

# **Incorporation of Child Natural Rights in the Constitution: Comparative between Tanzania and South Africa**

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## **Abstract**

This paper discusses the child fundamental natural rights as enshrined in the Constitutions of the United Republic of Tanzania and South Africa with a view of encouraging the Constitution of Tanzania to incorporate in its Constitution overtly the natural child rights protection. The term 'Human Rights' is dynamic concept and it endeavours to adapt itself to the needs of the countries and their people. Mathur (1996) provides that, these rights are sometimes known as basic rights, fundamental rights, natural rights, or inherent rights. The child rights are required to be incorporated in the constitution. The Constitution of South Africa at article 28 recognises and protects the rights of all people including the child. However, the Tanzania constitution has not incorporated such child human rights. Therefore, it is here appealed that, the Tanzania Constitution has to incorporate the rights of the child in its constitution to provide adequate protection of child rights as it has been done by the Constitution of South Africa.

**Keywords:** Tanzania; South Africa, Constitution, child rights, human rights, inherent rights.

## **1. Introduction**

The term 'natural rights' is used interchangeably with the term fundamental rights, inherent rights, human rights or basic rights. Shivji (2004) provides that, the child rights are built from the concept of natural rights. Natural rights are the inherent rights and are in the person by virtue of birth and are therefore prior to the State and the law (Mchome 2003). It is obvious that child rights are fundamental rights, which are not gifts from the State. Normally the constitutions incorporate natural child rights in their provisions through the bill of rights (Nielsen, 2008). This does not mean that the rights are created by the constitutions rather it is evidence of recognition and the intention that the States should take active role in the process of enforcement when violated by any person through the court of law (Mashamba 2010).

Therefore, despite natural rights being inherent rights and having been recognised by various constitutions of various countries in the world such recognition therefore signifies the willingness of various States to protect these fundamental natural 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 constitution like any other rights of human being. It is obvious that, the child rights needs special mentioned into the respective constitution of every State. Article 12 to 29 of the Constitution of Tanzania contains articles providing and recognising fundamental natural rights and freedom by the name of "Basic Rights and Duties." This part of the constitution provides the fundamental natural rights to which every human being is entitled to. It is obvious that, enshrining these natural rights provisions into the Constitution makes these rights to be part of the constitutional rights. The basis of incorporating the provision relating to natural 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 constitution establishes its enforcement as part of the constitutional rights enshrined into the parental law of the land.

However, the Constitution of Tanzania does not expressly provide the rights of the child as it has been provided in the Constitution of South Africa. Masua (2011) has enlightens that, the Constitution of South Africa overtly recognises the child's fundamental natural rights and provides the need of its protection. The Constitution of Tanzania does not expressively provide the child rights but it is said that, as the child is human being like any other person then, the natural rights enshrined into the Constitution cover the fundamental natural rights of the child. In addition, the Constitution should protect the child from the conception stage to the adulthood and should guarantee the child with necessary services such as education (Legal and Human Rights Centre 2004) medical treatment, nutritious food and any other necessary services to the child as important element for his growth as it has been provided through the Constitution of South Africa (Singh 2011).

## **2. The Constitution of the United Republic of Tanzania, 1977**

This is the fifth constitution. In other words, this constitution is regarded the permanent constitution of the

United Republic of Tanzania. This is due to the reason that it has survived for about 34 years now. However, the people are now demanding the new and comprehensive constitution which will take into account various issues of peoples' rights including reset up of the government leadership structure and determination of various matters relating to the union.

This constitution was made by the Constituent Assembly in 1977 under the single party State and through the slogan of party supremacy. This is one of the challenges to this constitution under the multiparty State. The people claim that, the constitution is the property of *Chama Cha Mapinduzi* as it was made during the single party State through the slogan of supremacy of the party.

In addition, this constitution has been amended 17 times from 1977 to date. These amendments aimed at providing better articles for protection of rights of the people including the child in Tanzania. The constitution of the United Republic of Tanzania in its article 98 provides clear that, the parliament of Tanzania has the power of enacting the law with a view of modifying, correcting, repealing, and replacing other provisions or re-enacting or modifying the application of any provision of the constitution. Generally, all these are done by amendment process.

According to Tibanyendela (2009), the landmark amendment in this Constitution under the umbrella of providing fundamental natural rights occurred in 1984 via Act no. 15 of 1984. This Act introduced part three of the Constitution under the name of "Basic Rights and Duties." Articles to this part are aimed at protecting fundamental natural rights (Magore 2008).

### **3. The Concept of Child Rights in the Constitution**

The concept of child rights built its roots from the concept of natural rights. Lugakingira J., (as then he was), in the case of *Rev. Mtikila versus Attorney General* (1995) 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 natural rights are conferred to the person by virtue of being a human being. According to Lugakingira J., the fundamental natural 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 natural rights protection. However, this kind of interpretation is wrong. In principle the expected child like foetus has rights, which calls for protection while is into the womb of its mother. To this regard, the fundamental natural rights cover the child, foetus expecting to be born alive, 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 toward the child or foetus while into the womb of her mother.

As Mchome (2003) has provided above, natural rights are inherent rights which began when the society emerged. But internationally and regionally the concept of natural rights gains its momentum on enactment of the Universal Declaration of Natural rights. 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 (1948) provides a number of natural 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 natural rights granted to him by law; and the right to presumption of innocence until proved guilty according to law. The Universal Declaration of Natural rights does not specifically confer these natural rights to the child. Thus, the child is human being like any other person. Hence, all these fundamental natural rights fall directly and must be considered the rights of the child too.

### **4. The Developments of Child Natural Rights in the Constitution**

The Constitution of the United Republic of Tanzania as amended in 1984 via Act no. 15 codified the principles of fundamental natural rights into the constitution (Peter 2004) in line with the Universal Declaration of Natural rights (Olenasha 2007). These fundamental natural rights codified into the Tanzanian constitution through the so

called Bill of Rights.

The essence of the Bill of Rights in Tanzania did not arise during the colonial period. Taking the bill of rights is taking the fundamental natural rights. Peter (1997) insists that, the colonialists in Tanzania were looking for low materials for their industries in Europe, cheap labour and market for their finished goods from Europe. The successfully realisation of these needs could not be archived without violation of natural rights and freedom. This automatically created no room for the introduction and protection of natural rights during the colonisation in Tanzania. This led to making the child to have no protection of his rights and continued to be recognised as a property of his parents as practised by some African culture and tradition.

By granting independence to Tanzania the British had expectation that, Tanganyika government would incorporate the bill of rights into the Independence Constitution. The British had this view for protecting their fellow European who remained in the country. These efforts of introducing the bill of rights into the constitution also were taken reluctantly by the Government of Tanganyika despite its people were advocating for its incorporation. All the efforts of the people and the British went into vain. The incoming rulers rejected the recognition of natural rights phenomena and its incorporation into the Independence Constitution, 1961. The leaders' denial was based into the reason that, the bill of right would create an obstacle into the entire process of developing the country. In their view, development processes required the elements of violation of natural rights. Had the bill of rights been incorporated into the Constitution it would have been highly used by the court to frustrate the government plan and activities by declaring the administrative actions and plan of the government being unconstitutional. The leaders' denial to incorporate the bill of rights into constitution also aimed at protecting leaders themselves from international and national forces compelling them to protect natural rights when violated by the State or any other person. The violation of natural rights by leaders in power would be brought to prosecution and conviction under the international tribunals. This might be one of the main reasons why the bill of rights was not incorporated into the Independence Constitution. The non-incorporation of the bill of rights into the constitution created the element of non respect of fundamental natural rights to all human being including the child in Tanzania.

The efforts of the people to make the government incorporate the bill of rights into the constitution did not succeed until 1965. In this year the idea was reluctantly accepted by the leaders and partially recognised and incorporated the fundamental natural rights only at the preamble of the Interim Constitution of Tanzania, 1965. This made Tanzania at the first time recognise the essence of protection of natural rights through the constitution (Peter 1991). In legal philosophy, preamble is not enforceable under the law. Peter (2008) remarking into the issue provides:

Firstly, putting the fundamental rights and freedoms in the preamble to the Interim Constitution was useless. This is because under Common Law system which is followed in Tanzania and other former British colonies, the preamble is not part of the Constitution and therefore one cannot base his or her case for violation of rights or freedom on this part of the Constitution.

Therefore, despite the presence of the preamble of the constitution, which recognised the fundamental natural rights but still person, could not be protected substantially through it. This makes its presence having no sense to the entire life of its citizen. This also created the child to hang about without constitutional legal protection and the rights of the child remained to be abused without the authority empowered to protect.

The Bill of Rights in Tanzanian Constitution was incorporated in 1984. The bill of rights contains the provision recognising fundamental natural rights. The main aim of incorporating the provision providing for the recognition and protection of natural rights arose with a view of eliminating the instances of natural rights violation conducted by the individual person and the State. This necessitated the people demanding the incorporation of the bill of rights. However, various international and regional natural rights development, which was underway pushed Tanzania to join hands with other African countries to incorporate fundamental natural, rights in its constitution.

It is important to point out that, despite Tanzania having been motivated to implement the Universal declaration of Natural rights and the African Charter on Human and Peoples Rights, 198, still it did not incorporate the fundamental natural rights in its constitution up to 1984. The Bill of Rights in the Constitution of the United Republic of Tanzania was supposed to be in operational by 1985. However, the implementation of the constitutional provisions relating to basic rights, freedom and duties were rescinded to apply for three years. This was made intentionally by the government so as to get ample time to rectify laws which hinders the smooth

protection of fundamental natural rights as it has been provided under the constitution. This further delayed the process of protection of fundamental natural rights to the child in Tanzania.

The suspension of applicability of the fundamental natural rights from being enforced through the court as declared by the State for the period of three years does not mean that, Tanzania was not obliged to respect these fundamental natural rights, but was obliged to respect as well. This suspension was in the view that, people should not rash to court to challenge a number of laws which seen to hinder the guarantee of these rights. To this regard, the government was taking steps to rectify such laws to conform to the enacted bill of rights provision embraced into the Constitution. The worse result from the three years of suspension the government did nothing. No single statute was amended or repealed which were seen to offend the protection of fundamental natural rights. This shows the government had reluctance attitude toward full implementation of fundamental natural rights principles in Tanzania. As the result the child rights until 1987, that is three years after enactment of the bill of rights, acquired no room to be protected under the Constitution of the United Republic of Tanzania.

The government of Tanzania after failing to meet its plan to rectifying the laws obstructing the implementation of the provision of the bill of rights in the constitution within a period of three years decided to allow the constitutional provisions to be applicable generally. This decision drew attention of the people to challenge the constitutionality of various provisions of laws offending the provision of the bill of rights at the court of law. Therefore, at this stage the hope of the people were left into the hands and the smartness of the court to declare its unconstitutionality of the various provision and laws offending the guarantee of fundamental natural rights. At this juncture then the fundamental natural rights and protection gained momentum into the soil of Tanzania. But the child did not have an expressly rights and protection in the Constitution.

## **5. The Child Natural Rights as Constitutional Rights**

Despite natural rights being inherent rights, these rights are always recognised by the constitutions of various countries in the world. This recognition signifies the willingness of a State 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 child 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. This study scrutinising the Tanzania constitutional child rights position and further takes experiences from South Africa Constitution.

### **5.1 The Child Natural Rights in the Tanzania Constitution**

Wambali (2008) provides that, Tanzania Constitution contain articles providing fundamental natural rights and freedom under Part III titled as “Basic Rights and Duties.” This part of the constitution provides the fundamental natural rights to which every human being is entitled to it. By enshrining these natural 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 rights and interest is also the violation of constitutional fundamental natural rights principles set into the constitution through the Bill of Rights. The rationale of incorporating the provision relating to natural 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 (Kihwelo 2008). Also the Constitution has no any single word “child” or any phrase identifying that, the child has rights. This does not mean 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. More discussion on the rights of the child in the Constitution of Tanzania is covered in this chapter under the subtitle “Child Rights in the Bill of Rights in Tanzania.”

### **5.2 The Child Rights in the South Africa Constitution**

The Constitution of South Africa, 1996 contains the provision of the Bill of Rights through articles 7 to 39. In South Africa Constitution, the Bill of Rights is considered as a cornerstone of democracy. It covers the rights of all groups of people. The bill of rights confirms the democratic values of fundamental natural rights and freedom that the State should recognise, respect, protect, and provide as provided into the constitution. The bill of rights

applicable to all laws and binds all government organs, individual person, and the legal entities. This means that, the fundamental human right is an alienable right by the State, individual person or the legal entities.

The South Africa Constitution as provided above protects the rights of all people including the children group in the country. Article 28 of the Constitution specifically recognises the rights of the child. Recognising specifically child rights automatically creates such rights to be the constitutional rights. In case these child rights are denied either by the State, community, individual person or any legal entities is actionable for contravention of the articles of the constitution. The child under the South Africa Constitution has been provided with a number of rights. Article 28 itemises these rights as follows;

1. "Every child has the right
  - a. to a name and a nationality from birth;
  - b. to family care or parental care, or to appropriate alternative care when removed from the family environment;
  - c. to basic nutrition, shelter, basic health care services and social services;
  - d. to be protected from maltreatment, neglect, abuse or degradation;
  - e. to be protected from exploitative labour practices;
  - f. not to be required or permitted to perform work or provide services that
    - i. are inappropriate for a person of that child's age; or
    - ii. place at risk the child's well-being, educational, physical or mental health or spiritual, moral or social development;
  - g. not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be
    - i. kept separately from detained persons over the age of 18 years; and
    - ii. treated in a manner, and kept in conditions, that take account of the child's age;
  - h. to have a legal practitioner assigned to the child by the State, and at State expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
  - i. not to be used directly in armed conflict and to be protected in times of armed conflict."

The State as provided above should recognise, respect, protect, promote, and fulfil all these child rights as it has been provided under the constitution. In fulfilling these rights the State should consider a child's best interests. Despite the presence of article 28, which specifically provides the rights of the child but every child, is entitled to be provided with any right stipulated into the constitution like any other person.

Despite the bill of rights containing the fundamental human right values, which is inherent rights, but according to the Constitution of South Africa these rights are not absolute. The rights enshrined in the bill of rights may be limited. The limitation that may arise must be within the terms of law and extended to the general application of law. However, the limitation should be reasonable and justifiable. The reasonability nature should comply with democratic society based on human dignity, equality, and freedom. The limitation of granting rights as provided under the bill of rights should take into account all relevant factors, including: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relationship between the limitation and its purpose; and the last factor is less restrictive means to achieve the purpose. All these factors should be well observed before the imposition of limitation on satisfying the rights under the bill of rights. It is important to point out that, the bill of rights is within the Constitution and it is part of the Constitution itself hence, no law may limit any right entrenched in the bill of rights except when is provided by the Constitution itself.

## 6. Conclusion

The Constitution of Tanzania has passed through five major amendments from independence in 1961 to date including amendment conducted in 1984 via Act no. 15 codified the principles of fundamental natural rights into the constitution in line with the Universal Declaration of Natural rights. This reveals the commitments of Tanzania in establishing the community which is abiding to the principles of freedom, justice, fraternity and unity. The principle of freedom, justice, fraternity and unity takes into board the respect of natural rights and protection of the duties of every individual person in the society. But through all these amendments there is no a single article expressly providing rights of the child in the constitution, despite the Constitution of Tanzania contains articles providing fundamental natural rights and freedom under Part III. It has no a single word "child" or any phrase identifying that, the child has natural rights.

However, for lack of the Constitution of Tanzania incorporating article providing the fundamental principles to

the child shows lack of enough commitment to expressly protecting the rights of the child. Tanzania constitution should take steps which have been taken by the Constitution of South Africa, 1996. The Constitution of South Africa recognises and protects the rights of all people including the child. However, the Tanzania in the coming constitutional re-enactment is expected to recognise and protect the child from the conception stages until he attains the majority age. This real will express its commitment in protecting and recognising the rights of the child.

As provided above, to open the door for the child to enjoy fully the fundamental natural 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 South Africa. The Constitution of Tanzania as well should protect the rights of the child from the womb of its 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 as part of the constitutional rights.

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