

CHAPTER THREE

3. International Human Rights, Constitutional and Statutory Framework for the Protection of Children

South Africa has a comprehensive child protection policy and statutory framework. The framework is set out primarily in the South African Constitution, in a number of international instruments to which the country is party and in domestic legislation aimed at facilitating the implementation of principles espoused in the Constitution and in international instruments. To provide a context to the inquiry, some of the policies and statutes that guide the protection of children's rights in South Africa are discussed in this chapter.

3.1 *The UN Convention on the Rights of the Child, 1979*

South Africa acceded to this Convention in 1995, thereby incurring the following obligations:

To take all appropriate legislative, administrative, social and educational measures to protect the child from forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of the parent(s), legal guardian(s) or any other person who has the care of the child.²⁰ Such protective measures should as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for other forms of identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described in the convention;

To protect children from all forms of sexual exploitation and sexual abuse by taking all appropriate national, bilateral and multinational measures to prevent:

The inducement or coercion of a child to engage in any unlawful sexual activity;

The exploitative use of children in prostitution or other unlawful sexual practice;

The exploitative use of children in pornographic performances and materials.²¹

To take all appropriate national, bilateral, and multinational measures to prevent the abduction of or the sale of or traffic in children for any purpose or in any form;²²

To take all appropriate measures to promote physical and psychological recovery and social integration of a child victim of: any form of neglect, exploitation, or abuse, torture or any form of cruel, inhuman or degrading treatment or punishment; or armed conflict. Such recovery and reintegration

shall take place in an environment which fosters the health, self-respect and dignity of the child.

3.2 African Charter on the Rights and Welfare of the Child

By acceding to the African Charter on the Right of the Child, South Africa assumed an obligation to:

Take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse. Such protective measures include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who care for the child, as well as other forms of prevention and for identification, referral, investigation and follow-up of instances of child abuse and neglect.

Protect the child from all forms of sexual exploitation and sexual abuse and in particular take measures to prevent:

The inducement, coercion or encouragement of a child to engage in any sexual activity;

The use of children in prostitution or other sexual practices;

The use of children in pornographic activities, performances and materials.²³

Take appropriate measures to prevent:

The abduction, sale of, or trafficking of children for any purpose or in any form, by any person including parents and other care-givers or legal guardians of the child;

The use of children in all forms of begging.²⁴

It is against the backdrop of the above rights and obligations that the State's performance in protecting children from sexual abuse will be measured.

3.3 The United Nations Convention on the Elimination of all forms of Discrimination against Women

The centrepiece of the international legal framework for the protection and promotion of women's rights is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). CEDAW is often described as the international bill of rights for women, entered into force in 1981. While its universal ratification has not yet been achieved, 168 states from all regions of the world have ratified it.

3.4 The Constitution of the Republic of South Africa Act, No 108 of 1996

The Bill of Rights entrenched in the South African Constitution enumerates a number of provisions aimed at ensuring the protection, promotion and respect of human rights of South African people.²⁵

These provisions are founded on values of equality, freedom and human dignity and are applicable to everyone, including children. Section 9 of the Bill of Rights guarantees everyone the right to equality before the law and to equal protection of the law. It also outlaws unfair discrimination on a number of grounds including race, class, gender, origin and status. Section 10 provides that ‘everyone has inherent dignity and the right to have their dignity respected and protected’. Section 12(1) (c) guarantees the right ‘to be free of all forms of violence from either public or private sources’. Subsection (1) (e) goes further to guarantee the right ‘not to be treated or punished in a cruel, inhuman or degrading way’.

Rights specific to children are set out in section 28 of the Bill of Rights. The section guarantees every child’s²⁶ right to:

A name and nationality from birth;²⁷

Family or parental care or to appropriate alternative care where the child is removed from his/her family environment;²⁸

To basic nutrition, shelter, basic health care and social services;²⁹

To be protected from maltreatment, neglect, abuse or degradation;³⁰

To be protected from exploitative labour practices;³¹

To have a legal representative assigned to the child by the state and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.³²

In terms of section 28(2), the child’s best interests are paramount in every matter concerning the child.

The relevant section with regard to abuse is *section 28(1) (d)*, which provides that ‘*every child has the right to be protected from maltreatment, neglect, abuse or degradation.*’

The above sections do not specifically provide for protection against sexual abuse, however “abuse” means all forms of abuse, including sexual abuse. According to section 10 of the Constitution “everyone has the right to have their dignity respected and protected”. Sexual abuse violates this “inherent dignity and is also a form of violence in contravention of section 12(1) (c). It further contravenes sections 12(1) (e) and 28(1) (d) in that it constitutes inhuman and degrading treatment.

3.5 Domestic Legislation and Policies

A number of domestic legislation and policies facilitate the practical implementation of children’s rights and government obligations as set out in the Constitution and in international instruments. While some of these were enacted prior to the Constitution

coming into effect and to South Africa acceding to the above international instruments, most of them where enacted after these events to specifically ensure the practical realization of promises espoused in the Constitution and in international instruments.³³ National legislation aimed at protecting children from sexual abuse includes:

The Child Care Act, No 74 of 1983 (as amended).

Sexual Offences Act, No 23 of 1957 (as amended). Other sexual offences against children operate in terms of common law e.g., rape, incest and indecent assault.

Domestic Violence Act, No 116 of 1998.

The Criminal Procedure Act 51 of 1977.

The National Policy Guidelines for Sexual Offences (“National Policy Guidelines”).

The Multi-Disciplinary Child Protection and Treatment Protocol.

(Most of these are reviewed in the next chapter.)