

An Analysis of the Child's Right to Safety in South Africa

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Abstract

Children are abducted, abused and killed every day around the world. Violence against children takes its toll in different regions, making them unsafe and depriving them of their freedom. Furthermore, these abuses and violence create fear in societies, exacerbating injustice and preventing peaceful living for many families. This article argues that a lack of political will leads to catastrophic situations that erode peace and a just way of living. When children are abused and subjected to violence, abductions, and killings, their future is diminished, and the frameworks aimed at securing their safety are undermined. This article adopts a doctrinal methodology and examines scholarly work on the suppression of young voices. The study protests against the scourge of violence against children and promotes the enforcement and enhancement of frameworks to protect them. Frameworks provide mechanisms to protect children, but political will is needed to enforce them. The article highlights that expansive child protection laws have not translated into tangible improvements in children's safety. This illustrates a lack of political will and effective resource allocation, reinforcing the need to enforce protective frameworks. The article further argues that South Africa must strengthen its processes for safeguarding children and prioritise their liberation.

Keywords

child violence, abuse, liberation, political will, killings, protection

1. Introduction

The South African Constitution, 1996, is the supreme law of the land, which means that any actions or legislation that contradict it are invalid and null and void.¹ Violence against children in South Africa is so serious that it can no longer be dismissed as episodic

1 Constitution of the Republic of South Africa, 1996, s 2. See also Thukuse, B & Masumbe, PS 'Balancing Constitutional Protections and Parental Rights: Safeguarding Children's Best Interests in Custody Disputes' (2025) 6(14) *E-Journal of Humanities, Arts and Social Sciences* 4179.

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criminality or moral failure; it is a sustained structural crisis implicating the state, its institutions and its political priorities.² Daily reports of child abuse, sexual violence, abductions and killings reflect not only the brutality inflicted upon children, but also the erosion of constitutional promises intended to secure their dignity, safety and freedom.³

2 Save the Children South Africa ‘Violence against Children: The Cost of Inaction to our Society and Economy’ (July 2017) <https://static.pmg.org.za/180515policy_Brief.pdf>. Accessed 28 January 2026.

3 More than 26,000 cases of child abuse and neglect were reported in the 2024-25 financial year, up from 23,732 during the same period last year, Social Development Minister Sisi Tolashe has said. “As a country, we have made strides, putting various measures in place such as child protection laws, policies, strategies, and programs to ensure the protection of children from abuse; however, our children continue to experience violence,” Tolashe said in a prepared speech to mark National Child Protection Week. South Africa’s perennial problem of child abuse, in its many forms, has been in focus with the recent trial, conviction and sentencing of Kelly Smith, Jacquen “Boeta” Appollis and Steveno van Rhyn each to 10 years in prison for kidnapping and to life imprisonment for trafficking Smith’s daughter, Joslin, who was six years old when she disappeared in February last year. Tolashe said the 26,852 cases of child abuse and neglect included 9,859 cases relating to sexual abuse reported in all nine provinces. Deliberate child neglect accounted for 9,485 cases, while physical abuse made up for 3,965, followed by abandonment, which accounted for 595 cases. About 1 100 children were killed in South Africa during the 2023-24 financial year, based on crime statistics from the South African Police Service. Last week, children accompanied by caregivers and guardians marched to the Constitutional Court in Johannesburg to champion the rights of children, an event organized by the Gauteng Department of Social Development. Addressing the march, Justice Minister Mmamoloko Kubayi said the Criminal Procedures Act — which governs bail and sentencing — requires urgent reform to protect children’s rights in court. “Laws have been amended, but there are still weaknesses. One of the areas that we have identified as a weakness is the last part of the Criminal Procedure Act that needs to be reviewed,” she said. The minister met Chief Justice Mandisa Maya on Friday to present a list of concerns regarding children. A recent report by the United Nations Children’s Fund South Africa found that 58% of children in South Africa between the ages of five and 16 years had experienced direct sexual abuse, while 52% were indirectly victimised. Additionally, 25% of children faced violence in their homes, 18% were physically abused, 13% suffered emotional abuse, and 12% experienced neglect. A 2015 study conducted by Save the Children South Africa and the University of Cape Town estimated that such violence cost the country R238.58 billion annually in child welfare — about 6% of its GDP. These are the most recent figures available. Beyond abuse itself, there are significant concerns around how the justice system handles such cases involving children, according to the nonprofit organisation, Joburg Child Welfare. It has called for harsher penalties under the Criminal Law Amendment Act 105 of 1997 and severe sentencing for Schedule 6 offenses against children, beyond the current 10 to 15-year prison terms. Schedule 6 offences are the most serious crimes under South African law, requiring the accused to prove “exceptional circumstances” to be granted bail. “We demand a justice system that not only protects but actively deters violence against children,” said Joburg Child Welfare chief executive Abubakr Hattas. “Violence against children creates lifelong psychological wounds and trauma, which increases the likelihood of them becoming future perpetrators and acting violently as adults.” As one of the nonprofit organizations affected by the Trump administration’s suspension of aid, Joburg Child Welfare said that although South Africa has strong legislation, authorities’ implementation is poor. “This is where child protection needs social consensus and more societal aversion to violence and abuse. Acceptance of violence against children undermines protective norms and practices, sharply increasing children’s vulnerability to violations of their rights,” Hattas said. Last year’s disappearance of Joslin Smith, who remains missing, highlights the urgent need for robust child safeguarding measures, activists said. During the sentencing of Joslin’s mother and her two co-accused, human trafficking expert Marcel van der Watt noted that the paradox of a family as both a safe haven and a site of harm “is fundamental in understanding violence against children”. See also, reported cases of child abuse and neglect rose to 26 000 in 2024-25. Accessed 28 January 2026.

In a constitutional democracy founded on human dignity, equality and freedom, the persistence of child violence exposes a troubling disjuncture between normative commitments and lived realities.

The Constitution explicitly elevates children's rights to a position of special protection. Section 28 guarantees every child the right to be protected from maltreatment, neglect, abuse or degradation, and affirms that a child's best interests are of paramount importance in every matter concerning the child. These guarantees are reinforced by a comprehensive statutory framework, most notably the Children's Act,⁴ which seeks to operationalise constitutional rights through preventative, protective and remedial mechanisms. Despite South Africa's strong legislative framework for child protection, violence against children remains endemic, raising the critical question: why do these frameworks fail to translate into adequate protection?

The Children's Act implements the constitutional rights of children⁵ and establishes the legal framework for what is now referred to as 'care' and 'contact' in matters related to custody.⁶ Section 7 of the Children's Act⁷ lists the factors to be considered when determining what best serves the child's interests. These factors include the need to safeguard the child's physical and emotional well-being and protect them from potential harm. Consequently, allegations of abuse are regarded as critically important in custody proceedings.⁸ Sections 6(4)(a)⁹ and 9 of the Act¹⁰ further emphasise the need to protect children from abuse and ensure that any judicial proceedings take the child's safety into account. In other words, it is essential to provide care for children in a manner that aligns with their best interests.¹¹ Additionally, the Children's Act provides mechanisms for appointing a family advocate to investigate allegations of abuse and offer guidance to the court. The family advocate does not investigate child abuse only but also other family matters.

4 Act 38 of 2005.

5 Children's rights are essential because they provide the legal and ethical framework for ensuring that children are protected, cared for, and empowered. They guide policies, legal decisions, and social interventions, recognize children's vulnerability, and hold adults and institutions accountable for safeguarding their well-being.

6 Tommie, F et al 'Attachment Goes to Court: Child Protection and Custody Issues' (2022) 24(1) *Attachment & Human Development* 1.

7 Section 7 of the Children's Act outlines key factors for determining a child's best interests, including: (a) the child's relationship with parents and caregivers; (b) the parents' ability to meet the child's needs; (c) the impact of changes in the child's living environment; (d) the child's physical and emotional safety and protection from harm; (e) the child's age, maturity and developmental stage; (f) the child's views and preferences, when appropriate; (g) protection from abuse and family violence; (h) the need for stability and continuity in care.

8 Silberg, J & Dallam, S 'Abusers Gaining Custody in Family Courts: A Case Series of Overturned Decisions' (2019) 16(2) *Journal of Child Custody* 140.

9 This provision states that in any matter concerning a child, (a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided.

10 This provision is about the paramount best interests of the child. It states that in all matters concerning the care, protection, and well-being of a child, the standard that the child's best interest is of paramount importance must be applied.

11 Thukuse & Masumbe (note 1) 4179–4187.

This article argues that the persistence of child violence in South Africa is not primarily due to the absence of legal frameworks, but instead to a chronic lack of political will to implement, enforce and adequately resource those frameworks. While South Africa has ratified international instruments such as the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, domestic compliance remains uneven and often symbolic.¹² The result is a pattern of reactive governance, fragmented institutional responses, and systemic impunity that undermines child safety and liberation.

The judiciary has repeatedly emphasised the state's heightened duty of care toward children. In *S v M*,¹³ the Constitutional Court recognised that children occupy a position of special vulnerability and that the state bears an obligation to protect their best interests even within the criminal justice system. Similarly, in *Centre for Child Law v Minister of Justice and Constitutional Development*,¹⁴ the court affirmed that punitive or administrative measures affecting children must be measured against the constitutional imperatives of protection and dignity.¹⁵ However, these judicial pronouncements have not been matched by sustained executive or legislative urgency.

This study adopts a doctrinal and critical legal methodology, drawing on constitutional interpretation, statutory analysis, and judicial precedent, and is supported by interdisciplinary scholarship on violence, governance, and child protection. By foregrounding political will as a decisive variable, the article contributes to an under-explored dimension of child protection discourse in South Africa. It seeks not only to expose the structural failures that perpetuate violence against children, but also to advance normative and institutional reforms aimed at genuine child safety, liberation and justice.

2. Children as constitutional subjects, not silent victims

South African constitutionalism decisively rejects the idea of children as passive dependants. For instance, under apartheid, children were largely invisible within legal discourse, viewed primarily through the lenses of control, discipline or welfare, rather than as autonomous rights-bearers.¹⁶ The advent of the final Constitution radically reconfigured this position by recognising children as constitutional subjects, individuals

12 While South Africa has ratified several international instruments, including the Convention on the Rights of the Child, the domestic compliance remains uneven and often symbolic. This indicates that while the government recognizes these rights, their implementation and enforcement in practice may not be fully adhered to, leading to a disconnect between formal ratification and actual compliance.

13 *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

14 *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (6) SA 632 (CC).

15 *Ibid.* In this case, Yacoob J wrote a dissenting judgment with which Ngcobo, Nkabinde and Skweyiya JJ concurred. Yacoob J held that the Constitution does not require the discretion of a court that sentences children to be wholly unlimited. The minimum sentencing regime must be interpreted on the basis that all children are the beneficiaries of the rights conferred by s 28(1)(g) of the Constitution. Because the Amendment Act does not require sentencing officers to ignore the requirements of the children's rights provision, it does not oblige sentencing officers to impose unconstitutional sentences.

16 Tshepo, LM 'Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights under the Final Constitution' (1998) 3 *Michigan Journal of Race and Law* 41.

endowed with inherent dignity and enforceable rights. This constitutional repositioning is foundational to any serious engagement with violence against children, as it reframes such violence not merely as social pathology or criminal misconduct, but as a profound constitutional violation.

Generally, section 28 of the Constitution is central to this transformation. It guarantees children a range of specific rights, including the right to be protected from maltreatment, neglect, abuse or degradation, and declares that a child's best interests are of paramount importance in every matter concerning the child. This provision does more than supplement the general rights in the Bill of Rights; it establishes children as a class deserving of heightened protection due to their vulnerability, dependency and developmental needs. Importantly, the Constitutional Court jurisprudence, particularly *S v M*¹⁷ and *Fitzpatrick*,¹⁸ confirms that children's interests must actively shape state decision-making rather than be treated as incidental or discretionary. The recognition of children as constitutional subjects necessarily entails rejecting narratives that portray them as silent victims whose suffering is regrettable but politically peripheral. Violence against children cannot be constitutionally neutral because it directly implicates the state's obligations under section 7(2) of the Constitution.¹⁹ When children are abducted, abused or killed, the failure is not only moral or administrative; it is constitutional. This framing is critical because it shifts responsibility from families and communities alone to the state and its political leadership.

The Constitutional Court's jurisprudence underscores this position. In *S v M*, the court confronted the question of how the criminal justice system should account for the interests of children affected by the incarceration of a primary caregiver.²⁰ Sachs J emphasised that children are not mere extensions of their parents, but bearers of rights. The court held that section 28(2) imposes a positive duty on decision-makers to actively consider and prioritise the best interests of the child, rather than treating those interests as peripheral or discretionary.²¹ Although *S v M* did not concern direct physical violence against children, its significance lies in its articulation of children as active constitutional subjects whose rights must meaningfully shape state decision-making.

This jurisprudential approach was reinforced in *Minister of Welfare and Population Development v Fitzpatrick*, where the court invalidated legislative provisions that prevented non-South African citizens from adopting South African children.²² Goldstone J rejected formalistic interpretations that subordinated children's interests to rigid statutory categories, holding that the best interests of the child must be the primary consideration. The case illustrates the court's broader commitment to dismantling legal structures that, whether intentionally or not, entrench harm or vulnerability for children. In the context of

17 *S v M* 2008 (3) SA 232 (CC).

18 *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC).

19 Section 7(2) provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

20 *S v M* (note 17).

21 *S v M* (note 17).

22 *Minister of Welfare and Population Development v Fitzpatrick* (note 15). The court invalidated s 18(4)(f) of the Child Care Act 74 of 1983, which prohibited non-South African citizens from adopting South African children.

child violence, this principle demands the scrutiny of laws, policies and practices that fail to protect children adequately, despite clear evidence of systemic abuse.

The notion of children as constitutional subjects also finds expression in *Centre for Child Law v Minister of Justice and Constitutional Development*,²³ where the court declared mandatory minimum sentencing provisions unconstitutional insofar as they applied to children. The judgment affirms that children's diminished moral blameworthiness and heightened capacity for rehabilitation require a justice system that is attentive to their specific circumstances. While the case focused on children in conflict with the law, its implications extend to child victims of violence: the Constitution requires a child-centred approach across all spheres of governance, including policing, prosecution, social services and legislative design.

Despite this rich jurisprudence, the lived reality of many children in South Africa remains starkly disconnected from constitutional ideals. The persistent prevalence of violence against children suggests that constitutional recognition alone is insufficient without the political will to give practical effect to children's status as rights-holders. The Constitution envisages an active, responsive state that intervenes decisively to protect vulnerable groups. However, institutional failures ranging from under-resourced child protection services to inadequate policing and delayed prosecutions signal a troubling inertia that effectively silences children's constitutional voices.

Critically, treating children as constitutional subjects requires more than reactive responses after violence has occurred. It demands proactive governance, adequate resource allocation and accountability mechanisms that reflect the seriousness of constitutional obligations. As the Constitutional Court has cautioned, constitutional rights are not paper promises. Where violence against children persists on a systemic scale, this invites interrogation of whether the state has discharged its duties under sections 7(2) and 28 in good faith.

This section has argued that violence against children in South Africa must be understood through a constitutional lens that centres children as active rights-holders rather than passive recipients of protection. The failure to prevent, respond to and eradicate such violence represents not only a social tragedy but a constitutional failure rooted in insufficient political commitment. Recognising children as constitutional subjects is therefore not merely symbolic; it is a normative demand that requires political will, institutional competence and sustained accountability if the Constitution's promise of dignity and safety for all children is to be realised.

3. The Children's Act: Ambition, architecture, and systemic breakdown

The Children's Act was enacted to translate section 28 into a comprehensive statutory framework, reinforcing the conception of children as rights-bearing subjects. The Children's Act emphasises prevention, early intervention and protection, and explicitly affirms the best interests of the child as the guiding standard. However, the gap between legislative intent and implementation raises serious constitutional concerns. When the state fails to

23 2009 (6) SA 632 (CC).

operationalise these protections, children are reduced to silent victims, who are visible in rhetoric but invisible in practice.

Unlike earlier child welfare statutes, which were largely reactive and paternalistic, the Children's Act adopts a rights-based and developmental approach aimed at prevention, early intervention and holistic child protection. Its breadth reflects a deliberate legislative ambition: to construct an integrated system capable of addressing the social, economic and institutional drivers of violence against children. Yet, nearly two decades after its enactment, the Children's Act's transformative promise remains largely unrealised.

At a structural level, the Children's Act establishes a multi-layered framework that distributes responsibility across families, communities, provincial departments and the national executive. It regulates parental responsibilities and rights, mandates the reporting of abuse and neglect, provides for children in need of care and protection, and creates mechanisms for alternative care, including foster care and child and youth care centres.²⁴ Notably, the Children's Act emphasises prevention and early intervention services, recognising that violence against children is often preceded by identifiable risk factors such as household instability, substance abuse and socio-economic deprivation.²⁵ In theory, this preventative orientation marks a significant advance over purely punitive responses. Van Niekerk and Matthias have identified the Department of Social Development (DSD) as the primary state institution responsible for providing child welfare services across the continuum of care, including prevention, early and statutory intervention.²⁶ This institutional mandate reflects the framework established under the Children's Act, particularly section 144, which emphasises prevention and early intervention services, and section 110, which triggers statutory intervention through the mandatory reporting of abuse and neglect.

In practice, however, the implementation of these legislative obligations relies heavily on subsidised non-profit organisations that partner with the DSD to deliver statutory child protection services nationwide. Van Niekerk and Matthias caution that these organisations are frequently under-resourced and overwhelmed, mainly due to the persistently high prevalence of child abuse and neglect.²⁷ This resource constraint undermines the practical realisation of the protective objectives envisaged by the Children's Act, revealing a gap between the Children's Act's normative commitments and the practical capacity of child protection institutions.

However, the effectiveness of this framework depends on institutional capacity and political commitment, both of which have proven to be insufficient. One of the most persistent challenges is the chronic under-resourcing of child protection services, particularly at the provincial and municipal levels. Social workers, who are the primary implementers of the Children's Act, operate under extreme caseload pressures, limited

24 Children's Act, ss 18, 110, 150; chapter 12.

25 Children's Act, s 144.

26 Van Niekerk, J & Matthias, C 'Government and Non-Profit Organisations: Dysfunctional Structures and Relationships Affecting Child Protection Services' (2019) 55(3) *Social Work/Maatskaplike Werk* 239.

27 Ibid.

support and inadequate infrastructure. Courts have repeatedly acknowledged that these capacity constraints undermine the Children's Act's objectives, yet meaningful remedial action has been slow and inconsistent.

The judiciary has been called upon to intervene where legislative design or executive implementation has failed. In *Centre for Child Law v Minister of Social Development*,²⁸ the court addressed the crisis in South Africa's foster care system, which arose in part from the state's inability to process foster care orders within the timeframes prescribed by the Children's Act. The court recognised that systemic administrative failure had placed thousands of vulnerable children at risk of losing access to social grants and legal protection. Although the court crafted a supervisory remedy, the case exposed a deeper structural problem: the Children's Act's mechanisms are rendered ineffective when the state lacks the political will to align administrative capacity with statutory obligations.²⁹

Beyond administrative failure, the Children's Act suffers from fragmented interdepartmental coordination. Adequate child protection requires cooperation between social development, health, education and law enforcement agencies. Yet, in practice, these departments often operate in silos, resulting in delayed interventions, duplicated processes and gaps through which children fall. This fragmentation is particularly risky in cases of severe abuse or abduction, where timely information-sharing and decisive action are critical. The Children's Act envisages an integrated system, but the absence of enforceable coordination mechanisms weakens its protective potential.

Another critical limitation lies in the uneven enforcement of mandatory reporting provisions. The Children's Act requires certain professionals, including teachers, healthcare workers and social workers, to report suspected abuse or neglect.³⁰ Despite this, under-reporting remains widespread due to fear of reprisals, lack of training, and uncertainty about procedural follow-through. Where reports are made, delays in investigation and intervention frequently undermine their effectiveness. This pattern reflects not a deficiency in the law itself, but a failure to cultivate an institutional culture that prioritises child protection as a non-negotiable obligation.

The Children's Act's emphasis on the best interests of the child, while normatively powerful, has also been criticised for its indeterminacy in practice. Without clear operational guidelines and adequate resources, decision-makers may invoke the standard rhetorically while failing to produce outcomes that meaningfully enhance child safety. This risk is compounded in contexts of political indifference, where compliance with statutory duties is treated as discretionary rather than imperative.

Importantly, the shortcomings of the Children's Act cannot be divorced from broader socio-economic realities. High levels of poverty, inequality and community violence place immense strain on families and social services alike. However, these conditions do not absolve the state of responsibility. On the contrary, they heighten the duty to ensure that statutory protections are robust, accessible and responsive. As scholars have noted,

28 [2013] ZAGPPHC 305.

29 *Centre for Child Law v Minister of Social Development* (note 28).

30 Children's Act, s 110.

legislative frameworks aimed at protecting children are only as effective as the political and institutional environments in which they operate.

This section contends that the Children's Act has failed not because it is conceptually flawed, but because its implementation has been undermined by weak governance, insufficient resourcing and a lack of sustained political will. The persistence of violence against children thus reflects a disjuncture between legislative ambition and executive action. Until the state treats the Act as a constitutional imperative rather than a policy option, children will remain exposed to harm despite the existence of an elaborate statutory framework designed to protect them.

3.1 Violence against children as a crisis of governance and political accountability

Violence against children cannot be adequately explained by individual criminal conduct, parental failure or socio-economic hardship alone. While these factors are undeniably relevant, they obscure a more profound and more troubling reality: the persistence of child violence reflects a systemic crisis of governance, characterised by weak political accountability, fragmented state responses, and a failure to prioritise child protection as a constitutional obligation. When violence against children becomes pervasive and predictable, it signals not merely social dysfunction, but institutional neglect at the highest levels of the state.

Governance, in a constitutional democracy, extends beyond policy formulation to include implementation, monitoring and accountability. Section 7(2) of the Constitution imposes a positive duty on the state to respect, protect, promote and fulfil the rights in the Bill of Rights. This responsibility is particularly acute in relation to children, whose vulnerability and dependency require proactive state intervention. Where the state fails to prevent foreseeable harm to children, or responds inadequately to known risks, it breaches not only statutory duties but constitutional responsibilities.

The concept of political will is central to understanding this failure. In the context of child protection, political will determines whether child safety is treated as a core governance priority or relegated to rhetorical concern. Despite South Africa's extensive legal framework, child protection has not been matched by consistent budgetary prioritisation, administrative urgency or coordinated leadership, resulting in systemic vulnerability for children. In *Van Duivenboden v Minister of Safety and Security*,³¹ the Supreme Court of Appeal emphasised that the state's constitutional obligations may require positive action to prevent harm, particularly where the state has assumed responsibility for public safety. Applied to child protection, this principle underscores that inaction or delay by social services, police, or prosecutorial authorities constitutes a governance failure with constitutional consequences.

A defining feature of South Africa's child protection crisis is the fragmentation of authority across multiple departments with overlapping mandates.³² Responsibility for

31 2002 (6) SA 431 (SCA).

32 Shomolekae, T 'NGO Blames Dept Fragmentation for High Levels of Child Abuse' *Polity*, 2 December 2025 <<https://www.polity.org.za/article/ngo-blames-dept-fragmentation-for-high-levels-of-child-abuse-2025-12-02#:~:text=Looking%20at%20South%20Africa's%20current,as%20Rwanda%2C%20Namibia%20and%20Europe>> accessed 24 January 2026.

children is dispersed between the social development, health, education, police services and justice institutions, yet no single entity bears ultimate accountability for outcomes. This diffusion of responsibility allows political leadership to deflect blame and avoid consequences when systems fail. Scholars have observed that where accountability is unclear, vulnerable groups are most likely to suffer. Children, who lack political voice and electoral power, are particularly exposed to this form of structural neglect.

The absence of effective monitoring and evaluation mechanisms further entrenches this crisis. While state departments regularly publish strategic plans and policy commitments relating to children, there is little transparency about whether these initiatives reduce violence or improve child safety in practice. Parliamentary oversight mechanisms, though constitutionally mandated, have struggled to ensure meaningful compliance or remedial action. As a result, failures continue without institutional learning or reform. Importantly, framing violence against children as a governance failure does not deny the role of social and economic inequality. Instead, it insists that inequality heightens, rather than diminishes, the state's responsibility. The Constitution was designed precisely to address structural disadvantage through deliberate, redistributive governance. When political leadership fails to prioritise children's safety amid known socio-economic risks, it reflects a choice with profound constitutional and moral implications.

This section contends that the continued prevalence of violence against children is inseparable from the lack of political accountability and effective governance. Legal frameworks exist, judicial guidance is clear, and empirical evidence of harm is abundant. What is lacking is the sustained political will to coordinate institutions, allocate resources and enforce accountability. Until child protection is treated as a measure of democratic legitimacy rather than a peripheral policy concern, violence against children will persist as a predictable and preventable constitutional failure.

4. Judicial voices in the wilderness: Courts, child protection and institutional limits

In the face of persistent state failures, South Africa's judiciary has emerged as one of the most vocal institutional defenders of children's rights. Through constitutional interpretation and remedial innovation, the courts have consistently articulated firm normative commitments to the protection of children's rights and dignity, and the best interests of children. Yet, despite this jurisprudential clarity, the infringement of children's rights remains widespread. This disjuncture raises a critical question: What are the limits of judicial intervention in the absence of political will and effective governance?

The Constitutional Court has repeatedly affirmed that children occupy a position of special constitutional concern. For instance, in *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*,³³ the court struck down provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act³⁴ that criminalised consensual sexual activity between adolescents. While the case did not concern violence

33 [2013] ZACC 35.

34 Act 32 of 2007.

or abuse, the court's reasoning was instructive. It emphasised that the law must protect children without inflicting further harm or stigma, and that legislative responses to child vulnerability must be carefully calibrated to respect dignity and developmental realities. The judgment reflects the court's broader insistence on child-centred reasoning grounded in constitutional values.

Similarly, in *Centre for Child Law v Minister of Justice and Constitutional Development*,³⁵ the court invalidated the automatic imposition of minimum sentences on child offenders, holding that such rigidity violated the constitutional imperative to treat children differently from adults. The judgment reaffirmed that children's vulnerability and capacity for rehabilitation demand a justice system that is responsive to their circumstances. Although these cases concern children in conflict with the law, they reveal a consistent judicial approach: children are not peripheral subjects of law, but central constitutional actors whose interests must shape legal outcomes.

Courts have also confronted the state's failures in implementing child protection mechanisms. In *Centre for Child Law v Minister of Social Development*,³⁶ the Constitutional Court addressed the foster care crisis caused by administrative incapacity within the DSD. The court acknowledged that systemic failures had left thousands of children without legal protection or access to social assistance.³⁷ While it issued a supervisory order to stabilise the system, the case exposed the judiciary's limited ability to compel sustained administrative reform in the absence of executive commitment. This limitation is not accidental; it is inherent in South Africa's constitutional design. The separation of powers doctrine constrains courts from assuming the role of policymakers or administrators. As the court cautioned in *Mazibuko v City of Johannesburg*,³⁸ courts are not institutionally equipped to determine how resources should be allocated across competing social priorities. Yet this restraint becomes deeply problematic when political actors consistently fail to prioritise children's safety, leaving courts to issue declarations that lack transformative effect on the ground.

The judiciary has nevertheless attempted to bridge this gap through creative remedies, including structural interdicts and supervisory jurisdiction. These tools seek to ensure ongoing compliance with constitutional obligations by requiring the state to report back on implementation. However, empirical studies suggest that such remedies vary in effectiveness, particularly where state capacity and political will are weak. In the context of child violence, court orders are not a substitute for functioning social services, trained personnel and coordinated enforcement.

Mathews and Bonvenuti observe that South Africa does not yet have comprehensive, systematic data that fully captures the scale of violence perpetrated against children.³⁹

35 2009(6) SA 632 (CC).

36 [2013] ZAGPPHC 305.

37 [2013] ZACC 35.

38 [2009] ZACC 28.

39 Mathews, S & Bonvenuti, P 'Violence against Children in South Africa: Developing a Prevention Agenda' in Shanaaz Mathews et al (eds) *South African Child Gauge* (Children's Institute, University of Cape Town 2014) 26–34.

Nevertheless, available population-based studies consistently indicate that violence against children most commonly manifests in physical and sexual abuse.⁴⁰ Their findings are reinforced by recent national data, with Statistics South Africa identifying physical and sexual abuse as the most frequently reported forms of violation experienced by children.⁴¹

Stevens et al also emphasise that exposure to violence during adolescence can have far-reaching consequences for children, as adolescence represents a pivotal developmental stage marking the transition from childhood to adulthood.⁴² During this period, individuals actively assimilate their earlier life experiences into their cognitive and psychological frameworks. Where such formative experiences are characterised by violence, there is an increased likelihood that violent norms and perceptions will become embedded in how adolescents understand and interpret the world around them.⁴³ The metaphor of judicial voices in the wilderness thus captures the paradox of child protection litigation in South Africa. Courts speak clearly and forcefully about children's rights, yet their pronouncements often go unheeded. These dynamic risks normalise a constitutional culture in which violations are acknowledged but tolerated, a condition fundamentally incompatible with the transformative ambitions of the Constitution.

This section argues that while judicial intervention is indispensable in articulating norms and exposing state failure, it cannot alone secure child safety and liberation. The persistence of the violation of children's rights, despite strong jurisprudence, underscores the central thesis of this study: without political will, even the most progressive constitutional judgments remain aspirational. Courts can illuminate injustice, but the political branches must dismantle it.

4.1 The international and regional law framework on the protection of children against violence

South Africa's constitutional commitment to children's rights does not exist in isolation; it is reinforced and shaped by binding international obligations, particularly under the United Nations Convention on the Rights of the Child (CRC) and related interpretative guidance.⁴⁴ International law establishes both the content of the right to protection from violence and the standard of conduct expected of states in preventing, identifying and responding to harm against children. This framework is therefore essential for assessing whether South Africa's legislative and institutional measures meet the threshold required by international norms, or whether persistent violence reflects a failure to comply rather than a lack of legal clarity.

4.2 Article 19 of the CRC: Absolute protection, preventative obligation

International law is unambiguous regarding state responsibility. The CRC acknowledges the central role of the family as the primary environment in which children are nurtured,

40 Ibid.

41 Ibid.

42 Stevens, G, Watts, J, Cockcroft, K & Duncan, N 'Violent Crime and Human Development in South Africa' in Watts, J, Cockcroft, K & Duncan, N (eds) *Developmental Psychology* 2 ed (Juta 2013) 525.

43 Ibid.

44 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

cared for and protected. It recognises parents and caregivers as bearing the primary responsibility for safeguarding children from harm and preventing violence. At the same time, the CRC addresses the reality that a significant proportion of violence against children occurs within the family setting. In response to this tension, the UN Committee on the Rights of the Child emphasises the need for state intervention where children are subjected to abuse, neglect or other forms of hardship in the home.⁴⁵

The right to protection from violence under Article 19 must be read together with other foundational provisions of the CRC, particularly Articles 3 and 6. Article 3(1) provides that in all actions concerning children, whether undertaken by public or private institutions, the best interests of the child shall be a primary consideration. This principle operates as a governing standard that permeates all decision-making affecting children, including legislative design, policy formulation, budgetary allocation and service delivery. In the context of violence against children, Article 3 underscores that failure to prioritise prevention, early intervention and adequate protection mechanisms constitutes a failure to treat children's best interests as a primary concern. Persistent exposure to violence, especially where risk factors are well-known, is incompatible with governance that genuinely centres the best interests of the child.

Article 19 of the CRC obliges states to protect children from all forms of physical and mental violence, including neglect, maltreatment and sexual abuse. The breadth of the provision signals zero tolerance: no cultural justification, institutional gap or resource constraint legitimises violence against children. Article 6 of the CRC recognises every child's inherent right to life and obliges states to ensure, to the maximum extent possible, the child's survival and development. Violence against children threatens not only life in its most literal sense but also the child's physical, psychological, emotional and social development.⁴⁶ Long-term exposure to violence has been consistently associated with developmental harm that extends into adulthood,⁴⁷ giving Article 6 particular relevance in contexts where violence is chronic rather than exceptional. Notably, the CRC recognises that violence includes both direct harm and exposure to violent environments, such as domestic abuse. Protection is therefore not limited to responding after harm has occurred, but extends to prevention, early identification and systemic intervention. Read together, Articles 3, 6 and 19 construct a holistic international obligation: states must actively organise their legal and institutional systems to ensure that children can survive, develop and live free from violence in environments that promote their well-being.

4.3 Participation as protection: Children's voices in their own safety

The recognition of children as autonomous rights-holders capable of expressing views on matters that affect them remains a contested concept in many socio-cultural contexts.

45 UN Committee on the Rights of the Child *General Comment No. 13: The Right of the Child to Freedom from All Forms of Violence* (2011) para 3(h).

46 World Health Organization 'Violence against Children' 29 November 2022 <<https://www.who.int/news-room/fact-sheets/detail/violence-against-children>>.

47 Davids, N 'Childhood Exposure to Violence Carries Long-Term Neurodevelopmental Risks' *University of Cape Town News*, 29 January 2026 <<https://www.news.uct.ac.za/article/-2026-01-29-childhood-exposure-to-violence-carries-long-term-neurodevelopmental-risks/>>.

In several African societies, childhood has traditionally been understood through a protective lens, with children often perceived as lacking full decision-making capacity and therefore needing adult guidance and protection.⁴⁸ While this approach is rooted in communal values and concern for children's welfare, it has historically limited the extent to which children's voices are acknowledged in decision-making processes.

International law further recognises that adequate protection from violence requires the meaningful participation of children themselves.⁴⁹ Article 12 of the CRC reinforces that children are not passive beneficiaries of protection but active participants in decisions affecting their lives. The Committee on the Rights of the Child has clarified that children's participation strengthens protection mechanisms by improving the accuracy, legitimacy and effectiveness of interventions.⁵⁰ In the context of violence, participation enables children to disclose harm, identify unsafe environments, and contribute to the design of prevention and protection strategies that reflect lived realities. While debates remain regarding the justiciability of participation as a standalone right, the Committee's interpretation indicates that participation is integral to the fulfilment of Article 19 obligations rather than an optional add-on.⁵¹ While the justiciability of child participation remains contested, General Comment 13 strengthens the argument that the involvement is integral to protection from violence.⁵² In this context, participation may reasonably be understood as enforceable where its absence undermines the effectiveness of protective measures.

For instance, Skelton provides a detailed account of the constitutional architecture that underpins the protection of children's human rights.⁵³ Central to her analysis is the increasingly influential role played by *amici curiae* in children's rights litigation, particularly in cases decided after 2008, where expert interventions have assisted courts in adopting a more child-centred approach.⁵⁴ Skelton further identifies an emerging jurisprudential shift in which children are no longer treated as passive subjects of legal proceedings but are afforded meaningful opportunities to participate in matters that affect them. This development is illustrated in *Centre for Child Law v Hoërskool Fochville*,⁵⁵ where a group of learners, collectively represented by the Centre for Child Law, had their views and interests placed before the court and considered through structured questionnaires.

48 African Child Policy Forum *Harmonisation of Laws Relating to Children in Eastern and Southern Africa: A Draft Report* (2006) 44.

49 Mesthrie, S 'Interpreting the Child's Right to Protection from Violence in the South African Context in Line with International Law Obligations' (2024) 17 *Journal of Human Rights Practice* 48.

50 UN Committee on the Rights of the Child *General Comment No. 13: The Right of the Child to Freedom from All Forms of Violence* (2011) para 3(e).

51 UN Committee on the Rights of the Child *General Comment No. 13: The Right of the Child to Freedom from All Forms of Violence* (2011) para 3(e) and Art 19 of the CRC.

52 UN Committee on the Rights of the Child *General Comment No. 13: The Right of the Child to Freedom from All Forms of Violence* (2011).

53 Skelton, A 'Constitutional Protection of Children's Rights' in Boezaart, T (ed) *Child Law in South Africa* (Juta, 2017) 334.

54 Ibid.

55 2016 (2) SA 121 (SCA).

This approach reflects a growing alignment between South African constitutional jurisprudence and Article 12 of the CRC, which affirms the right of children to express their views freely in all issues that involve them and requires that such views be given due weight in accordance with the child's age and maturity.

4.4 Regional reinforcement: The African Charter on the Rights and Welfare of the Child

Article 12 of the African Charter on the Rights and Welfare of the Child (ACRWC)⁵⁶ provides:

1. [T]he parties acknowledge the child's right to rest and leisure, to partake in play and recreational activities suitable for their age, and to freely engage in cultural life and the arts.
2. The States Parties are obligated to uphold and advance the child's right to actively participate in cultural and artistic endeavors, and they shall promote the availability of equitable and suitable opportunities for cultural, artistic, recreational, and leisure activities.

Additionally, South Africa's international obligations are further reinforced at the regional level through the ACRWC. Article 16 of the ACRWC obliges states to take specific legislative, administrative, social and educational measures to protect children from all forms of torture, inhuman or degrading treatment, and abuse, including sexual abuse. The ACRWC emphasises the establishment of monitoring mechanisms, reporting procedures and preventative strategies tailored to African contexts. The ACRWC is particularly significant in recognising the structural and socio-economic conditions that heighten children's vulnerability to violence in many African states. Its emphasis on community-based protection and state accountability aligns closely with the realities of inequality, poverty and historical marginalisation that continue to shape children's lived experiences in South Africa.

Taken together, the CRC and the ACRWC establish a coherent and demanding framework for the protection of children from violence. The obligations are clear, comprehensive, and reinforced by authoritative interpretation. They leave little room for ambiguity about the scope of protection or the state's responsibilities. Where violence against children persists at systemic levels, the issue is therefore not one of normative uncertainty; compliance and political commitment are the issues. International law provides both the standard and the lens through which domestic legislative and institutional frameworks must be evaluated. Thus, persistent child violence reflects failure of implementation rather than a deficit of legal obligation.

56 Organization of African Unity (OAU) *African Charter on the Rights and Welfare of the Child*, CAB/LEG/24.9/49 (1990).

5. Conclusion and recommendations

The Children's Act represents a paradigm shift toward a rights-based, developmental model of child protection. Its emphasis on prevention and early intervention reflects an appreciation that violence is often predictable and preventable. However, the implementation of the Children's Act revealed a stark disjuncture between legislative ambition and institutional reality. Furthermore, chronic under-resourcing, excessive social worker caseloads and weak interdepartmental coordination have hollowed out its protective potential. While sections 104 to 106 of the Act envisage a coordinated and adequately funded child protection system, service delivery remains uneven and fragile. National norms and standards aim to translate constitutional principles into operational guidance. However, their legal force remains uncertain, and their content reflects limited engagement with child participation. While isolated provisions encourage child involvement in assessments, participation is not consistently embedded across prevention and early intervention programmes. Excluding children's voices from the design of protective interventions risks reproducing paternalistic approaches that fail to address lived experiences of harm.

This study has demonstrated that the persistence of child violence reflects a failure of political prioritisation. Political will determines whether laws are resourced, coordinated, monitored and enforced. In South Africa, child protection remains rhetorically essential yet practically marginal. Fragmented accountability across departments allows systemic failures to persist without consequence. Children, who lack electoral power, are uniquely vulnerable to this form of political neglect. Where state systems repeatedly fail to respond to known risks, violence is predictable and preventable harm is tolerated. In this regard, judicial intervention has been crucial in affirming children's rights and exposing administrative collapse. Yet courts are institutionally constrained. Structural interdicts and supervisory orders cannot compensate for a lack of political commitment or dysfunctional administration. The result is a constitutional paradox: strong jurisprudence coexists with weak protection. Courts can articulate norms and demand accountability, but they cannot manufacture political will.

Generally, violence against children in South Africa persists not because the law is silent, but because political action is insufficient. Child liberation requires more than constitutional recognition; it demands governance that treats child safety as a measure of democratic legitimacy. Lastly, until political will aligns with legal obligation, the promise of protection will remain aspirational, and violence against children will continue to represent a profound constitutional failure.

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