that appear in Kenya Constitutions by establishing a separate article 34 in its Constitution that recognises and protects the rights of the child generally. The child also has many other rights which include: The right to basic education which is the responsibility of the State and the parents of the child; and, the right to protection from social or economic exploitation and must not be employed in or required to perform works that is dangerous to his health, physical, moral and social development or to interfere with his education.

Therefore, as provided above, each Constitution in East African Countries has its manner of recognising and protecting the rights of the child. The Constitutions of Uganda and Kenya expressly provide a separate articles recognising and protecting the rights the child in the same way protects the rights of the child from the conception stage, after birth and until he attains the majority age. The Constitutions of Tanzania and Rwanda do not have articles providing expressly the rights of the child and protecting the rights of the child from the conception stage. This is true that, the rights of the child are not well enshrined by the Constitutions of Rwanda and Tanzania compared to the Constitutions of Uganda and Kenya. This is true that, these Constitutions needs harmonisations to an extend of all the Constitutions of East African countries should incorporate special provisions recognising the rights of the child and protecting the child from the conception stage, after birth and until the child attains the age of majority.

CONCLUSION

The Constitutions provides the principle of freedom, justice, fraternity and unity, this takes into board the respect of human rights and protection of the duties of every individual person in the society. The Constitutions of Rwanda and Tanzania do not have articles providing the fundamental child rights to the child. The Constitutions of Kenya and Uganda recognises and protects the rights of all people including the child. These constitutions recognise and protect the child from the conception stages until he attains the majority age. This real shows the commitment of these States in protecting and recognising the rights of the child whereby the Tanzania and Rwanda Constitutions should follow these steps by

incorporating expressly the child rights in its Constitution through its Bill of Rights.

Therefore, to open the door for the child to enjoy fully the fundamental human rights should be specifically stated in the constitution by recognising the child rights as part of the constitutional rights as it has been provided under the Constitution of Kenya and Uganda. The Constitution of Tanzania and Rwanda as well should protect the rights of the child from the womb of her mother to the stage of attaining the majority age. This will protect the rights of the child in the circumstances where is in conflict with law or is in need of care. Such protection will not let the rights of the child being abused or violated by the State, members of the community or individual person in general and where such rights has been violated, then the legal action will be strongly taken against violators as well. However, incorporation of these constitutions into the uniformity manner enables uniformity enforcement and protection of the child rights to all the children in the entire East African Countries.

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