


The implementation and recognition of children's rights to special care and protection within the digital environment

Mpete DR

 orcid.org/0000-0002-9166-2709

Mini-dissertation accepted in partial fulfilment of the requirements for the degree *Master of Laws in International Child Law* at the North-West University

Supervisor: Ms C Feldhaus

Graduation: June 2023

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Acknowledgements

Any individual that achieves a certain milestone should honour and appreciate those who were a support system to achieving that milestone and mine happens to be my parents. To my parents, thank you for giving me this opportunity to undergo this journey, i would not have even attempted to do so if it wasn't for your love and support.

To my supervisor i am beyond grateful for all that you have done for me. From day one, you have been nothing but supportive, even on days where I wanted to give up, you lifted me up and never gave up on me and I will forever be grateful for all you have done for me. Lastly, I would like to thank the almighty God for all that he has done for me, I will forever be grateful.

ABSTRACT

The digital environment has extensively evolved over the years, enabling new ways in which individuals and society operate and communicate. The digital and online dimension has also created innovative and effective opportunities that has broadened the educational spectrum for children. This has also promulgated a faster and more convenient way for children to access information that will enhance their level of learning.

With the rapid use of the digital environment, children have shown to have adapted more so than any other group in society. They have adapted to the use of the digital environment not only for educational purpose but also for social interactions. The advancement of digital technologies has also enabled easy accessibility for any individual including children, to use and this has created both a negative and positive outcome. In as much as the digital environment has enacted various opportunities for children by providing digital access to various platforms that promote a wide spectrum of educational information through digital devices, the digital environment has also made it accessible for negative aspects that violate children's wellbeing and their rights to safety.

This mini dissertation is motivated by the following legal question: to what extent are children's rights to special care and protection within the digital environment being recognised and implemented? The mini dissertation answered this research question through a series of extensive and comprehensive discussions that involved international laws such as the UNCRC, that form basis on the rights of children in general and how such rights are to be implemented and recognised. This mini dissertation further went on to evaluate how these rights as enshrined under the UNCRC have a direct or indirect inference on the implementation and recognition of children's rights to special care and protection within the digital environment. A further discussion of the effect that regional and national laws have on the protection of children's rights to special care and protection within the digital environment was held. This also included a comprehensive discussion on how South African law can protect children's rights to special care and protection.

Keywords: Digital Environment; Children's Rights, Technology; Protection; UNCRC

LIST OF ABBREVIATIONS

AU – AFRICAN UNION

ACRWC – African Charter on the Rights and Welfare of the Child

CPA – Criminal Procedure Act

ICTS – Information and Communications Technologies

POPI – Protection from Personal Information Act

UDHR- Universal Declaration of Human Rights

UNCRC – UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

UN – United Nations

1 Chapter 1 Introduction and Problem Statement

1.1 Introduction

The digital environment has evolved to become an important part of life for individuals and society as a whole, and this is significantly observed through children.¹ The digital environment has also become a vital component within children's lives, enabling access to the promulgation of opportunities and broadened knowledge .² Through the use and adaptation of the digital environment ,children are now exposed to a wider spectrum of educational platforms through various digital devices such as smartphones, laptops, tablets and computers .³ The digital environment has also broadened children's exposure to diverse levels of learning, social interactions, recreational interests and significant participation in various matters and experiences in the world.⁴

The digital environment and its digital platforms does not accommodate participation thorough certification of digital users,⁵ making it accessible for many negative aspects to interfere with the proper use of digital technologies and platforms by children.⁶ Various digital technologies and environments are created to allow easy accessibility and this creates opportunities for individuals who have intentions otherwise to utilise digital platforms in a manner that violates individuals and their rights online, including children. The underlying concerns should not only be the harmful aspects that children may encounter within the digital environment itself but rather the substantial question of

¹ Livingstone and Bulger 2014 *Journal of Children and Media* 317.

² Research platforms are significantly assisting children with their school reports and enhancing active participation in learning.

³ Livingstone and Bulger 2014 *Journal of Children and Media* 318.

⁴ Digital platforms such as *Facebook, Twitter* and so forth have enhanced social interactions for individuals as well as children all over the world by creating a means of direct connection and communication with multiple individuals all over the world.

⁵ Majority of digital platforms do not provide positive identity verification of individuals using these digital platforms, enabling identity fraud risks.

⁶ Digital online verification is essentially difficult to maintain as information can be easy fabricated ad altered.

whether or not they enjoy the same kind of rights to special care and protection online as they do offline.

Children have largely adapted to the digital environment through various aspects of their lives and this is inclusive of their social, educational and cultural aspects of their lives and this is largely evident through the manner in which they interact as well how they utilise the digital environment as a communicative tool.⁷ With new digital innovations and technologies continually evolving, certain new risks affecting children have developed simultaneously.⁸ Risks such as online-based threats that include invasion of privacy exposure to content such as cyber-bullying, child-trafficking, scams, cyber predators and child pornography.⁹ With these risks increasing over time, children's rights as articulated under the United Nations Convention on the Rights of the Child (hereafter UNCRC)¹⁰ and various other policies and legislations, are at stake and likely to be violated through online bullying, exploitation and violence within the digital environment.

With the UNCRC being the most widely recognized international instrument that advocates for children's basic human rights globally, its fundamental purpose is to ensure that governments of state parties to the UNCRC and their respective policy makers sufficiently set out basic standards of entitlements towards children without discrimination.¹¹ The UNCRC is considered the cornerstone of children's rights and as a result, bears the fundamental template on the recognition of children's rights in all matters and scope of concern pertaining to children, including the fundamental recognition of their rights within the digital environment.¹²

⁷ Livingstone and Bulger 2014 *Journal of Children and Media* 317.

⁸ As technology evolves, certain new risks evolve which may affect children and their use of digital platforms.

⁹ Other risks involved include phishing, posting of private information, malware and so forth.

¹⁰ United Nations Convention on the Rights of the Child (1989).

¹¹ A 2 of the United Nations Convention on the Rights of the Child (1989).

¹² The UNCRC bears its significance as the most ratified legally binding international agreement that advocates for the sufficient recognition of child rights.

These rights enshrined in the UNCRC are to be implemented and recognised just as any other human rights.¹³ The UNCRC does, however, recognise that children are a vulnerable group deserving of special care and protection as compared to adults.¹⁴ This means that in all aspects, including within the digital environment, children should be conferred special care and protection. The UNCRC is based on the premise that a child's best interests are of paramount significance.¹⁵ This would entail that in all aspects and matters involving children, the best interests of the child should be adequately considered and evaluated.¹⁶ This requires that the best interests of the child should be evaluated within the digital environment by enabling sufficient protection and measures of children's rights. Furthermore, by enabling safer approaches which will be discussed later in this paper, children can be given the opportunity to fully enjoy and utilise digital platforms efficiently rather than risk being exposed to obscene materials within the digital environment.

The interests of children remain of paramount significance in matters involving digital innovation.¹⁷ Although the UNCRC was fundamentally formulated in a pre-digital era, it is eligible for a systematic transformation by its drafters, various international governments and interested associations with the sole purpose of bestowing the same level of recognition of children's rights as enshrined under the UNCRC online as they are recognised offline.¹⁸

The UNCRC has influenced the promulgation of certain international obligations bearing the same purpose of protecting and recognising children's rights. Article 4 of the UNCRC places an obligation on signatories to the UNCRC to implement legislative, administrative and other measures of significance that should abundantly implement the rights of

¹³ The UNCRC draws sufficient influence from the *Declaration of Human Rights* (1948), which recognized children as humans deserving of equal protection and bearers of human rights.

¹⁴ See Preamble of the United Nations Conventions on the Rights of the Child (1980).

¹⁵ A 3 of the United Nations Convention on the Rights of the Child (1989).

¹⁶ A 3(1) of the United Nations Convention on the Rights of the Child (1989).

¹⁷ See A 3 of the Convention on the Rights of the Child (1989).

¹⁸ Both the UNCRC and the internet were promulgated and adapted around the same time. The UNCRC became adaptable and was brought into effect while the internet on the other hand was still being innovated.

children effectively.¹⁹ South Africa is a signatory to the UNCRC and by virtue of being such a signatory, it is bound by the obligations imposed by the UNCRC.

Taking into consideration the significant obligations imposed by the UNCRC, signatories such as South Africa are to implement legislative, administrative and other measures that should effectively fulfil the promotion, protection and monitoring of children's rights .²⁰ As a result, South Africa promulgated various legislative measures *_such as the Film and Publications Act 65 of 1996 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007,* however one of the most significant being the *Children's Act 38 of 2005* (hereinafter "the Children's Act").²¹ The Children's Act was enacted as a legal binding document that gives implementation and protection to children's rights as enshrined under the *Constitution of the Republic of South Africa, 1996* (hereinafter "the Constitution").²² With that said, children's rights as enshrined under the Children's Act are to be respected and protected in all matters of concern to children.

South Africa is also signatory to other international as well as regional instruments that promote the protection, recognition, and effective implementation of children's rights. These include the African Charter on the Rights and Welfare of the Child (hereafter ACRWC),²³ which largely shares the same values as the provisions of the UNCRC.²⁴ The ACRWC places fundamental obligations on member states of the African Union (AU) to which South Africa is signatory, to adequately sustain the paramount existence and recognition of children's rights.²⁵ The influence of these international instruments on the recognition of children's rights to special care and protection within the digital

¹⁹ A 4 of the United Nations Convention on the Rights of the Child (1989).

²⁰ A 4 of the United Nations Convention on the Rights of the Child (1989).

²¹ 38 of 2005.

²² See Section 28 of the Constitution of the Republic of South Africa, 1996.

²³ African Charter on the Rights and Welfare of the Child (1990).

²⁴ Both the UNCRC as well as the ACRWC provide for the recognition of children's rights and wellbeing and places obligations on state signatories to implement child protective measures on all matters that are of concern to children.

²⁵ See preamble of the African Charter on the Rights and Welfare of the Child (1990).

environment serves similar purposes, which is to protect and consider the best interests of children in all matters that are of concern to them.

In the South African context, existing policy and legislation may suggest an equal application of children's rights within the online and offline domain but this has proven difficult to implement in practice.²⁶ This is influenced by the fast pace at which digital innovation proliferates and dominates children's lives, making it difficult for a standardized approach relative to the recognition and implementation of children's rights.²⁷ This is because legislations enacted such as the *Films and Publications Act*,²⁸ the *Protection from Harassment Act*,²⁹ *Criminal Law (Sexual Offences and Related Matters) Amendment Act*³⁰ provide some form of assistance in evaluating matters involving the violation of children's rights on digital platforms. However, none of the above-mentioned legislations were explicitly created and enacted for this purpose.³¹ The UNCRC, the ACRWC and various legislations face multiple challenges related to fulfilling child rights obligations effectively within mainstream environments such as the digital milieu.

The objective is for State parties to the UNCRC and ACRWC such as South Africa, to recognise that the concern lies within the idea of children co-existing, participating and interacting in the same direct spaces as adults, creating an environment that is increasingly difficult to monitor or regulate in order to curb any form of child violation and effectively promote child rights.³² One of the issues at hand is evaluating who is a child and who is an adult within the digital environment.³³ It can be argued that certain platforms within the digital environment require an age verification before allowing access

²⁶ Livingstone and Bulger 2014 *Journal of Children and Media* 321.

²⁷ Livingstone and Bulger 2014 *Journal of Children and Media* 321.

²⁸ Act 65 of 1996.

²⁹ Act 17 of 2011.

³⁰ Act 32 of 2007.

³¹ South African kids Online A glimpse into children's internet use and online activities 5.

³² The digital environment or the 'internet' as its known, is accessible to all groups of individuals, children and adults, making it a complex environment to monitor effectively.

³³ Individuals within digital platforms are able to fabricate certain personal details such as age, making it difficult challenging to determine who is a child and who is an adult.

to their site, but this has proved challenging as most children provide a false identity in order to gain access to restricted digital platforms.³⁴

Digital environments have not only enabled convenient and abstract tools of communication but they have also propagated a sphere of free expression. Article 13 of the UNCRC enables a child to practice freedom of expression. Such practices include the right to receive and impart information either orally or through any other media of the child's choice.³⁵ This allows children to express themselves online in a manner that fulfils their individual aspirations. Freedom of expression, like any other children's rights, deserves to be implemented effectively and this means that children can express themselves without any intrusion, violation or infringement upon their rights.

It is, however, noted that while the purpose of the UNCRC and ACRWC is to uphold, enable and protect children's rights, such rights should not be intrusive nor infringing of individual's basic human rights.³⁶ This means that there ought to be a balance between children's rights as well as adult rights. Both children and adults have rights to access the digital environment and platforms, however, their experiences within the digital environment differ in terms of experience and knowledge and with children being vulnerable, they require their access of the digital environment to be through the assistance and monitoring of parents.³⁷ As argued above, children are a vulnerable group and tend to be lured into complex contexts that they do not fully comprehend. Children easily become targets of scams and risks sometimes shadowed as opportunities and as a result, have their rights violated.³⁸

³⁴ A majority of social media platforms such as *Facebook* and *Twitter* require a user to be at least 13 years old of age in order to sign up for an active account.

³⁵ Article 13 of the United Nations Convention on the Rights of the Child (1989).

³⁶ Certain limitations are permitted by human rights law and rights that will infringe upon other basic human rights in the process of being effected, are limited reasonably.

³⁷ More adults are able to derive away from certain risks within the digital environment as they have sufficient knowledge of the dangers of digital platforms while children need to be thoroughly educated on such matters.

³⁸ Livingstone and Bulger 2014 *Journal of Children and Media* 321.

Primarily, adult content found within the digital environment is developed for a more mature audience whereas most children are only learning to fathom the content on such platforms.³⁹ Such content is initially created by a mature audience and children are likely to encounter such content when they accidentally click on external links that may subsequently open more explicit pages.⁴⁰ The contentious issue at hand becomes the difficulty in navigating space for everyone to express themselves freely while at the same time creating a safe space for children to learn, socialise and communicate without the hurdle or fear of having their rights infringed.

With children's rights articulated under the UNCRC and various other legal instruments, state parties also bear the responsibility to ensure that such rights are implemented to their utmost potential.⁴¹ The UNCRC further states in its preamble that children are entitled to special care and assistance and this premise is to be fulfilled by all relevant stakeholders including the Government and parents.⁴² This means that in all aspects and situations, such as the digital environment, it is the responsibility of adults as parents, the society, governments, service providers to create an environment that is safe for children to browse and use without any due infringement upon their rights.

The discussion of whether children's rights pre-exist in the digital environment is one that has been articulated by many stakeholders, organisations, conventions and states for the past few years since the proliferation of digital platforms.⁴³ The Committee on the Rights of the Child (hereinafter referred to as 'the committee'), being the independent body of experts that bears the obligation of reviewing state parties to the UNCRC and how

³⁹ Many adults already have digital devices and platforms while children are slowly being introduced to such platforms either through educational means at schools or by their own parents when they reach a certain age.

⁴⁰ Cyber hackers and bullies are normally individuals that are technologically advanced. Many predators within the online domain turn out to be adults that prey on children to lure them into risks such as child trafficking and child pornography.

⁴¹ Parents, the society, service providers and so forth also have a significant role to monitor what children get up to within these digital platforms and effectively monitor their activities.

⁴² See Preamble of the United Nations Convention on the Rights of the Child (1989).

⁴³ Organizations such as UNICEF, forums and other sectors of interest have all taken initiative over the past few years to contextualize child rights in the digital environment.

effectively they implement the provisions of the UNCRC, is earnestly concerned about children's rights within the digital environment. The Committee set out an objective to determine the extent to which the use of digital technologies and platforms has an impact on the implementation of children's rights.⁴⁴ This comes after the committee dedicated its discussion in 2014 to "digital media and children's rights"⁴⁵, an expedition in evaluating the impact of digital technologies on children's rights through the lens of the UNCRC.⁴⁶ The committee recognised that it is significant to determine the extent to which children participate in digital platforms and how rights-based strategies could be developed to promote online opportunities while minimizing online risks and possible harms.

With the evaluation of rights online and offline, it can be argued that every individual embraces an online presence in today's age, making it a prerogative to not only incorporate offline based rights within the digital sphere but to ensure that such rights are not infringed or deprived. Whether such an online presence is viewed as both a pathway to abundant opportunities for children or as a threat to their wellbeing, is up for discussion.

This study is designed to determine the effectiveness of children's rights, particularly rights in relation to special care and protection within the digital environment as well as the implementation of these rights on digital platforms and all its components. Children's rights are enshrined in international law with the purpose of assuring basic human rights to children throughout the world as well as enabling such rights to be adequately respected and implemented in the same manner as any other human rights.

The UNCRC is the primary foundation for essential child rights on an international level and thus serves as a significant platform to assessing the accountability of child-rights implementation across the digital environment. This is therefore the starting point to

⁴⁴ The Committee's main objective was to determine factors that might contribute to the deprivation of child rights within the digital environment as well as possible mitigating factors that can be implemented to protect and preserve these rights within such an environment.

⁴⁵ The Day of general discussion took place on the 12th of September 2014 in during the 67th session of the committee in Geneva.

⁴⁶ UNCRC General day of discussion (2014).

evaluating the extent in which these rights are effected through streams such as the internet as well as evaluating various alternatives that may be trailed should it be found that some or certain rights are being infringed upon.

In conclusion, this research study focuses not only on the implementation and enforcement of children's rights to special care and protection in the digital environment but also on the various ways in which these rights could be infringed and the legal implications of such infringements internationally and within the South African legal framework. The goal is to articulate acceptable penalties that could arise in each scenario within the digital environment and evaluate if such an offence can equally have the same legal repercussions as scenarios outside the digital environment.

The purpose of this research study is to contextualize the current legislative measures put in place to regulate digital-based content as well as how it affects and protects children's rights and safety on an international level as well as within the South African legal context.

1.2 Framework of the study

Chapter two proffers a background to the study and this includes a clear definition of what the digital environment is, how it is defined and adapted within the modern mainstream as well as how it affects various sectors within society. This chapter further outlines the impact the digital environment has had on modern society as well as opportunities and challenges associated with its adaptation.

Chapter three outlines the international and regional instruments associated with the recognition, implementation and protection of children's rights. It also delineates how these instruments affect or promote children's rights in general and their impact on special care and protection of children within the digital environment.

Chapter four provides an analysis and detailed discussion of the current South African legal framework as well as how it exerts an impact on the recognition of children's rights

to special care and protection within the digital environment. This chapter equally discusses how the Constitution, being the supreme law of the land in South Africa, has an impact on the protection of children's rights and how such can be used to recognise children's rights to special care and protection within the digital environment. South Africa has various legislations that have a direct and indirect inference on the implementation and recognition of children's rights to special care and protection within the digital environment and these are discussed therein to clarify the challenges that may arise.

Chapter Five outlines the outcome of the study as well as the general framework discussed and proffers a conclusion to the study.

In order to garner a detailed discussion on the above-mentioned aspects, this research study follows a qualitative approach in which a detailed analysis and systematic review of literature, legislation, case law and various journal articles are used. The study utilises primary sources such as statutes and various decided case law as well as secondary sources such as scholarly books, journal articles derived from international law. The study also privileges credible online sources which report on recent developments in government schemes, possible authoritative expansions, and the international sphere.

2 Chapter 2 Background of the Study

2.1 Introduction

The global community has progressed into a significant transformation that has presented advanced adaptation and use of digital technological systems.⁴⁷ Overall, technology has evolved and created a digital environment comprising of versatile adjustments and tools that have transformed modern day intellectual development within communities throughout the world.⁴⁸ These digital and technological adjustments have infiltrated almost every aspect of human life and this is evident through the abundant access that individuals have to health care services, high quality education, several career opportunities, efficient socialisation and interactive communicative tools, social and efficient security programmes, reliable resources to remote learning and public digital content.⁴⁹

With the development of the digital environment, there has also been an extensive growth with regards to interactive digital technologies and these have enabled proficiency within the telecommunications sector, allowing efficient and faster communication between individuals from anywhere across the world.⁵⁰ This extensive transformation from the traditional methods of communication and interaction such as letters and newspapers to the digitalised methods has created platforms for individuals to learn and interact in a more faster and innovative way.⁵¹

Individuals throughout the world have adapted to the use of advanced technological devices and gadgets such as smartphones, laptops, tablets and computers and these have simplified and created platforms used for communicational purposes and social interaction, access to almost any information throughout the world as well as content

⁴⁷ Lyshchikova et al 2019 Journal of Advanced Research in law and Economics 1338.

⁴⁸ Lyshchikova et al 2019 Journal of Advanced Research in law and Economics 1338.

⁴⁹ Purohit 2011 *International In-house Counsel Journal* 2.

⁵⁰ Purohit 2011 *International In-house Counsel Journal* 3

⁵¹ Purohit 2011 *International In-house Counsel Journal* 3.

and resources that is effortless and wireless.⁵² These technological devices and gadgets are referred to as digital devices and have become the essential components used in accessing the digital environment in a manner that enables portability and easy accessibility for individual interactivity.

With the digital environment being a staple in individual lives throughout the world, children have been at the receiving end the most when it comes to the use and adaptation of the digital environment and its components. This is because children have shown to have integrated faster into the digital environment by having access to digital innovations enabled through advances in technology.⁵³ Moreover, children have also integrated into the digital environment faster due to social digital platforms such as *Facebook, Instagram, Twitter, Youtube* and many other platforms that have allowed for social interaction without the encumbrance of distance, age and time.

In order to evaluate the effectiveness of implementation and recognition regarding children's rights, specifically the rights to special care and protection within the digital environment, a deep understanding of what the digital environment is and what it comprises of, should be developed. This chapter defines the digital environment as understood currently, how it differs from the traditional methods of communication or social interaction. This is all discussed with regards to how such changes and recent adaptations to the digital environment has had an impact on the lives of individuals throughout the world, specifically children.

Taking into consideration these developments regarding children and their adaptation to the digital environment, the purpose of this chapter is to also outline what the digital environment is inclusive of, its platforms and how such platforms have a significant impact on the sustainable development of children. This chapter will further outline how the digital environment has exerted an impact on modern mainstream society as well as the

⁵² Lyshchikova *et al* 2019 *Journal of Advanced Research in law and Economics* 1339.

⁵³ Smith 2016 *Thriving in the Digital Age: Conquests, Challenges, and Thoughts on School Libraries* 201.

risks and challenges associated with its use and how it could significantly affect individual lives, particularly children's lives.

2.2 The digital environment defined

Technology has created an unprecedented adaptation of digital innovations that have changed various aspects of individual lives throughout world.⁵⁴ These digital innovations have not only exerted a significant change on individual lifestyles but also on the way in which individuals throughout the world interact daily. There are multiple ways in which the digital environment can be defined however the term is often used interchangeably with other terms of similar application.⁵⁵ The term itself can be classified to include both computer-based technology using the internet as well as web-based resources used to transmit a preferred outcome.⁵⁶

One of the ways in which the digital environment can be differentiated from traditional media is through the way the digital environment is used.⁵⁷ Ordinarily, the use of traditional media includes print media while digital media is often computer based. It is also to be noted that unlike the traditional media, the digital environment is participatory in nature and allows its audiences to be a part of the communicative ensemble, in creating and generating electronic or digital content.⁵⁸

Often classified as a tool used to locate a preferred search outcome or information, the digital environment is characterised by settings in computer technology that allow for queries and specific data.⁵⁹ These include websites, mobile applications, and social media

⁵⁴ Quinton and Simkin 2016 *International Journal of Management Reviews* 2.

⁵⁵ In some instances, the term 'digital environment' is often used interchangeably to the term 'digital platforms' to which can mean one thing depending on the context in which it is used. However, the digital environment refers to the collective sphere of computer technologies with the extension of the internet. Therefore, the digital environment is often used to include the aspects of digital social networks, mobile applications, digital learning and communication, with the option of sharing media content.

⁵⁶ See footnote above

⁵⁷ Evans *Social Media Marketing; An Hour A Day* 11.

⁵⁸ Evans *Social Media Marketing; An Hour A Day* 11.

⁵⁹ Smith 2016 *Thriving in the Digital Age: Conquests, Challenges, and Thoughts on School Libraries* 202.

platforms such as *Facebook, Instagram, Twitter, YouTube, Snap Chat*.⁶⁰ The internet, however, plays a significant role in the application of the digital environment because these web-based resources must be utilised with discretion, purpose and the attendant discrimination.⁶¹ This entails that the digital environment differs from the traditional media because the latter comprises print media that does not necessarily call upon the internet or any form of web-based resources for it to function.

2.3 The role of the digital environment within modern mainstream society

The implementation and adaptation of the digital environment has enabled a creation of numerous digital innovations that have not only changed the lives of individuals but also the manner in which individuals facilitate communication as well as accelerate sustainable living amongst individuals throughout the world. With these digital innovations, there has been significant lifestyle changes and improved productivity amongst society

The adaptation of the digital environment and the growing use of digital devices has created an evolutionary phase within normal day-to-day activities.⁶² Over time, people have relatively adapted to lifestyle changes influenced by digital devices that have influenced activities such as shopping, recreation, paying bills, working remotely, teaching and learning, socialising and communicating. These platforms have enabled such chores to become second nature in a more convenient and enjoyable ways.⁶³

The amplification of the digital space within the global community has also allowed for digital technology to become a fundamental factor necessary to evaluate growth and development within priority areas in society.⁶⁴ These priority areas may include the

⁶⁰ Smith 2016 *Thriving in the Digital Age: Conquests, Challenges, and Thoughts on School Libraries* 202.

⁶¹ Smith 2016 *Thriving in the Digital Age: Conquests, Challenges, and Thoughts on School Libraries* 202.

⁶² Lyshchikova et al 2019 *Journal of Advanced Research in law and Economics* 1338.

⁶³ Lyshchikova et al 2019 *Journal of Advanced Research in law and Economics* 1338

⁶⁴ Lyshchikova et al 2019 *Journal of Advanced Research in law and Economics* 1338.

strength of economy, reforms of education, health care systems, social security and the quality of life, including national security.⁶⁵ These priority areas have also undergone transformation, contributing therefore to the goals of achieving global development.

Notwithstanding that the digital environment has enabled participation in the different priority areas mentioned above, there are segments of society that have adapted more to the digital environment than others.⁶⁶ These modalities of participation include enhancements in the quality of life, social and national security as well as dramatic affordances in the education sector.

2.3.1 *The impact of the digital environment within the educational sector.*

The education sector has seen major improvements and innovations pertaining to adaptation of the digital capabilities.⁶⁷ This has enabled fast access to educational materials and systems to individuals, including children across the world. The right to education is a fundamental human right as enshrined under the *Universal Declaration of Human Rights*,⁶⁸ and with the inherent and transforming dynamics in the digital environment, this right has been expanded across the world in very bold ways.⁶⁹

The digital environment consists of an integrated technological system whereby numerous digital devices promulgate communication and manage any form of content or activity within it and this is possible through the use of the internet and digital devices.⁷⁰ Following these developments, there has been a sharp increase in the deployment and uses of digital learning amongst individuals.⁷¹ The primary conception of digital learning has also allowed individuals, more so children, to become more exposed to opportunities

⁶⁵ Lyshchikova *et al* 2019 *Journal of Advanced Research in law and Economics* 1338.

⁶⁶ The adaptation of digital technology has shown to advance not only the lives of individuals but also the manner in which systems of authority function.

⁶⁷ Ranieri and Barbosa Lima 2018 *International Journal for Education Law and Policy* 27.

⁶⁸ A 26 of the Universal Declaration of Human Rights, 1948.

⁶⁹ Ranieri and Barbosa Lima 2018 *International Journal for Education Law and Policy* 27.

⁷⁰ Yar 2018 *International Journal of Cybersecurity Intelligence & Cybercrime* 5.

⁷¹ Ranieri and Barbosa Lima 2018 *International Journal for Education Law and Policy* 27.

that may not necessary have been available to them in the developing regions.⁷² This is due to a much higher range of information and knowledge archived and disseminated across a spectrum of resources and skills that enable quality education.

Taking into consideration that to achieve educational opportunities through the digital environment, individuals must possess the necessary knowledge and tools, there has also arisen the conflicting reality of access to the internet in general.⁷³ This anomaly in accessibility engenders exclusion as well problems related to appropriation of the internet or ICTs. The urgent need for technological infrastructure often becomes a priority in developing countries so as to prevent the constraints associated with the inequitable distribution of quality education resources.⁷⁴

2.4 Risks and challenges associated with the digital environment.

The rapid increase in digital users and their adaptation of the digital environment have enabled, ironically, illegal and harmful content in the same manner as it has brought about positive developments within society.⁷⁵ Online digital interactions amongst users have raised ongoing concern regarding the safety and security of individuals, especially the exposure of children to illicit content.

The digital environment has also raised controversy related to online based threats that particularly affect children such as cyberbullying, exposure to offensive images and messages and manipulation of children.⁷⁶ Concerns pertaining to the protection of user data and the lack of privacy are on the rise across the global community.⁷⁷ The explosion of the digital environment has enabled platforms that allow digital users to disseminate their own digital content to multiple users across the world. Online content such as images, visual stories using social media, text, or audios, are shared to known and

⁷² Ranieri and Barbosa Lima 2018 *International Journal for Education Law and Policy* 27

⁷³ Ranieri and Barbosa Lima 2018 *International Journal for Education Law and Policy* 28

⁷⁴ Ranieri and Barbosa Lima 2018 *International Journal for Education Law and Policy* 28.

⁷⁵ Yar 2018 *International Journal of Cybersecurity Intelligence & Cybercrime* 5.

⁷⁶ Yar 2018 *International Journal of Cybersecurity Intelligence & Cybercrime* 5

⁷⁷ Yar 2018 *International Journal of Cybersecurity Intelligence & Cybercrime* 5

unknown individuals to the primary online creator.⁷⁸ Though this form of interaction has its own conveniences and advantages of creating easy connectivity from every place in the world, it does allow those with alternative and often sinister agendas to circulate content that infringes upon the rights of the child. In such an event, the internet is abused to subvert its positive uses. In turn, criminal behaviour gets entangled into the architecture of the internet of things.

With the digital environment comprising social media platforms such as *Facebook*, *twitter*, *Instagram* and *YouTUBE*, online digital presence becomes expanded, creating accessibility for online digital offenders to disseminate their criminal content.⁷⁹ This is an unfortunate aspect related to the expanded digital presence. The more people adapt, participate and interact within the digital environment, the more difficult it becomes to identify the centre upon which such online based threats originate.⁸⁰

Online based risks such as cyberbullying of other digital users, hate speech, harassment and intrusion into privacy, have become imminent with the growing use of the digital environment. There has been a dramatic rise in unknown digital users targeting other digital users.⁸¹ It is unfortunate that the most vulnerable groups such as children are on the receiving end of these online digital risks.⁸² With children forming an integral fraction of the growing proportion of digital users, they fall victim consequently to the increase of online based threats.⁸³

2.5 Conclusion

The digital environment can be classified as an innovative set of technological systems and platforms that have made life more convenient and easier for individuals as opposed to the traditional forms of communicative stances and apparatuses. The influence of the

⁷⁸ Yar 2018 International Journal of Cybersecurity Intelligence & Cybercrime 5

⁷⁹ Choudhuri 2019 *Socio-Legal Review* 151.

⁸⁰ Choudhuri 2019 *Socio-Legal Review* 151

⁸¹ Yar 2018 International Journal of Cybersecurity Intelligence & Cybercrime 7.

⁸² Choudhuri 2019 *Socio-Legal Review* 152.

⁸³ Choudhuri 2019 *Socio-Legal Review* 152.

digital environment can be seen through the increased use of the internet and web-based resources, which has enabled a fast and portable way of communication. It eradicates the constraints of speed, time, age and overall physical space, thus benefitting the user. It is also integrated within various components of society, making the sustainable development more immediate.

The digital environment does, however, have negative aspects with regards adaptation and use. Vulnerable groups such as children and those less fortunate to have access to web-based resources have been on the receiving end of the negativity identified. Not only do these create online based risks associated with cyberbullying, privacy concerns, harassment, discrimination and other forms of human right infringement but they are bound to reinforce exclusion embedded in the expansion of quality education and learning.

3 Chapter 3 International and Regional Framework

3.1 Introduction

The recognition and protection of children’s rights has developed significantly over the years. Children’s rights are regarded as universal and are required to receive the same level of respect, adaptation and recognition throughout the world.⁸⁴ With the promulgation of international and regional instruments such as the UNCRC and the ACRWC, children have developed as subjects with their own rights, views and opinions equivalent to any other members of society.⁸⁵ With these international and regional instruments in place, children’s rights are to be protected for the benefit of every child’s wellbeing and development.

Children, as human rights holders, are to enjoy these rights in a manner that protects their wellbeing as well as have their best interests taken into consideration as enshrined under international law.⁸⁶ These internationally recognised children’s rights are to be protected through the establishment of precautionary channels or measures that will sufficiently provide special care and protection within the different aspects or phases of children’s lives.⁸⁷ The promulgation of international and regional instruments such as the UNCRC as well as the ACRWC also reaffirms that children are vulnerable human beings that need and require special care and protection and this includes protection from any form of abuse or neglect.

The provisions of the UNCRC as well as the ACRWC adequately encourage member states to prioritise the realisation of children’s rights effectively by providing clear recognition and implementation of children’s rights to special care and protection through principles that can be adhered to and implemented.⁸⁸ These international instruments have four

⁸⁴ Gustin M 2022, *EU and Comparative Law Issues and Challenges Series 454*.

⁸⁵ See preamble of the United Nations Convention on the Rights of the Child, 1989.

⁸⁶ Both the UNCRC as well as the ACRWC recognise the child’s best interests to be of paramount significance in everything involving a child and their wellbeing.

⁸⁷ Gustin M 2022, *EU and Comparative Law Issues and Challenges Series 456*.

⁸⁸ See preamble of the United Nations Convention on the Rights of the Child, 1989.

main cardinal principles that define the standards by which children's rights should be protected and these include taking into consideration the child's right to life, survival and development, the child's right to non-discrimination, the child's right to participate as well as the right to act in the best interests of the child.⁸⁹ With these principles taken into consideration, children's rights as interpreted under international and regional law are to be protected by further requiring member states to implement interventions that will adhere to the best interests of the child.

The economic, social, and cultural aspects of children's lives have seen a transition due to the advances in technology. In this light, it is imperative to preserve and implement children's rights through revised approaches parallel to the constant changes that have been adopted.⁹⁰ As access to the digital environment has become more effortless, the use and adaptation of the digital environment has become more pervasive with most users being children.⁹¹ This has enabled significant transformation within personal, social, educational, and commercial aspects of children's lives, granting numerous opportunities as well as challenges.⁹² With the digital environment emerging as a fundamental space within the economic, social and cultural aspects of children's rights, such a role should be subjected to the same preservation of children's rights to special care and protection as provided for in the UNCRC.

Taking the above mentioned into consideration, the purpose of this chapter is to critically explore the emergence of children's rights and how they have become a significant field of interest within the human rights discourse. This chapter will also focus on how children's rights have become recognisable since the adoption of international and regional instruments such as the UNCRC, the ACRWC as well as how such instruments have enabled member states to promulgate measures that will advance the implementation, protection, and recognition of children's rights. Lastly, this chapter also

⁸⁹ Gustin M 2022, *EU and Comparative Law Issues and Challenges Series 456*.

⁹⁰ Reynaert *et al* 2009 *Childhood* 518.

⁹¹ Ranieri and Barbosa Lima 2018 *International Journal for Education Law and Policy* 24.

⁹² Ranieri and Barbosa Lima 2018 *International Journal for Education Law and Policy* 24.

provides an analysis regarding the impact that the UNCRC and the ACRWC has on children's social and cultural aspects of life, including their use of and adaptation to the digital environment. Overall, this chapter elucidates the significance of realising children's rights as enshrined under the UNCRC, the ACRWC and how such rights should be recognised and implemented within the digital environment

3.2 A brief background of children's rights

Prior to the adoption of international and regional instruments such as the UNCRC and ACRWC, the concept of children having rights was perceived as illogical and unacceptable in society.⁹³ Children had little to no entitlement to basic human rights as they were regarded as the lawful property of their parents.⁹⁴ However, since the promulgation and ratification of these internationally recognised children's rights instruments, children have received a significant amount of attention, recognition and their rights implemented throughout the world.⁹⁵

The implementation and recognition of children's rights through international and regional instruments such as the UNCRC as well as the ACRWC has advanced the way in which children's rights are perceived and advocated for. Historically, children suffered discrimination and were not seen as individuals capable of bearing their own rights and as a result, they suffered the exclusion of having their own wellbeing considered as a prerogative.⁹⁶ In the same manner in which women were previously subjected to gender inequality by having little to no status in society as well as how black people were subjected to marginality through slavery and apartheid, children were also excluded as right bearers and members of society eligible to receiving an abundant amount of respect and dignity.⁹⁷ However, with the adaptation of internationally recognised children's rights

⁹³ Koshier, Ben-Arieh and Hendelsman *Children's Rights and Social Work* 9.

⁹⁴ Freeman 2007 *International Journal of Children's Rights* 6.

⁹⁵ Reynaert *et al* 2009 *Childhood* 518.

⁹⁶ Koshier, Ben-Arieh and Hendelsman *Children's Rights and Social Work* 9

⁹⁷ Freeman 2007 *International Journal of Children's Rights* 7.

instruments, children's rights have emerged just as significant as any other human rights without any form of discrimination.⁹⁸

The adaptation of international instruments and the principles that they necessitate on the implementation and recognition of children's rights has also allowed children to be subjects who have their own values and rights known and respected like any other members of society. The lack of identity that was previously ascribed to children as well as the lack of recognition of children's rights had led to unfavourable circumstances that included but are not exclusive to child exploitation, child labour, physical and emotional abuse, discrimination, sexual exploitation, and many other forms of mishandling towards the wellbeing of children.⁹⁹ It is evident that children had been previously deprived of a healthy and safe environment and with the enactment of these internationally recognised children's rights instruments, a change was expected to emerge with regards to eradicating threats or exploitation experienced by children.¹⁰⁰

Technological and socio-economic developments throughout the world instigated conversations regarding the sanctity of childhood and the protection of children from any form of exploitation.¹⁰¹ Considering that children were previously disadvantaged of their rights prior to the enactment of international instruments recognising children's rights, their status within the society became a social concern that required intervention and this influenced the consideration of an adequate system catering for the protection of children's rights.¹⁰² These augmented conversations regarding the protection of children expanded towards international attention, with the League of Nations (now the *United Nations*) adopting the *Declaration of Geneva on Children's Rights*,¹⁰³ which primarily entailed responsibilities society had to adopt regarding the protection and care of children.¹⁰⁴ This was followed by the enactment of the *Declaration of the Rights of the*

⁹⁸ Freeman 2007 International Journal of Children's Rights 7.

⁹⁹ Kosher, Ben-Arieh and Hendelsman *Children's Rights and Social Work* 10.

¹⁰⁰ Kosher, Ben-Arieh and Hendelsman *Children's Rights and Social Work* 10.

¹⁰¹ Kosher, Ben-Arieh and Hendelsman *Children's Rights and Social Work* 11.

¹⁰² Kosher, Ben-Arieh and Hendelsman *Children's Rights and Social Work* 11.

¹⁰³ Declaration of Geneva on Children's Rights, (1924).

¹⁰⁴ The *Geneva Declaration* was adopted in 1924 and essentially became one of the first concepts to

Child by the United Nations General Assembly, which asserted the need of a happy childhood.¹⁰⁵

To further assert children's rights throughout the international arena, the UNCRC was then adopted in 1989. The UNCRC has become the most ratified international and legally binding instrument to date advocating for the implementation and recognition of children's rights.¹⁰⁶ The UNCRC outlines comprehensive provisions regarding the protection and special care of children's rights as well as the obligations imposed upon state members, governments, parents, and other stakeholders to effectively implement children's rights adequately.¹⁰⁷

3.3 Emerging children's rights within the digital environment

The proliferation of digital platforms and advanced technologies has a significant impact on the standard of living in modern day life.¹⁰⁸ Various subdivisions of industries and sectors such as the economy, retail, media outlets, marketing, healthcare, education and security are significantly impacted by the digital environment and have simultaneously adapted the utilization of these modern digital platforms to acknowledge their presence.¹⁰⁹

The digital environment is a significant platform for individuals, including children, for providing communicational innovation and access to various rights such as the right to education and freedom of expression.¹¹⁰ As a medium enabling access to vast educational

adequately recognize child rights.

¹⁰⁵ Kosher, Ben-Arieh and Hendelsman *Children's Rights and Social Work* 15.

¹⁰⁶ Kosher, Ben-Arieh and Hendelsman *Children's Rights and Social Work* 15.

¹⁰⁷ See the *United Nations Convention on the Rights of the Child*, (1989).

¹⁰⁸ Livingstone and O'Neill "Children's rights online: Challenges, dilemmas and emerging directions" 19 – 38.

¹⁰⁹ Numerous sectors are profoundly influenced by digital platforms and make use of digital technologies to enable a faster and profound existence within their respective categories.

¹¹⁰ The right to education and freedom of expression are primarily the most considerable aspects of children's rights within the digital environment as they contextualize the purpose and outreach that digital platforms bring forth to the sustainment of child development and extensive learning.

and social experiences for children, the digital environment requires sufficient regulation with regards to children's rights to special care and protection.¹¹¹

The sufficiency in regulation and recognition of children's rights remains an inconvenient concern to their wellbeing.¹¹² A promulgation of a wider regulatory arrangement providing adequate protection of the rights of children within the digital environment needs critical attention while simultaneously regarding the rapid changes and advantages that come with the use and adaptation of digital technologies.¹¹³

Public policy awareness regarding the special care and protection of children's rights is apparent in various international instruments such as the UNCRC or ACRWC.¹¹⁴ These international instruments advocate for the protection of children's rights in countless matters including the digital environment.¹¹⁵ The most significant is the UNCRC that specifies the most essential rights to which every child is entitled.¹¹⁶ All rights enshrined under the UNCRC have been promulgated for the purpose of providing recognition, special care and protection of all children and their wellbeing within various spaces, including the digital environment.¹¹⁷

¹¹¹ Though not through similar platforms, the natural 'offline' world, and the digital Environment comprises of human engagement and interaction, sustaining the need for similar approaches towards human rights perseverance.

¹¹² Livingstone and O'Neill "Children's rights online: Challenges, dilemmas and emerging directions" 19 – 38

¹¹³ Livingstone and O'Neill "Children's rights online: Challenges, dilemmas and emerging directions" 19 – 38.

¹¹⁴ International instruments such as the UNCRC, the ACRWC and many other regulatory instruments considerably engage in the perseverance of children's rights and how state members can alternatively approach convening matters involving child rights exploitation.

¹¹⁵ Child based instruments preserve the normative of placing the best interests of the child as a priority in all matters concerning the child, therefore finds relevance in sustaining the same approach within the digital environment considering how a majority of children are invested and influenced by digital platforms.

¹¹⁶ See the United Nations Convention on the Rights of the Child, (1989).

¹¹⁷ See the United Nations Convention on the rights of the child, (1989).

3.4 Positioning children's rights as enshrined under the UNCRC within the digital environment

The proliferation of digital technologies within society has become material towards sustaining the quality of life of all humanity.¹¹⁸ With the growing proportion of digital users being children, it is imperative that the UNCRC be adapted to preserve children's rights to special care and protection within the digital environment. Presently, the UNCRC is the most widely ratified human rights instrument in the history of the United Nations, with various states including South Africa as signatories.¹¹⁹ The UNCRC is the epitome of special care and protection of children within various environments, including the digital one.

The UNCRC is guided by four significant principles: the consideration of the best interests of the child, non-discrimination, survival and development, as well as active participation of children in matters concerning them.¹²⁰ These significant principles cater as the most substantial standards that the UNCRC rests upon and ignites its mandate towards being an empowering international instrument that shelters and protects the rights of children while enabling an effective recognition of their existence as individuals with definitive standing and status.¹²¹

Proclaiming the significant recognition of childhood from the *Universal Declaration of Human rights*,¹²² the UNCRC was drafted to provide clear and legal binding provisions that state members should protect and promote the rights of children.¹²³ The UNCRC in its preamble, draws inference from the *Declaration of the Rights of the Child*, which states that:

¹¹⁸ Choudhuri 2019 *Socio-Legal Review* 152

¹¹⁹ Livingstone and Third 2017 *New Media and Society* 658.

¹²⁰ See A 2, 3, 6 and 12 of the United Nations Convention on the Rights of the Child, (1989).

¹²¹ Livingstone and Third 2017 *New Media and Society* 658.

¹²² See preamble of the *United Nations Convention on the Rights of the Child*, (1989).

¹²³ See preamble of the *United Nations Convention on the Rights of the Child*, (1989).

the child, by reason of [his] physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth¹²⁴

It is evident that the drafters of the UNCRC considered the vulnerability of children as well as how state members may approach the safekeeping of children's rights.¹²⁵ The UNCRC promulgated a reservation of legally binding obligations to all state members to enact protective measures against the exploitation of children's rights, which should extend to the digital environment.

It is certain that modern society has adapted to the realisation and implementation of digital technologies and applications to successfully achieve an orderly and sustainable livelihood.¹²⁶ While the digital environment may be regarded as a platform deserving of its own specific legally binding governance,¹²⁷ it should be legally bound from existing norms and principles enshrined within legally binding instruments such as the UNCRC and the ACRWC by establishing additional provisions for the protection and special care of children's rights.¹²⁸

The UNCRC was drafted prior to the vast proliferation of the digital environment and its universal adaptation within children's lives.¹²⁹ This should not however dismiss the significance and relevance it has on the implementation and recognition of children's rights to special care and protection within the digital environment.¹³⁰ Within the fifty-four articles enshrined under the UNCRC, a significant number of articles find direct and indirect relevance regarding the implementation and recognition of children's rights to special care and protection within the digital environment.

¹²⁴ See preamble of the *United Nations Convention on the Rights of the Child*, (1989).

¹²⁵ See preamble of the *United Nations Convention on the Rights of the Child*, (1989).

¹²⁶ Livingstone and Third 2017 *New Media and Society* 658.

¹²⁷ These are primarily referred to as digital rights.

¹²⁸ Livingstone and Third 2017 *New Media and Society* 659.

¹²⁹ The UNCRC was adopted and open for signature on the 20th of November 1989.

¹³⁰ Livingstone and Third 2017 *New Media and Society* 658.

3.4.1 Article 1 of the UNCRC

The UNCRC defines a child as every human below the age of eighteen years old unless under the law applicable to the child, majority is attained at an earlier stage.¹³¹ From a systematic view, eighteen years old is considered the appropriate age at which a child attains majority and becomes an adult, becoming precluded from aspects concerning or specifically limited to the welfare of children.¹³²

Age, specifically in relation to children and their presence within the digital environment, contributes to the accumulation of their rights and whether such rights receive protection and special care in the same manner as they do in the natural world.¹³³ Notwithstanding that the UNCRC is flexible when it comes to the age of majority in some states, it does place an obligation on state members to sustain rights enshrined under the UNCRC. Furthermore, the UNCRC encourages an adaptation of such rights to the benefit of children below the age of eighteen.

When evaluating both the negative and positive contributions that the digital environment has exerted upon the lives of children, it is imperative that a child's age and evolving capacity be considered in addressing the implementation and recognition of children's rights.¹³⁴ This is of significance considering that the digital environment consists of digital platforms that do not prioritise or validate age or capacity when allowing accessibility and usage by children.¹³⁵ This often leads to an inappropriate access to digital platforms by both children and adults without any form of age constraints. In this regard, children are given access to illicit content available within the digital environment that violates their rights to special care and protection.¹³⁶

¹³¹ A 1 of the *United Nations Convention on the Rights of the Child*, (1989).

¹³² A majority of states require eighteen years old as the appropriate age at which a person attains adulthood.

¹³³ Lievens, Livingstone, McLaughlin, O'Neill and Verdoodt 2018 *International children's rights law* 490.

¹³⁴ Livingstone *et al One in three: Internet governance and children's rights* 22.

¹³⁵ Livingstone *et al One in three: Internet governance and children's rights* 22.

¹³⁶ Livingstone *et al One in three: Internet governance and children's rights* 22.

State members have the duty to ensure that the age of a child is of paramount consideration when it comes to the digital environment as well as what children are allowed access to within the digital platforms. State members have the duty to implement age-based restrictions within digital platforms in order to minimize children from being exposed to channels or online digital based content that has palpable detrimental effects on their wellbeing, privacy and safety.

3.4.2 *Article 2 of the UNCRC*

Article 2 of the UNCRC bears one of the most significant principles that shelters the need for adequate implementation and recognition of all other rights enshrined in the UNCRC.¹³⁷ The provision encourages a comprehensive eradication of all forms of discrimination against children and the equal dispersal of all their rights as enshrined under the UNCRC.¹³⁸ The contents of this provision is relevant within the digital environment primarily because online digital presence represents an expansion of human development within the digital environment.¹³⁹ This means that children develop immensely from the use of digital technologies and as a result, should be given equal respect, protection and opportunities.¹⁴⁰

The significance primarily lies between preserving non-discrimination against children's rights and their use to the digital environment and this adequately revolves around various factors such as their educational, social, cultural, political and other distinctive spheres.¹⁴¹ These spheres require state members to enact and implement radical changes to their legislative, administrative or any other relevant measures of authority, that may

¹³⁷ See A 2 of the *United Nations Convention on the Rights of the Child*, (1989).

¹³⁸ A 2 (1) of the *United Nations Convention on the Rights of the Child*, (1989).

¹³⁹ Lievens, Livingstone, McLaughlin, O'Neill and Verdoodt 2018 *International children's rights law* 491.

¹⁴⁰ Lievens, Livingstone, McLaughlin, O'Neill and Verdoodt 2018 *International children's rights law* 491.

¹⁴¹ A 2(1) of the *United Nations Convention on the Rights of the Child*, (1989).

be of assistance in preserving children’s development within the digital environment while sustaining disciplined protection of children’s rights.¹⁴²

Member States have the obligation to observe and eradicate the different ways in which children may experience discrimination within the digital environment and its various platforms. One way in which children may experience discrimination is through limited access to digital platforms.¹⁴³ Children from disadvantaged and vulnerable backgrounds are excluded from the realisation of their significant rights to participation, extensive learning, broadened communication, and many other rights enshrined under the UNCRC.¹⁴⁴ State members therefore have the obligation to identify such vulnerable groups of children and adequately implement and adapt special measures or resources that ought to overcome digital exclusion and permit access to children’s rights.

The concept of non-discrimination further entails the recognition of informative elements that could assist children in identifying what is considered discriminatory content or behaviour, and this could be significant in identifying such content within the digital environment.¹⁴⁵ For state members to implement the right to non-discrimination effectively within the digital environment, children must be informed on what constitutes as discriminatory behaviour within the digital environment as well as the various ways in which such may be prohibited.

It is therefore imperative for Article 2 of the UNCRC to be interpreted in light of the digital context by enabling state members to concede to the obligation of providing children with the necessary skills and mechanisms to effectively recognise discriminatory behaviour within digital platforms in order to sustain the right to special care and protection in which

¹⁴² Lievens, Livingstone, McLaughlin, O’Neill and Verdoodt 2018 *International children’s rights law* 491.

¹⁴³ Lievens, Livingstone, McLaughlin, O’Neill and Verdoodt 2018 *International children’s rights law* 491.

¹⁴⁴ Lievens, Livingstone, McLaughlin, O’Neill and Verdoodt 2018 *International children’s rights law* 491.

¹⁴⁵ Lievens, Livingstone, McLaughlin, O’Neill and Verdoodt 2018 *International children’s rights law* 491.

children are entitled to.¹⁴⁶ Furthermore, children are also encouraged to comprehend the extensive consequences of their interactions and behaviours within digital platforms and carry out their own responsibilities and obligations not to intrude or discriminate against other children's rights or vulnerable groups.¹⁴⁷

3.4.3 Article 3 of the UNCRC

Notwithstanding the technological advantages that come with the use of digital platforms, the digital environment has introduced children to an environment that reconfigures and jeopardises their rights and safety.¹⁴⁸ Augmented participation by children within the digital environment has generated increased risks associated with questionable behaviour, invasion of privacy, cyberbullying, misrepresentation and various other delinquent activities that are contrary to the promotion of the best interests of the child as stipulated under Article 3 of the UNCRC.¹⁴⁹]

The provisions of Article 3 entail a vital obligation placed upon state members of the UNCRC to recognise that every action concerning a child should be approached and adhered to in accordance with their best interests.¹⁵⁰ This provision extends to all platforms in which children interact and participate on regularly, including the digital environment. For the effective enhancement of children's rights to special care and protection within the digital environment, state members to the UNCRC are obliged to craft additional measures of action whether undertaken by public or private institutions, administration authorities, courts of law or legislative bodies, to realise this right while sustaining the development of every child's wellbeing.¹⁵¹

¹⁴⁶ Lievens, Livingstone, McLaughlin, O'Neill and Verdoodt 2018 *International children's rights law* 491.

¹⁴⁷ Lievens, Livingstone, McLaughlin, O'Neill and Verdoodt 2018 *International children's rights law* 491.

¹⁴⁸ Berson, Berson, Desai, Falls and Fenaughty 2008 *Contemporary Issues in Technology and Teacher Education* 223.

¹⁴⁹ Berson, Berson, Desai, Falls and Fenaughty 2008 *Contemporary Issues in Technology and Teacher Education* 223.

¹⁵⁰ A 3(1) of the United Nations Convention on the Rights of the Child, (1989).

¹⁵¹ A 3(1) of the United Nations Convention on the Rights of the Child, (1989).

Article 3 of the UNCRC further recognises the significance of having the duties of caretakers such as parents, guardians, or any other relevant caregivers legally responsible for a child, taken as significant consideration when evaluating a child’s wellbeing.¹⁵² Parents and caregivers are a significant contribution to children having access to the digital environment as they provide digital devices to children as an additional means of enabling their educational and communicational attributes. Therefore, both State members as well as the parents have a duty to provide the necessary protection and care of children and their rights within the digital environment.

Furthermore, Article 3 recognises the significant role that competent authorities have towards establishing suitable standards by institutions, services, and facilities responsible for the care and protection of children.¹⁵³ This is of relevance within the digital context as state members must adhere additional measures to ensure that private institutions and sectors such as digital companies and service providers consider the best interests of the child through the utilisation of platforms and products by children.¹⁵⁴ Moreover, such consideration to the best interests of the child should be extended to instances whereby children experience and encounter content on digital platforms that is transgressive of their rights to special care and protection. In short, these authorities and institutions should provide adequate remedies.

3.4.4 Article 6 of the UNCRC

As a general principle of the UNCRC, Article 6 entails the right of every child to have their life protected to ensure sustained survival and development.¹⁵⁵ Considering that child development is influenced by numerous factors, some of which are attributed to the mental capacity of children, physical, moral, cultural, or social aspects of a child’s life,^{156a}

¹⁵² A 3(2) of the United Nations Convention on the Rights of the Child, (1989).

¹⁵³ A 3(2) of the United Nations Convention on the Rights of the Child, (1989).

¹⁵⁴ Lievens, Livingstone, McLaughlin, O’Neill and Verdoodt 2018 *International children’s rights law* 492.

¹⁵⁵ A 6 of the United Nations Convention on the Rights of the Child, (1989).

¹⁵⁶ Lievens, Livingstone, McLaughlin, O’Neill and Verdoodt 2018 *International children’s rights law* 493.

majority of these factors are challenged by the use and adaptation of the digital environment by children.¹⁵⁷

Accordingly, many of these factors contribute negatively to the implementation and recognition of children's rights to special care and protection within the digital environment and this ought to encourage and maximise measures that will promote the adequate protection of every child, particularly within the digital environment¹⁵⁸ Overall, the digital environment has become an important tool for children to explore, evolve, communicate, learn and attain opportunities that could enhance their survival and developmental attributes. Therefore, state members are encouraged to effectively implement the provisions of Article 6 to their extensive capability.¹⁵⁹

3.4.5 *Article 12 of the UNCRC*

The digital environment is universal and enables users to interact, communicate and participate in a convenient manner without the burden of distance, time, speed or even cross boarder exclusion.¹⁶⁰ As a result of this convenience, the digital environment has enabled children to explore educational opportunities across the world, information and views on topics of interest and international current affairs. This engagement has enabled practical elevation of the principles enshrined under the UNCRC to further provide children with the opportunity to participate in important issues and have their views fully considered regarding matters concerning them.¹⁶¹ Article 12 of the UNCRC places an obligation on state members to ensure that children express their views and that these views be given due weight even within the digital environment.¹⁶² This is primarily done

¹⁵⁷ Lievens, Livingstone, McLaughlin, O'Neill and Verdoodt 2018 *International children's rights law* 492

¹⁵⁸ Lievens, Livingstone, McLaughlin, O'Neill and Verdoodt 2018 *International children's rights law* 493.

¹⁵⁹ A 12 of the United Nations Convention on the Rights of the Child, (1989).

¹⁶⁰ Digital communication permits engagement without certain barriers such as distance, time and so forth, enabling instant participation at a click of a digital device.

¹⁶¹ A 12 of the United Nations Convention on the Rights of the Child, (1989).

¹⁶² A 12(1) of the United Nations Convention on the Rights of the Child, (1989).

when children engage in digital platforms as well as in social media platforms that form a part of the digital environment

3.4.6 Article 13 of the UNCRC

Article 13 of the UNCRC encourages the right to freedom of expression, which includes the right to receive, seek and impart information or appropriate ideas without undue constraints.¹⁶³ The provisions of Article 13 are of relevance within the ambit of the digital environment as it encourages children to exercise their right to free expression through various methods and channels either in writing, print, or through any other means of a child's choice.¹⁶⁴ Though the contents of the Article 13 do not explicitly mention a digital environment, modern communication channels and media outlets subsume the use of digital platforms to convey expressed views, making them a relevant channel for children to have their rights recognised and fully realised.

A significant right such as the right to freedom of expression conveyed under Article 13 obliges state members to the UNCRC to adequately provide the relevant special care and protection of such a right.¹⁶⁵ It is enshrined that for the proper promulgation of this right, expressed views should be allowed without constraints.¹⁶⁶ Relatively, this responsibility lies within state members to desist from interfering with the realisation of this right by creating unreasonable boundaries or censorship approaches that would restrict children from expressing their views through the digital environment.

Article 13 of the UNRCR further enables children the access to a diversity of sources and this can relatively be achieved with the use of the digital environment and its various search platforms, enabling unprecedented opportunities for children and the full realisation and promotion of their educational needs.¹⁶⁷ Taking into consideration the expressed realisation of this right, the right to free expression is subject to certain

¹⁶³ A 13(1) of the United Nations Convention on the Rights of the Child, (1989).

¹⁶⁴ A 13(1) of the United Nations Convention on the Rights of the Child, (1989).

¹⁶⁵ A 13(1) of the United Nations Convention on the rights of the Child, (1989).

¹⁶⁶ A 13(1) of the United Nations Convention on the Rights of the Child, (1989).

¹⁶⁷ A 13(1) of the United Nations Convention on the Rights of the Child, (1989).

restrictions permissible by law and where adequately necessary.¹⁶⁸ This entails that there must be a reasonable balance whereby children are allowed to express their views and opinions while simultaneously enabling precautionary measures that will protect children from harmful content in the digital environment.

State members simultaneously bear the duty to protect children from the misuse of this right by applying certain restrictions in law only where it is necessary to do so.¹⁶⁹ This provision of the UNCRC promotes the special care and protection of children by ensuring that expressed views are encouraged while excluding the detrimental consequences infringing upon child rights and the rights of other digital users.¹⁷⁰

Furthermore, to enable the full realisation of this right, particularly within the digital environment, children must be equipped with the necessary skills and information pertaining to the risks and challenges that they may come across within the digital environment while fully expressing themselves. This enables State members to adequately be proportionate when establishing appropriate filters that will serve as a precautionary measure protecting children from harming digital content. State members may also encourage digital service providers to take precautionary measures by establishing age-appropriate platforms that children may access to express themselves and impart information while upholding their safety from harmful digital content and risks.

3.4.7 Article 16 of the UNCRC

Article 16 confers the right to privacy, and this is one of the most significant right relative to the use of digital technologies. This right to privacy is specifically relevant to children and their rights to special care and protection within the digital environment.¹⁷¹ Article 16 states that every child is entitled to adequate protection that sustains their privacy as well as privacy associated with their home, family and correspondence.¹⁷² The protection of

¹⁶⁸ A 13(2) of the United Nations Convention on the Rights of the Child, (1989).

¹⁶⁹ A 13(2) of the United Nations Convention on the Rights of the Child, (1989).

¹⁷⁰ A 13(2)(a) of the United Nations Convention on the Rights of the Child, (1989).

¹⁷¹ See A 16 of the United Nations Convention on the Rights of the Child, (1989).

¹⁷² A 16 (1) of the United Nations Convention on the Rights of the Child, (1989).

this right becomes a focal point relative to the frequent use of digital platforms and should be a constant priority for state members of the UNCRC.

Privacy is a broad concept within the digital environment, and it contextualises concerns such as data protection, identity theft, scams, interactions with paedophiles, coercion, and illicit activities.¹⁷³ Essentially, children may be percipient towards the use of technological and digital devices, however a majority of the time, they are extremely vulnerable within the digital environment. This vulnerability is exhibited in the substantial lack of awareness and the immediate capability to foresee detrimental privacy risks associated with the use of the digital environment.¹⁷⁴

Other privacy risks encountered may include disclosure of a child's personal information such as their identity, location and whereabouts. This disclosure exposes children to physical interactions with criminals.¹⁷⁵ Such exposure and vulnerability encourages state members to effectively place intervening measures and legislation that are designed to protect children from such harm.¹⁷⁶

Notwithstanding that a child's right to special care and protection is of priority, it is important to ensure that promulgation of protective measures with regards a child's privacy within the digital environment does not infringe upon a child's right to expressed views in the broader sense. In essence, adequate protection would require access to and surveillance of a child's digital interactions or communications.¹⁷⁷ This requires state members to strike a balance between sustaining adequate protection from online risks while respecting the child's right to expression and other significant rights of association.

¹⁷³ Lievens, Livingstone, McLaughlin, O'Neill and Verdoodt 2018 *International children's rights law* 496.

¹⁷⁴ Lievens, Livingstone, McLaughlin, O'Neill and Verdoodt 2018 *International children's rights law* 496.

¹⁷⁵ Lievens, Livingstone, McLaughlin, O'Neill and Verdoodt 2018 *International children's rights law* 496.

¹⁷⁶ A 16(2) of the United Nations Convention on the Rights of the Child, (1989).

¹⁷⁷ Lievens, Livingstone, McLaughlin, O'Neill and Verdoodt 2018 *International children's rights law* 496.

3.4.8 Article 17 of the UNCRC

Article 17 bears significance within the digital environment as it recognises and encourages the importance of mass media and adequate access to information for the benefit of the child.¹⁷⁸ For many years, the narrow meaning of media often referred to traditional instruments such as print advertising, television and radio broadcasting and direct mail however, applied science and digital technology has advanced the understanding of digital media as we know it today.¹⁷⁹ With the introduction of digital media, access to information and material has become easier and faster due to the rapid speed of the internet.

With digital media gaining sufficient prominence, children can access information related to their education as well as social and cultural aspects in more convenient fashion. This gives state members to the UNCRC the obligation to assert measures that will enable sufficient access to information through digital media, for the fulfilment of important child rights such as education, survival and development and other rights eminent towards their best interests.¹⁸⁰

The utilisation of digital media or the digital environment in general permits acquisition of information without the inconvenience of any restrictions.¹⁸¹ Primarily, this means that any form of information is openly available for the convenient viewing by any person, including children.¹⁸² The lack of restrictions regarding the dissemination of information within digital media exposes children to encountering certain illicit materials and information that is detrimental to their wellbeing. This further encourages state members, as enshrined under the UNCRC, to enact guidelines that protect children from such harm,

¹⁷⁸ A 17 of the United Nations Convention on the Rights of the Child, (1989).

¹⁷⁹ Lievens, Livingstone, McLaughlin, O'Neill and Verdoodt 2018 *International children's rights law* 498.

¹⁸⁰ A 17 (a) of the United Nations Convention on the Rights of the Child, (1989).

¹⁸¹ Lievens, Livingstone, McLaughlin, O'Neill and Verdoodt 2018 *International children's rights law* 498.

¹⁸² Lievens, Livingstone, McLaughlin, O'Neill and Verdoodt 2018 *International children's rights law* 498.

prominently sustaining their rights to special care and protection within the digital environment.¹⁸³

Moreover, Article 17 identifies the significance of international co-operation regarding the transmission of information and materials for the benefit of children.¹⁸⁴ This encourages member states to work coherently together to administrate the various materials or resources used by children to gain access to the digital environment from various parts of the world,¹⁸⁵

3.4.9 Article 19 of the UNCRC

One of the most exceptional facets about the UNCRC is its aim to recognise, identify and further protect children from of all forms of child exploitation.¹⁸⁶ Various articles within the UNCRC refer to protective rights relevant to the wellbeing of children in all aspects of their lives and this should be extended to include within the digital environment.¹⁸⁷

The significance of these protective rights is that they provide guidance on what conduct may constitute or will be considered as exploitation and how measures put in place by member states can assist in protecting children adequately. Article 19 of the UNCRC finds relevance within the digital environment as it elucidates the different ways in which children may be subjected to exploitation or mishandling and how member states must ensure that appropriate measures are put in place in to protect children adequately.¹⁸⁸

The provisions of Article 19 states:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental

¹⁸³ A 17 (e) of the United Nations Convention on the Rights of the Child, (1989).

¹⁸⁴ A 17 (b) of the United Nations Convention on the Rights of the child, (1989).

¹⁸⁵ A 17(b) of the United Nations Convention on the Rights of the Child, (1989).

¹⁸⁶ Lievens, Livingstone, McLaughlin, O'Neill and Verdoodt 2018 *International children's rights law* 501.

¹⁸⁷ These rights can be identified as Protective rights and somewhat explicitly state what kind of Exploitation is prohibited and what measures can state members implement to prevent any further exploitation.

¹⁸⁸ See A 19 of the *United Nations Convention on the Rights of the Child*, (1989).

violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.¹⁸⁹

This provision identifies various forms of ways in which children may suffer exploitation or abuse, creating an interference in a child's wellbeing as well as their rights to special care and protection. State members as well as any individual who has a significant interest in the best interests of the child, are required to have measures in place that will protect children from any form of harm and these provisions should extend to invertible harm that child may or will face within the use of the digital environment.

This provision is also of importance considering that the digital environment has various individual and unidentified profiles that intentionally intimidate and coerce vulnerable individuals such as children into participating in online based content that generates different forms of abuse or exploitation.

When interpreting the provisions of Article 19, it is imperative to note that children can be easily protected from violence or any form of abuse in the real world by relatively identifying the source of the abuse or where it is coming from. This is not easily done in the digital environment as digital users have the capability to manipulate their anonymity and cause harm to children without ever being identified or traced.¹⁹⁰ Children are often approached and violated by individuals who hide their identity, making it difficult to realise immediate special care and protection. For state members to effectively curb this problematic aspect, extensive and appropriate measures with additional technological advances must be enacted to protect children from such digital users.

Article 19 of the UNCRC further states:

Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary

¹⁸⁹ A 19 (1) of the United Nations Convention on the Rights of the Child, (1989).

¹⁹⁰ Lievens, Livingstone, McLaughlin, O'Neill and Verdoodt 2018 *International children's rights law* 501.

support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.¹⁹¹

With this provision, state members are not only encouraged to actively protect children from violence but to anticipate further involvement in any manner concerning the maltreatment of and violence meted on a child.¹⁹² The inclusion of affirmative authorities such as judicial officers and follow up procedures such as investigations, enables state members to extend such measures within the digital environment and provide accountability for the infringement upon children's rights to special care and protection online just as they do in the offline world.¹⁹³

To further provide informative clarification with regards to the provisions of Article 19 as well as comprehensible obligations to be executed by state members, the Committee enacted and published *General Comment No 13 on the right of the child to protection from all forms of violence* (hereafter 'General Comment No 13').¹⁹⁴ The Committee explicitly states that the reason for the promulgation of General Comment No 13 is the upsurge in child maltreatment and violence and as a result, encourages state members to strengthen measures of action to end violence against children.¹⁹⁵

The promulgation of General Comment No 13 carries significant weight within the implementation and recognition of children's rights to special care and protection in the digital environment due to the technological advancements that have the potency to enable violence or abuse against children in various forms.¹⁹⁶ Children encounter numerous violations of their rights within digital platforms through exposure to obscene content, cyberbullying, child pornography, scams and other online based detrimental

¹⁹¹ A 19(2) of the United Nations Convention on the Rights of the Child, (1989).

¹⁹² A 19(2) of the United Nations Convention on the Rights of the Child, (1989).

¹⁹³ A 19(2) of the United Nations Convention on the Rights of the Child, (1989).

¹⁹⁴ CRC/C/GC/13

¹⁹⁵ CRC/C/GC/13 par 3.

¹⁹⁶ Huda *et al* 2017 *International Electronic Journal of Elementary Education* 693.

contents.¹⁹⁷ Not only does online based illicit content violate a child's best interests but it also violates their right to adequate special care.¹⁹⁸

The Committee is relatively of the view that in enabling state members to take protective measures against any form of violence against children, consideration must be made on how these violations come about in the first place. This can be achieved by drawing inference to Article 19.¹⁹⁹ Furthermore, the Committee elucidates that violence should not be limited to physical or intentional harm but also interpreted to include non-physical or non-intentional harm such as psychological maltreatment.²⁰⁰ This encourages state members to interpret both Article 19 as well as General Comment No 13 to mean all online based threats that generate distress and violation of children and their rights in the same manner as violence in the natural world.

Moreover, in an effort to enforce the provisions of Article 19 and the General Comment No 13, state members are obliged to do so through various channels of communication, organisations and structures, including print media, the internet and other means.²⁰¹ The acknowledgement of the internet by the Committee as a notable means of communication corroborates the recognition of the digital environment and its impact on the proper enforcement of children's rights to special care and protection.

3.4.10 Article 34 of the UNCRC

Though this paper has outlined the significant benefits that the use of the digital environment has provided for children, it has also brought about disadvantages and threats to children's rights and as a result, has brought about concerns regarding children

¹⁹⁷ Online based illicit content not only creates inappropriate exposure to vulnerable individuals such as children but also violates a variety of their rights enshrined under the UNCRC as well as diminishes their right to adequate special care.

¹⁹⁸ See A 3(1) of the United Nations Convention on the Rights of the Child, (1989).

¹⁹⁹ CRC/C/GC/13 par 4

²⁰⁰ CRC/C/GC/13 par 4

²⁰¹ CRC/C/GC/13 par 8

encountering sexual abuse and exploitation.²⁰² Article 34 of the UNCRC outlines preventative and reactive measures that state members must observe to protect children from such abuse.²⁰³ By placing an obligation on State members to enact measures that will prevent children from being sexually abused and exploited, this obligation extends to all platforms in which children interact and use such as the digital environment.

Article 34 of the UNCRC finds relevance relative to the impact that the digital environment has on the recognition and implementation of children's rights to adequate protection due to the increased use of digital technologies by children.²⁰⁴ With the rapid use of the digital environment, children have come to create and develop several relationships, interactions and connections with numerous individuals that they have never met, and this has the probability to pose a threat to a child's safety and security.²⁰⁵ These interactions and connections with unknown digital users may have a negative impact on the development of children's rights as they can be exposed to acts of sexual predation.²⁰⁶

Furthermore, the increased use of the digital environment and digital platforms by children has also enabled opportunists to subject children to various forms of exploitation such as the exposure to pornographic materials and inappropriate content.²⁰⁷ This kind of exploitation enables a certain degree of harm to not only the child's physical wellbeing and safety but also a child's mental health and sense of vulnerability. As a result of this kind of exploitation towards children, the best interest of the child becomes paramount and must be implemented as entailed under the provisions of Article 34, with measures that will protect children from any form of sexual exploitation.

²⁰² A 34 of the United Nations Convention on the Rights of the Child, (1989).

²⁰³ A 34 makes provision for State members to take appropriate measures including national, bilateral and multilateral measures that will protect children from sexual abuse.

²⁰⁴ The digital environment is a large component in which all kinds of illegal activities and Materials that individuals, including, are bound to come across unless a firm system is put in place to outsource exposure to such.

²⁰⁵ Lievens, Livingstone, McLaughlin, O'Neill and Verdoodt 2018 *International children's rights law* 501.

²⁰⁶ Gustin M 2022, EU and Comparative Law Issues and Challenges Series 475.

²⁰⁷ Lievens, Livingstone, McLaughlin, O'Neill and Verdoodt 2018 *International children's rights law* 501.

As imperative as Article 34 is as a protective right towards the sexual exploitation of children, its convenience lies in implementing effective preventive measures that curtail the instigation of any form of sexual exploitation of children.²⁰⁸ The UNCRC places obligations on state members to take appropriate national, bilateral, and multilateral measures to prevent such sexual exploitation of children.²⁰⁹ With a majority of these incidents occurring within digital domains, it is only imperative that state members extend their obligations to special care and protection of children and their rights within the digital environment.

Moreover, the mass use of digital platforms by children has stoked serious risks towards the wellbeing of children. State members therefore have the obligation to classify any kind of sexual exploitation towards children as unlawful and implement measures that will uphold the safety and security of children within different platforms, including the digital environment.²¹⁰ Article 34 also states that measures must be enacted to prevent:

The exploitative use of children in pornographic performances and materials²¹¹

Taking that into consideration, it would be suitable for state members to effectively enact measures that curb the vast circulation of exploitative sexual materials of children within the digital environment while sustaining their right to dignity. Furthermore, the UNCRC acknowledges the impact that sexual abuse and exploitation has on children within its *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*.²¹²

²⁰⁸ Lievens, Livingstone, McLaughlin, O'Neill and Verdoodt 2018 *International children's rights law* 501.

²⁰⁹ A 34 of the United Nations Convention on the Rights of the Child, (1989).

²¹⁰ Livingstone and O'Neill "Children's rights online: Challenges, dilemmas and emerging directions" 19 – 38.

²¹¹ A 34 (c) of the United Nations Convention on the Rights of the Child, (1989).

²¹² See preamble of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

3.5 Positioning children's rights as enshrined under the ACRWC

within the digital environment

The African Charter on the Rights and Welfare of the Child (ACRWC) conveys detailed principles concerning the rights and wellbeing of the child.²¹³ The ACRWC was adopted in 1990 by the Organisation of African Unity (OAU) which is now known as the African Union (hereinafter referred to as 'AU'),²¹⁴ and thereafter came into effect in 1999. The ACRWC shares similar objectives to the UNCRC and exists as a comprehensive children's charter that outlines and recognises children's rights as well as sets out universal principles pertaining to the preservation and protection of children's rights in Africa.

Like the UNCRC, the ACRWC is a legally binding instrument that holds all its signatories responsible and accountable for the implementation and recognition of children's rights in Africa.²¹⁵ The ACRWC also emphasises the significance of having active participation of duties imposed towards everyone in order to promote and protect children's rights as well as their wellbeing.²¹⁶ The ACRWC not only outlines the principles and the duties that signatories have towards preserving sufficient special care and protection of children in Africa, but has also created a legally binding instrument that has promulgated detailed recognition of children's rights within the African context while taking into consideration the socio-cultural and economic realities that Africans encounter.²¹⁷

The ACRWC shares similar objectives to the UNCRC and exists as a comprehensive children's charter that outlines issues that are not necessarily addressed in other global instruments such as the UNCRC and this is due to the different cultural dynamics within the African region.²¹⁸

²¹³ See preamble of the *African charter on the Rights and Welfare of the Child*, (1990).

²¹⁴ The African Union was previously known as the Organisation of African Unity.

²¹⁵ See Preamble of the African Charter on the Rights and Welfare of the Child, (1990).

²¹⁶ See Preamble of the African Charter on the Rights and Welfare of the Child, (1990).

²¹⁷ Ekundayo 2015 *International Journal of Humanities and Social Science* 147.

²¹⁸ Ekundayo 2015 *International Journal of Humanities and Social Science* 147.

Children in Africa face various issues and situations that expands their vulnerability more as opposed to other children anywhere else across the world.²¹⁹ The lack of social support and education in Africa is one of the most pressing issues influencing certain discriminatory occurrences involving children and their wellbeing.²²⁰ The situation pertaining to the African child's livelihood remains a unique and critical factor influenced by numerous socio-economic, cultural, traditional and development circumstances.²²¹

The use and adaptation of the digital environment and digital technologies has become ubiquitous in various settings throughout Africa and has further evolved as a significant factor in the realisation of certain human rights such as the progressive realisation of education,²²² expressed views and opinions ²²³and many other significant human rights. With a majority of States in Africa being influenced by the pervasive use of the digital environment and as a result, children have adopted to digital use on a regular basis.²²⁴ Children in Africa are primarily the most influenced by the adaptation of the digital environment and this is achieved through the abundant access of digital devices such as smartphones. ²²⁵

Taking into consideration the abundant use and adaptation of the digital environment and digital platforms by children in Africa, their rights as enshrined under the ACRWC are largely affected, be it positively or negatively. The ACRWC recognises that for a child to attain prominent enjoyment and recognition of their rights, eradication of non-discrimination is essential.²²⁶ This reflects the provisions of the UNCRC and should be

²¹⁹ Preamble of the African Charter on the Rights and Welfare of the Child, (1990).

²²⁰ This is derived from the fact that Africa as a continent has been previously disadvantaged as opposed to the rest of the world due to poverty and other economical restrains. This led to African countries receiving less resources.

²²¹ See preamble of the *African Charter on the Rights and Welfare of the Child*, (1990).

²²² A 11 of the African Charter on the Rights and Welfare of the Child, (1990).

²²³ A 7 of the African Charter on the Rights and Welfare of the Child, (1990).

²²⁴ With African states being regarded as developing, a majority have managed to adapt to the prominent technological advances, with children largely showing an interest in digital platforms and media.

²²⁵ Children are slowly getting access to digital devices as they utilise them for educational purposes.

²²⁶ A 3 of the African Charter on the Rights and Welfare of the Child, (1990).

extended to children in Africa as well.²²⁷ All rights enshrined under the ACRWC eminent to the African child, should be given the same respect, approach and protection as rights enshrined under the UNCRC. Numerous provisions within the ACRWC prescribe immediate special care and protection of children's rights, and as a result, find relevance within the digital environment context. Provisions within the ACRWC pertaining to the privacy of children,²²⁸ freedom of expression, the eradication of sexual exploitation,²²⁹ and child abuse all find relevance within the digital environment and should be approached with similar respect and adherence just as they are within the UNCRC and will be discussed in detail below.

3.5.1 Article 4 of the ACRWC

The provisions of Article 4 entail the significance of taking the best interests of the child into consideration within all actions concerning the child.²³⁰ This Article further entails that such consideration to the best interests of the child should be adhered by all persons or authority that undertakes any kind of action concerning the child²³¹ and with that being of importance, any action undertaken by a child or concerning a child within the digital environment finds relevance. This Article indicates how the ACRWC holds significant value to protecting children from any detrimental action that might interfere with their best interests taken into consideration.

Like the UNCRC, the ACRWC entails obligations to all persons and authorities within the respected African States to impart and implement the views of the child in matters concerning them.²³² Article 4 creates an opportunity for children to impart their views and opinions through the digital environment and have those views duly considered and communicated to the relevant parties or authorities. This will not only enhance a child's

²²⁷ This extension of adequate protection of rights towards the African region minimizes the underrepresentation that the African region sustained during the UNCRC drafting.

²²⁸ A 10 of the African Charter on the Rights and Welfare of the Child, (1990).

²²⁹ A 16 of the African Charter on the Rights and Welfare of the Child, (1990).

²³⁰ A 4 of the African Charter on the Rights and Welfare of the Child, (1990).

²³¹ A 4 of the African Charter on the Rights and Welfare of the Child, (1990).

²³² A 3 of the United Nations on the Convention on the Rights of the Child resembles similar provisions to A 4 of the African Charter on the Rights and Welfare of the Child.

participatory right but will also enable child rights to be protected and implemented efficiently.

3.5.2 Article 5 of the ACRWC

Article 5 of the ACRWC emphasises a child's survival and development and this is primarily to be protected by law.²³³ This Article places an important role on State members to enact laws and promulgate regulations that will effectively protect and promote a child's right to survival and development and this finds relevance within the digital environment. When children interact within the digital environment, their wellbeing becomes paramount due to the digital content that they consume and adapt to.

Children use and consume digital content more on a regular basis and this has an impact on their behavioural patterns, their physical and mental wellness as well as their development in general. By recognising the significance of having a child's development and survival being protected, the ACRWC has enabled State members to adhere to such a duty in all possible ways.²³⁴ This can primarily be achieved by implementing ways in which children can access the digital environment whilst sustaining their right to special care and protection.

3.6 Conclusion

A number of rights within the UNCRC as well as the ACRWC find adequate relevance within the digital environment. Digital platforms have shown significant presence and contribute to various aspects of a child's life, enabling favourable opportunities for their wellbeing while also creating illicit prospects. This distinction justifies intervention regarding the approach and implementation of children's rights and as a result, must be mediated by state members within the obligations imposed upon them by the UNCRC as well as the ACRWC.

²³³ A 5(1) of the African Charter on the Rights and Welfare of the Child, (1990).

²³⁴ A 5(2) of the African Charter on the Rights and Welfare of the Child, (1990).

The use of digital platforms by children has created a clear intersectionality between the offline and online domains, calling for imminent recognition and protection of their rights as enshrined under the UNCRC and the ACRWC. Moreover, to sustain such protection, state members have serious obligations to enact with regards special care and protection of children's rights in the digital environment while maintaining the use of digital technologies for concomitant child development.

4 Chapter 4 South African Legal Framework

4.1 Introduction

The commitment towards the objectives and obligations imposed by international and regional human rights treaties relies on states to effectively undertake steps of implementation within domestic legislation.²³⁵ South Africa is a member to international and regional child rights instruments such as the UNCRC and ACRWC and as a result, has acceded to undertaking the implementation of the provisions enshrined under these instruments, bearing legal compliance.²³⁶

Taking into consideration the magnitude of various legal regimes, South Africa is recognised for its assertion of constitutional democracy.²³⁷ The conclusive assimilation of constitutional supremacy in South Africa actively promotes consistency, requiring every law or conduct to be imposed and fulfilled in accordance with the provisions enshrined under the Constitution.²³⁸ Any other laws contradictory to the values of the Constitution are considered to be invalid and primarily lack reason to be adapted within the South African legal regime.²³⁹

The Republic of South Africa, through its Constitution, recognises the values of human development and democracy of all individuals who live in it.²⁴⁰ The achievement of equal protection, equality, dignity, and freedom remains one of the most important values for the full recognition of the fundamental human rights of individuals.²⁴¹ Furthermore, the Constitution itself recognises children as an integral part of society and their rights are just as valuable to the constitutional framework as any other rights.²⁴² Children's rights enabled adequate recognition through the Bill of Rights as well as through a separate

²³⁵ Section 231(4) of the Constitution of the Republic of South Africa, 1996.

²³⁶ Section 231(4) of the Constitution of the Republic of South Africa, 1996.

²³⁷ Section 1 of the Constitution of the Republic of South Africa, 1996.

²³⁸ Section 2 of the Constitution of the Republic of South Africa, 1996.

²³⁹ Section 2 of the Constitution of the Republic of South Africa, 1996.

²⁴⁰ See preamble of the Constitution of the Republic of South Africa, 1996.

²⁴¹ Section 7 of the Constitution of the Republic of South Africa, 1996.

²⁴² Section 28 of the Constitution of the Republic of South Africa, 1996.

provision specially dedicated to the preservation and protection of children and their wellbeing.²⁴³

To establish a legal regime that provides special care and protection of children, the State has the duty to enact legislation that provides sufficient protection with regards to the rights of children as stipulated under international law and the Constitution.²⁴⁴ Legislation such as the Children's Act,²⁴⁵ has inference in all matters concerning children, and can find sufficient relevance within the implementation and recognition of children's rights within the digital environment. The Children's Act places a general duty on the State to safeguard those rights to the maximum possibility.

In light of the above mentioned, this chapter explores the fundamental values of the Constitution and how these values recognise and protect the rights of all people in the country including children.²⁴⁶ In preserving and implementing the democratic values of equality, freedom and human dignity,²⁴⁷ it is important to determine whether such an inference to the preservation of democratic values as stated under the Constitution extends to children and their protection within the digital environment.

In evaluating the state's obligations to protect, respect and fulfil rights enshrined under the Bill of Rights, this chapter also explores the State's attempt to comply with international and regional regimes by evaluating whether such obligations imposed by the UNCRC as well as the ACRWC are effectively implemented within the State's legal regime through legislation and to what extent they underpin the protection of children's rights to special care and protection within the ambit of the digital environment.

²⁴³ See Section 28 of the Constitution of the Republic of South Africa, 1996.

²⁴⁴ See A 4 of the United Nations Convention on the Rights of the Child, 1989.

²⁴⁵ Children's Act 38 of 2005.

²⁴⁶ Section 7(1) of the Constitution of the Republic of South Africa, 1996.

²⁴⁷ Section 7(2) of the Constitution of the Republic of South Africa, 1996.

4.2 An overview of the Constitutional framework in South Africa

The promulgation of the 1996 Constitution saw South Africa adapt to a newly structured dispensation that affirms the State as one sovereign and democratic republic.²⁴⁸ The new democratic order is founded on fundamental values, human dignity, equality, non-racism and non-sexism, the supremacy of the Constitution as well as the advancement of human rights and freedoms for all.²⁴⁹ These foundational principles are entrenched within the provisions of the Constitution and they affirm a transformed South Africa united in diversity.

As mentioned above, South Africa confers to a dispensation that is based on the values of Constitutional supremacy.²⁵⁰ The notion of Constitutional supremacy requires all principles, conduct and laws to abide by the values of the Constitution, fulfilling obligations imposed by such values.²⁵¹ Section 2 states:

this Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.²⁵²

By requiring laws to align with the values of the Constitution, these values must take precedence over any other law and failure renders such laws or conduct invalid and inconsistent.²⁵³ This provision further affirms the legitimacy of the South African legal system that derives its values from the Constitution. It is declared as a one system law to which all law, inclusive of common law, becomes subject to Constitutional adherence.²⁵⁴

²⁴⁸ Section 1 of the *Constitution of the Republic of South Africa*, 1996; the 1996 Constitution was promulgated by the late former President Nelson Mandela and came into effect on the 4th of February 1997 in replacement of the interim Constitution of 1993.

²⁴⁹ Section 1(a)-(d) of the Constitution of the Republic of South Africa, 1996.

²⁵⁰ See footnote 3 above; See also Section 1 of the *Constitution of the Republic of South Africa*, 1996.

²⁵¹ Section 2 of the Constitution of the Republic of South Africa, 1996.

²⁵² Section 2 of the Constitution of the Republic of South Africa, 1996.

²⁵³ Section 2 of the Constitution of the Republic of South Africa, 1996.

²⁵⁴ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of*

Chapter 2 of the Constitution outlines a Bill of Rights comprising a number of fundamental human rights.²⁵⁵ These are basic human rights to which every person by virtue of being a human, is entitled. Rights within the Bill reflect the values on which the Constitution is founded and promote human rights and freedoms in general.²⁵⁶ The Constitution has enshrined these rights for the protection and wellbeing of all individuals who live in South Africa, including children.²⁵⁷

The Bill of Rights comprises civil, political, and socio-economic rights, all of which are protected therein and bind all branches of government, organs of state as well as the natural and juristic person.²⁵⁸ With the Bill of Rights regarded as the cornerstone of democracy, the State is required to respect, promote, protect, and fulfil all the rights in the Bill, subject to the limitations imposed by section 36 or elsewhere.²⁵⁹

By establishing sufficient protection and recognition of the Constitutional values and all other rights enshrined in the Bill of Rights, the Constitution acknowledges the impact that past experiences and social injustice have had on people and as a result, created a sphere of vulnerability that protects certain groups of people.²⁶⁰ The current Constitutional order delineates the duty to protect the vulnerable and everyone else by assuring adequate fulfilment of all rights enshrined under the Bill of Rights.

the Republic of South Africa and Others 2000 (2) SA 674 (CC) para 44.

²⁵⁵ See chapter 2 of the Constitution of the Republic of South Africa, 1996.

²⁵⁶ Rights enshrined under the Bill of Rights must be read and interpreted in conjunction with the values outlined under Section 1 of the Constitution.

²⁵⁷ Section 7(1) of the Constitution of the Republic of South Africa, 1996.

²⁵⁸ Section 8(1) of the Constitution of the Republic of South Africa, 1996.

²⁵⁹ Section 36 of the Constitution is often referred to as the general limitation clause as it provides for all rights enshrined under the Bill of rights to be limited only in terms of law of general application. For the limitation to be valid, it must be justifiable and reasonable in an open and democratic society.

²⁶⁰ See *Sidumo v Rustenburg Platinum Mines Ltd* and Others 2008 (2) SA 24 (CC) para 150; See also the preamble of the Constitution of the Republic of South Africa, 1996.

4.2.1 The impact of the current Constitutional framework in preserving children's rights to special care and protection within the digital environment.

The significance of the Constitution lies in its inherent duty to protect, promote, and fulfil the rights of all people that live in South Africa, and children are not an exception to that duty.²⁶¹ Children are an integral part of society deserving of protection and special care not only from the State but from parents and caregivers as well.²⁶² They are ultimately seen as a vulnerable group considering how they still depend on the care of their parents and caregivers.

South Africa's Constitutional order has shown a significant recognition of the importance of childhood and preserving the safety of children in all matters.²⁶³ This is evident through the Constitution's development of a coherent provision under section 28 that entails a range of rights providing special care and protection for children.²⁶⁴ In addition to protection provided in section 28 of the Constitution, children accrue the remainder of their Constitutional rights through the rest of the provisions enshrined under the Bill of Rights.

A specific inclusion of a children's rights provision within the Constitution as enshrined by section 28 not only reassures the effective implementation of special care and assistance towards childhood,²⁶⁵ but also places an obligation on the state to draft and enact measures that preserve and sustain an appropriate environment for children. The Constitutionality of children's rights further promulgated an avenue that sustains and incorporates the values of the UNCRC and the ACRWC.²⁶⁶ The insertion of international

²⁶¹ See Section 7(1) of the Constitution; Children are human beings as well and deserve the same amount of respect and honour as adults.

²⁶² See Section 28 of the Constitution of the Republic of South Africa, 1996.

²⁶³ See section 28 of the Constitution; preamble of the Children's Act

²⁶⁴ Section 28 of the Constitution of the Republic of South Africa, 1996.

²⁶⁵ See Preamble of the United Nations Convention on the Rights of the Child, 1989; The UNCRC specifically mentions the significance of childhood asserting adequate protection and assistance, to which South Africa as a state member has adopted within its Constitutional framework.

²⁶⁶ Both the UNCRC and the ACRWC are of the principle that childhood is entitled to special care and assistance including appropriate legal protection.

children's rights within the Constitution allows the State to be justiciable and notable towards the enforcement of the Bill of Rights.²⁶⁷ The overall inclusion of international child right instruments to which South Africa is a part has effectively influenced the recognition of children's rights in the Constitution.²⁶⁸

The Constitution has shown consideration to the evolving maturity of children and how that should warrant a need for adequate protection and awareness regarding their autonomy within the parameters and values of the Constitution.²⁶⁹ In *Centre for Child Law and Others v Media 24 Limited and Other*,²⁷⁰ the Constitutional Court emphasised the duty embedded within the Constitution to protect children. In this matter, the court was faced with an application that arose from an order made by the Supreme Court of Appeal with regards section 154 of the Criminal Procedure Act²⁷¹ (hereinafter the 'CPA') and how it was constitutionally invalid as it did not protect the identity of child victims in criminal proceedings.²⁷²The court stated:

The recognition of the innate vulnerability of children is rooted in our Constitution, and protecting children forms an integral part of ensuring the paramountcy of their best interests. This Court has underscored the importance of the development of a child, and the need to protect them and their distinctive status as vulnerable young human beings.²⁷³

A child's development is subject to different factors such as their physical growth, education, health, emotional, social, and cultural interaction or behaviour, communication skills and a significant number of other factors. Most of these factors mentioned above such the rights to education,²⁷⁴ the right to life,²⁷⁵ freedom and security,²⁷⁶ health care, food, water and social security²⁷⁷ are already provided for and recognised within the

²⁶⁷ Kilkelly and Liefwaard 2019 *De Jure Law Journal* 522.

²⁶⁸ See section 39(1)(b) of the Constitution of the Republic of South Africa, 1996.

²⁶⁹ Sloth-Nielsen 2019 *De Jure Law Journal* 512.

²⁷⁰ *Centre for Child Law and Others v Media 24 Limited and Other* 2020 (4) SA 319 (CC)

²⁷¹ Act 51 of 1977.

²⁷² *Centre for Child Law and Others v Media 24 Limited and Other* 2018 (2) SACR 696 (SCA).

²⁷³ *Centre for Child Law and Others v Media 24 Limited and Other* 2020 (4) SA 319 (CC) para 64.

²⁷⁴ Section 29 of the Constitution of the Republic of South Africa, 1996.

²⁷⁵ Section 11 of the Constitution of the Republic of South Africa, 1996.

²⁷⁶ Section 12 of the Constitution of the Republic of South Africa, 1996.

²⁷⁷ Section 27 of the Constitution of the Republic of South Africa, 1996.

Constitution and they are subject to the state's obligation to realise these rights in the best interests of the child.

The rapid growth of digital technologies within developing States such as South Africa has enabled children to access a stream of knowledge and information instrumental to their wellbeing as well as promote their growth and sustainable development.²⁷⁸ The digital environment has influenced how children learn and perceive knowledge, how they express themselves through matters that concern or affect them and their environment.²⁷⁹ The Constitution, through the Bill of Rights, acknowledges this and compels the state to adequately fulfil, promote and protect each one based on the democratic values upon which the constitution is founded.

It is without a doubt that the use of digital platforms by children and the exposure to the digital environment in general has generated a sphere of extensive learning and opportunities beneficial to the development and special care of children,²⁸⁰ however the rapid use of digital technologies has exposed children to platforms that prompt discriminatory content and risks that may have a detrimental impact on their human rights.²⁸¹ These risks include cyberbullying, hate speech, racism, data protection issues, distribution of child pornography or cybercrimes.²⁸² While a majority of these risks may have a direct impact upon children's safety, these risks also steer against rights procured by children in terms of the Constitution as well as the founding principles of the Constitution.

Section 28 of the Constitution prescribes protecting children against any form of maltreatment, neglect, abuse or any act that is degrading towards their wellbeing.²⁸³ This provision entails the State's obligation to preserve measures that sustain special care towards the wellbeing of children so as to evade any form of infringement aimed at the

²⁷⁸ Luthi 2017 Strathmore Law Review 85.

²⁷⁹ Luthi 2017 Strathmore Law Review 85

²⁸⁰ Luthi 2017 Strathmore Law Review 85.

²⁸¹ Rights enshrined under Section 28 of the Constitution and the remainder of the Bill of Rights.

²⁸² Luthi 2017 Strathmore Law Review 86.

²⁸³ Section 28(1)(d) of the Constitution of the Republic of South Africa, 1996.

proper fulfilment and protection of children’s rights. When children experience any form of maltreatment or abuse within the digital environment, it still has the same detrimental impact upon a child’s wellbeing as it has outside the digital environment.²⁸⁴ In this respect, the Constitution must abide by its duties to preserve the rights of children, even within the ambit of the digital environment.

The ideology of participating in matters that are of interest through active engagement, is one of the fundamental reasons why children become integrated within the digital environment.²⁸⁵ One of the reasons being that the digital environment operates at an instantaneous pace, enabling fast and direct interaction regarding numerous issues ranging from sports, entertainment, politics and social issues.²⁸⁶ This has enabled children to promptly express their views and opinions on matters that are of interest to or concern them.²⁸⁷

The Constitution primarily affirms freedom of expression.²⁸⁸ This affirmation entails that:

Everyone has the right to freedom of expression, which includes— (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research.²⁸⁹

This provision enshrines the constitution’s recognition of expressed views as a fundamental human right that everyone is entitled to, including children. The inclusion of this right as a fundamental human right enshrined within the Bill of Rights requires the State to also respect, protect, promote and fulfil the right accordingly.²⁹⁰ By promulgating special care and protection towards children’s right to expression within the digital

²⁸⁴ Luthi 2017 Strathmore Law Review 87

²⁸⁵ Luthi 2017 Strathmore Law Review 87.

²⁸⁶ Luthi 2017 Strathmore Law Review 87.

²⁸⁷ Sustaining their right to free expression as enshrined under the Constitution and within international instruments.

²⁸⁸ See section 16 of the Constitution of the Republic of South Africa, 1996.

²⁸⁹ Section 16(1) of the Constitution of the Republic of South Africa, 1996.

²⁹⁰ See section 7(2) of the Constitution of the Republic of South Africa, 1996.

environment, the State is fundamentally obliged to live up to its Constitutional duty as enshrined under section 7.

The Constitution's assertion towards free expression, particularly with regards children and their use of the digital environment to express their views and opinions, confers one of the four cardinal pillars of the UNCRC under Article 12 that promotes the inclusion of children's views on matters that are of concern to their wellbeing. This suggests the Constitution's duty to consider international law when interpreting the rights enshrined under the Bill of Rights.²⁹¹

Freedom of expression or 'free speech' however, is one of the few rights that can complicate further inclusion of other rights as enshrined under the Constitution. Free speech relates to the views of people and with that comes an affirmation of their right to human dignity. The Constitution is of the notion that everyone has inherent dignity and the right to have their dignity respected and protected,²⁹² and with the direct reference being 'everyone', this right is also extended to children as human rights bearers. The right to freedom of expression is often violated within the context of digital platforms as people, including children, experience different forms discriminatory behaviour and inequality, all which have a detrimental impact on the proper attainment of this inherent dignity.

Striking a balance between allowing free flow of expressed views, which is of importance towards the development of children, and the regulation and monitoring of the digital environment is imperative. This is to enable children to have a say in matters that affect them through active participation, either within or outside the digital environment, without enduring or feeling inferior over their views as a priority. This will not only promote and show adequate respect towards a child's human dignity but will also affirm that the Constitution is relative to its duties to promote, preserve, respect and protect the rights in the Bill of Rights.²⁹³

²⁹¹ Section 39(1)(b) of the Constitution of the Republic of South Africa, 1996.

²⁹² Section 10 of the Constitution of the Republic of South Africa, 1996.

²⁹³ Section 7 of the Constitution of the Republic of South Africa, 1996.

The Constitution places obligations to respect, protect, and promote the rights enshrined under the Bill of Rights, however, it is not subject to place an unjustified limitation on that obligation simply based on the platform in which it is applicable. All rights within the Bill of Rights, including children's rights, may be limited only in terms of general application and if the limitation is reasonable and justifiable based on the values of human dignity, equality and freedom.²⁹⁴ It would therefore be unjustifiable not to implement children's rights to special care and protection within the ambit of the digital environment. In *Minister of Welfare and Population Development v Fitzpatrick and Others*,²⁹⁵ the court states:

Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights enumerated in s 28(1) and 28(2) and must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in it.²⁹⁶

The Constitution's obligations to protect children should therefore not be independent or subjected to unjustified limitations that are detrimental to their best interests. It is important for children's rights to be afforded significant recognition and respect at all times to advance their human rights as stated within the Constitution and international law.

4.3 Legislation applicable to the recognition of children's rights in South Africa within the digital environment

To enable an extensive approach towards the recognition and implementation of children's rights as enshrined under the Constitution and international law, South Africa as a State member, is bound by the Constitution to enact applicable legislation that

²⁹⁴ Section 36(1) of the Constitution of the Republic of South Africa, 1996.

²⁹⁵ *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC)

²⁹⁶ *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC) par 17.

underpins a coherent legal framework positioned towards children's rights to special care and protection.²⁹⁷ This is encouraged by the Constitutional provision entailing that any international agreement becomes part and parcel of binding law in the Republic of South Africa once enacted into law by national legislation.²⁹⁸

Legislation is recognised as a generative source of South African law promulgated by parliament²⁹⁹ to adhere to the values and principles of rights enshrined in the Bill of Rights.³⁰⁰ Parliament as a national legislator promulgates Acts of parliament subordinate to the Constitution however superior to all other forms of legislations.³⁰¹ These Acts of parliament are enacted with the fundamental purpose of implementing Constitutional imperatives and the enforcement of legal procedures regarding any matter within the state.³⁰²

Extensively, South Africa has various pieces of legislation promulgated towards the achievement of the democratic values of all individuals who live in it, including children.³⁰³ Each legislation promulgated serves as an instrument applied by parliament to outline and monitor different fragments of government while acting in accordance and within the limits of the Constitution.³⁰⁴

Evidently, South Africa does not have a specific legislation directly promulgated towards the regulation of the digital environment but does have legislation aimed towards the perseverance and recognition of children's rights in general.³⁰⁵ The enhancement of digital technologies has led to an increase in the use of digital platforms and devices by children, raising concern regarding their preservation of special care and protection within

²⁹⁷ Section 231(4) of the Constitution of the Republic of South Africa, 1996.

²⁹⁸ Section 231(4) of the Constitution of the Republic of South Africa, 1996.

²⁹⁹ See chapter 4 of the Constitution of the Republic of South Africa, 1996.

³⁰⁰ Du Plessis 2011 *PELJ* 93.

³⁰¹ Section 44(1) of the Constitution of the Republic of South Africa, 1996.

³⁰² Section 44(1)(a)(ii) of the Constitution of the Republic of South Africa, 1996.

³⁰³ Section 44(4) of the Constitution of the Republic of South Africa, 1996.

³⁰⁴ Section 44(4) of the Constitution of the Republic of South Africa, 1996.

³⁰⁵ The Children's Act 38 of 2005 is the most significant legislation pertaining to the recognition of children's rights generally and alternatively enacted to be of assistance within the South African child care and protection system.

the digital environment. The absence of a specific legislation regulating the digital environment does not exclude the obligation imposed upon the State to implement and preserve children's rights to special care and development within the digital environment.

4.3.1 The Children's Act 38 of 2005

In 2010, parliament promulgated the Children's Act aimed at providing adequate protection, support, and care for children in South Africa.³⁰⁶ The Children's Act was promulgated to validate the significance and implementation of children's rights as enshrined in the Bill of Rights and most significantly section 28 of the Constitution.³⁰⁷ Its significance lies within its objectives to validate the prominent role that children have in society by advancing preservation of their fundamental human rights through special care and protection.³⁰⁸

The Children's Act provides legislative obligations to ascertain that the child-care and protection system in South Africa is administered according to the standards and principles enshrined under international instruments that South Africa has ratified.³⁰⁹ These child protection provisions enshrined in international law are recognised and adapted into legislation as obligated by the Constitution.³¹⁰ The Children's Act is thus a reflection of all child-based international instruments to which South Africa is signatory.³¹¹ By enacting prominent legislation such as the Children's Act, South Africa took a step

³⁰⁶ The Children's Act came into effect on the 1st of April 2010 and successfully repealed the Child Care Act of 1983 which was enacted by the apartheid government and as a result lacked provision for adequate protection and promotion of rights enshrined under the Bill of rights and contravened South Africa's international legal obligations pertaining to child rights.

³⁰⁷ See long title of the Children's Act 38 of 2005.

³⁰⁸ See preamble of the Children's Act 38 of 2005.

³⁰⁹ International instruments such as the United Nations Convention on the Rights of the Child, 1989 and the African Charter on the Rights and Welfare of the Child, 1990; see also the long title of the Children's Act.

³¹⁰ Section 231 of the Constitution of the Republic of South Africa, 1996; See also A 4 of the United Nations Convention on the Rights of the Child, 1989.

³¹¹ This includes the UNCRC and the ACRWC.

further in fulfilling its obligations under international law to take all appropriate measures of implementation as specified within the UNCRC.³¹²

With the rapid increase of digital usage in South Africa, children form a high fraction of digital users, raising concern regarding the recognition, protection, and care of their rights within the digital environment. The Children's Act articulates as the most significant and relevant legislation with regards the effective implementation and recognition of children's rights in general. Its insistence on the preservation of democratic values, social justice and fundamental human rights³¹³ makes it a significant facet when considering the recognition of children's rights within the digital environment.

Furthermore, with the Children's Act regarding the care and protection of children in general, it is fundamental to establish whether such provisions find adequate application within the digital environment and if so to what extent. Further underlying concerns relate to the efficiency of implementing legal ramifications preceded by any form of infringement in the implementation and recognition of children's rights as enshrined under the Children's Act.

As mentioned above, the fundamental facets of the Children's Act lie within its ability to give effect to children's rights through adequate protection and care. The Children's Act articulates what it means to 'care' for a child³¹⁴ and this includes providing appropriate assistance towards the living conditions of a child to sustain their wellbeing and development as well as provision for financial support when needed.³¹⁵ This is of significance as children often from poorer backgrounds resort to making a living off the digital environment by engaging in detrimental situations that not only violate their innocence but also their dignity and privacy such as but not inclusive to selling pictures of themselves online. While this may seem harmless as it is within the ambit of the digital environment, it allows for such content to permanently remain within the digital domain

³¹² See A 4 of the United Nations Convention on the Rights of the Child, 1989.

³¹³ See preamble of Act 38 of 2005.

³¹⁴ See section 1 (interpretation) of the Children's Act 38 of 2005.

³¹⁵ Section 1 of the Children's Act 38 of 2005.

and become accessible to anyone across the world, violating a child's right to privacy and dignity.

Chapter 1 of the Children's Act outlines various significant objectives that the State is committed to realising. There is an embedded imperative obligation that the State has towards the preservation of children's rights and their wellbeing.³¹⁶ It is noted in the Children's Act that these obligations must be implemented in all spheres of government, and this includes at a national, provincial and local level.³¹⁷ This enables the State to fully disperse of the provisions in the Children's Act in a manner that will reach all individuals, authorities, organs of state and most importantly children in an effective manner.

Though the Children's Act was not explicitly implemented to confer such rights within the ambit of digital expansion, it does provide regulatory guidelines towards the recognition of children's rights to special care and protection in the digital environment. Each provision asserts valuable principles regarding a child's wellbeing by promoting suitable preservation of the best interests of the child in every matter concerning the child.³¹⁸ By virtue of being a child, the Children's Act will provide the necessary security and perseverance of human rights.

Taking note that the digital environment has extensively proliferated all aspects of livelihood concerning children,³¹⁹ stimulating a discussion concerning a range of matters that negatively and positively affect the implementation and recognition of their rights to special care and protection. With the Children's Act steadily in operation towards the recognition and implementation of South Africa's obligations towards the promotion and wellbeing of children in general, it is imperative to expand its obligations within the digital domain.

³¹⁶ See chapter 2 of the Children's Act 38 of 2005.

³¹⁷ Section 4(1) of Act 38 of 2005.

³¹⁸ Section 2 of Act 38 of 2005.

³¹⁹ See previous chapters on the impact that the digital environment has had on children and how it has advanced some aspects of their lives, education and livelihood in general.

In its extensive definition of 'care', the Children's Act insists care of a child to mean, where appropriate, safeguarding and promoting the wellbeing of the child.³²⁰ The direct imperative is to ensure that a child enjoys adequate security that is of convenience towards their wellbeing and this advances the duty placed on South Africa through measures to recognise instances where children's safety may be compromised and provide a solution that should foster security.

Section 7 of the Children's Act outlines the best interests of the child, requiring certain factors to be considered before the standard can be fully applied to give effect to the provisions of the Children's Act.³²¹ The Children's Act states that when the best interests of the child standard is applied, a child's age, maturity, and stage of development should be considered.³²² Though the Children's Act does not make any direct comment on a child's age and level of maturity within the ambit of the digital environment, it is relevant as a child's age and stage of development are important in preserving their rights to special care and protection.

The complexity of the digital environment and its platforms lies within its borderless configuration that allows limitless access without the validation of age or stage of development of its digital users.³²³ When registering within digital platforms, most platforms have an age restriction as part of their terms and conditions of use, however, various digital systems do not validate age, enabling children to falsify their age.³²⁴ This is detrimental to their rights to special care and protection as children get exposed to illicit content for their age and as a result, infringes upon their right to dignity, privacy, and overall safety. In order to preserve their rights, various stakeholders must bear the responsibility to see that children stick to age appropriate digital content and this includes parents, telecommunication companies, social media companies and the Government. Navigating age restrictions within the digital environment is a conundrum as children still

³²⁰ See Section 1 of the Children's Act

³²¹ Section 7 of the Children's Act 38 of 2005.

³²² Section 7(1)(g) of the Children's Act of 2005.

³²³ Choudhuri 2019 *Socio-Legal Review* 154,

³²⁴ Choudhuri 2019 *Socio-Legal Review* 154.

pursue a digital presence even when they are at a very vulnerable stage of their development.³²⁵

The Children's Act requires a child's physical and emotional security as well as his or her social or cultural development to be taken into consideration when implementing the best interests of the child standard.³²⁶ This is of significance within the parameters of the digital environment as children get exposed to harms that are detrimental to their physical and psychological safety and security.³²⁷ Such harmful exposure in terms of the physical and emotional wellbeing of a child constitutes as abuse or maltreatment either caused by other digital users or digital companies.

As a directive to implementing adequate protection and care of children's rights as enshrined in the Constitution, the Children's Act provides an extensive definition of 'abuse' and what constitutes abusive behaviour towards children and their rights. The Children's Act defines abuse in relation to a child to mean:

Any form of harm or ill-treatment deliberately inflicted on a child, and includes;

- (a) Assaulting a child or inflicting any other form of deliberate injury to a child;
- (b) sexually abusing a child or allowing a child to be sexually abused;
- (c) bullying by another child;
- (d) a labour practice that exploits a child;
- (e) or exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.³²⁸

With the Children's Act being the principal legislation expedited to sustain adequate protection and care of children's rights, it does have the obligation as encapsulated in the objectives of the Act, to protect children from any form of abuse or maltreatment.³²⁹ Though the Children's Act does not make any direct reference to the abusive and degrading behaviour that children encounter within the digital environment, it does

³²⁵ Choudhuri 2019 *Socio-Legal Review* 155.

³²⁶ Section 7(1)(h) of the Children's Act 38 of 2005.

³²⁷ Online based threats such as cyberbullying perpetuates children to experience anxiety, fear, and humiliation, violating their constitutional rights to human dignity and privacy.

³²⁸ See section 1 (definitions) of the Children's Act 38 of 2005.

³²⁹ Section 2 (b)(iv) of the Children's Act 38 of 2005

however make provision for the well-being of children.³³⁰ Abusive and degrading behaviour towards children is circumstantial within the ambit of the digital environment thus requiring adequate child protection and special care that is not subjected to unjust limitations.

Furthermore, taking into consideration the best interests of the child, it is in the best interests of children to eradicate any form of neglect, abuse, degradation or maltreatment that children may experience throughout their everyday lives, even within environments such as the digital one. The Children's Act requires prominent steps to implement, protect and recognise children's rights in general.³³¹ One of the objectives of the Children's Act is to provide for the promulgation of structures and services aimed at promoting and monitoring the physical, psychological, emotional, and social development of a child effectively.³³² Such structures and services are meant to assist children should they experience any form of violation or abuse of their rights and wellbeing.

Primarily, courts are structures bearing the authority to hear and resolve disputes in various matters, including children's concerns. As a prerequisite towards the enforcement of children's rights, a child through the assistance of a guardian, whose rights under the Bill of Rights or the children's Act have been infringed upon or threatened, may approach a competent court to have the matter heard and being granted relief or a declaration of rights.³³³ This would mean that should a child experience any form abuse or infringement of their rights within any environment, including the digital environment, such a child may approach a competent court to address the infringement.

The Children's Act further outlines the establishment of children's courts to deal with any issue affecting children as well as any matter arising from the application of the Children's Act.³³⁴ The children's court, however, has a listing of matters it may adjudicate, most of

³³⁰ Section 2(c) of the Children's Act 38 of 2005

³³¹ As per objectives of the Children's Act 38 of 2005.

³³² Section 2(d) of the Children's Act 38 of 2005

³³³ Section 15(1) and (2) of the Children's Act 38 of 2005.

³³⁴ Section 42(1) of the Children's Act 38 of 2005

which involve the care, support, and protection of a child.³³⁵ Furthermore, the children's court is mandated to adjudicate over matters involving the maltreatment, abuse, degradation, exploitation and neglect of a child excluding any criminal prosecutions.

The Children's Court is the appropriate mechanism of approach regarding any form of abuse or violation of children's rights to special care and protection within the digital environment. However, the ramifications of various forms of abuse and maltreatment of children within the digital environment often constitutes criminal offences which, in this instance, the Children's Court does not have adjudication over, however children are given the remedy to approach other measures that may be of assistance like the High Court, with the assistance of a parent or guardian.

The Children's Act remains fundamental in matters involving the child, yet practically has shown insufficiency as it lacks adjudication in regulating the digital environment extensively. An extensive amendment is necessary to include the proper implementation of the Children's Act and its objectives within the digital environment. As it remains, it would be effective to evaluate some inference from other pieces of legislations in order to receive adequate special care and protection of children's rights within the digital environment.

4.3.2 Protection of Personal Information Act 4 of 2013

The Protection of Personal Information Act (hereinafter 'POPI Act') was promulgated to promote adequate protection of personal information processed by public or private persons.³³⁶ The POPI Act finds relevance within the discussion of preserving children's rights to special care and protection within the digital environment by virtue of its sharp intent to sustain the constitutional right to privacy.³³⁷

³³⁵ Section 45(1) of the Children's Act 38 of 2005

³³⁶ See long title of the Protection of Personal Information Act 4 of 2013.

³³⁷ See preamble of the Protection of Personal Information Act 4 of 2013.

Considering that not all children can navigate through the digital environment with strict caution, safeguarding children's privacy rights within the digital environment addresses this issue as any failure to do so may lead to compromises where children experience threats online because they are unaware of their rights under the POPI Act. These privacy risks include having their personal data or information appropriated and processed through the digital environment for everyone to see and use. Moreover, personal information could be further disseminated through digital platforms where ill-intentioned individuals may process such information and use it to cause detrimental harm to a child's wellbeing, infringing upon their right to special care and protection within the digital environment.

In this instance, the POPI Act prohibits the processing of children's personal data as a consideration to their constitutional right to privacy.³³⁸ Moreover, the POPI Act requires consent to be acquired from the child prior to processing their data.³³⁹ Failure to do so is considered as a violation of the provisions of the POPI Act, enabling penalties such as a fine or imprisonment.³⁴⁰ Such promulgated penalties by the POPI Act indicate proactive participation on the part of the legislator to take applicable measures in respecting, recognising, implementing and protecting the rights of children as enshrined within the Constitution and international instruments.

4.3.3 The Protection from Harassment Act 17 of 2011

The purpose of Protection from Harassment Act (hereinafter 'the Act') is to effect and provide for the issuing of protection orders against any form of harassment or abuse.³⁴¹ This is significant as it entails an effective means to protect the constitutional rights of harassed victims, including child victims.³⁴² The Act makes provisions that deal directly with potential offences that may transpire within the digital environment.

³³⁸ Section 11(1)(a) of the Protection of Personal Information Act 4 of 2013.

³³⁹ Section 11(1)(a) of the Protection of Personal Information Act 4 of 2013.

³⁴⁰ Section 100 of the Protection of Personal Information Act 4 of 2013.

³⁴¹ See the long title of the Protection from Harassment Act 17 of 2011.

³⁴² See preamble of the Protection from Harassment Act 17 of 2011

Within its definition of 'harassment', the Act understands harassment to include harm caused towards a complainant through verbal, electronic and other means of communication.³⁴³ Primarily, electronic means of communication subsist through digital devices and platforms that children use and are a part. Within these digital platforms, children experience various forms of harassment such as hate speech, cyberbullying, online impersonation, which all require substantive intervention to preserve their rights to special care and protection.³⁴⁴

The application of procedures promulgating protection orders validates the protection awarded to the preservation of children's constitutional rights.³⁴⁵ The Act further states:

Notwithstanding the provisions of any other law, any child, or person on behalf of a child, may apply to the court for a protection order without the assistance of a parent, guardian or any other person.³⁴⁶

This provision permits a child who has experienced any form of harassment, in particular harassment within the digital environment, to approach a court for an application seeking a protection order without the assistance of a parent, enabling the child an opportunity to combat online harassment themselves.³⁴⁷

4.3.4 *The Films and Publications Act 65 of 1996*

The *Films and Publications Act* (Hereinafter "the FPA")³⁴⁸ is one of the most significant legislations pertaining to the direct and indirect publication of certain films or other related

³⁴³ See section 1 (definitions and application of the Act) of the Protection from harassment Act 17 of 2011.

³⁴⁴ Luthi 2017 Strathmore Law Review 87.

³⁴⁵ Rights such as non-discrimination, human dignity and equality as enshrined under *the Constitution* of the Republic of South Africa, 1996.

³⁴⁶ Section 2(4) of the Protection from Harassment Act 17 of 2011

³⁴⁷ Section 2(4) of the Protection from Harassment Act 17 of 2011.

³⁴⁸ Act 65 of 1996.

content. The FPA has several objectives and one of the most significant objectives of the FPA is to regulate the distribution of certain publications and the exhibition and distribution of certain films.³⁴⁹ The FPA intends to achieve this by means of classification, through the imposition of age restrictions as well as through giving consumers advice while taking due regard to the fundamental rights enshrined in the Constitution.³⁵⁰ The objective of the FPA is primarily relevant as children are exposed to certain publications and films inappropriate for their age and wellbeing within the digital environment and with such age restrictions put into place either by the Government, social media platforms or parents, children's rights to special care and protection will be preserved.

The FPA further aims to prohibit the distribution of such inappropriate publications through any medium including the internet and social media platforms and this includes any films, games or publications that incite propaganda for war, imminent violence or overall hate speech.³⁵¹ With the FPA in place, children as well as their rights may benefit to being protected within the scope of the digital environment.

4.4 Conclusion

Evidently, South Africa prides itself of its extensive constitutional recognition, protection and promotion of people's rights, including children. The Constitution itself affirms the values and principles to which each provision enshrined within it is founded upon. It extensively recognises the rights of children within the Bill of Rights, preserving values that were previously denied. It also confirms to respect and fulfil all rights which the children are entitled to and the consideration of the best interests of the child in all matters. This consideration as articulated by the Constitution has potential to be extended within the digital environment.

The Constitution has shown that rights are recognisable irrespective of the environment in which they are applicable. With the proliferation of digital use by children, their rights

³⁴⁹ Section 2 of the Films and Publications Act 65 of 1996.

³⁵⁰ Section 2 of the Films and Publications Act 65 of 1996.

³⁵¹ Section 2 of the Films and Publications Act 65 of 1996.

are still recognised by the Constitution as there is no separate set of provisions applicable within different spheres of environments. South Africa has shown co-operation when it comes to the implementation of international law within the republic. With South Africa being a member of the UCNCR as well as the ACRWC, it has managed to implement such international as well as regional obligations into legislation through the promulgation of the Children's Act.

The Children's Act finds notable relevance in preserving children's rights but lacks extensive regulation when it comes to the preservation of child rights within the digital environment. Because it bears the duty to give effect to constitutional rights, it lacks comprehension when it comes to providing legal recourse and penalties when children's rights are infringed within the digital environment, as a majority of offences are liable to criminal prosecution. In order to evaluate options on how to preserve children's rights to special care and development particularly in the digital environment, reference must be made to other legislations in order to obtain reliable legal recourses. The lack of an explicit legislation that confers to the recognition of rights within the digital environment is evidence that there is a need for South African law to reform its approach towards the preservation of children's rights in general.

5 Chapter 5 General conclusion and recommendations

The main objective of this research study was to ascertain the extent to which children's rights to special care and protection are effectively implemented and recognised within the digital environment. In striving to determine this extent, this research initiated an extensive discussion on what the digital environment is, its various components and the structural impact it has on almost every aspect of human life, more specifically children.

This study examined how the digital environment has infiltrated almost every aspect of human lives and how children have since adapted to the extensive use and adaptation of digital technologies. This enabled a further discussion on how the digital environment is a complex network and environment that has both a positive and negative impact on children's rights to special care and protection as well as how such rights may be protected and recognised.

The use and adaptation of the digital environment was asserted to have introduced versatile technological advances and favourable adjustments applicable to modern day intellectual development within societies. This suggests that the use of the digital environment has introduced new ways in which individuals within societies interact, communicate and function throughout their everyday lives. Chapter 2 of this study offered a comprehensive discussion on what the digital environment is and what it comprises. This included a detailed discursive analysis of the various ways in which the digital environment exerts an impact on modern mainstream society.

The discussion in chapter 2 concluded that the digital environment has enacted various technological innovations that have proliferated almost every aspect of individual lives.

This chapter also concluded that with these technological innovations, certain risks and safety concerns arise that simultaneously affect vulnerable individuals such as children. Furthermore, chapter 2 entailed a comprehensive dialogue on how to ascertain safety and security within the digital environment. To ascertain such safety precautions, a detailed outlook on the risks and challenges faced within the digital environment was discussed and this enabled an understanding of how children encounter threats and challenges within the digital environment and various digital platforms that they find themselves participating in. This also included discussing how vulnerable groups such as children needed to be adequately protected within such a complex environment such as the digital environment. One of the most significant outcomes was taking note of how such detrimental risks and challenges faced within the digital environment has an impact on children's privacy, preservation of their dignity and even their physical and mental wellbeing. Such primary concerns are to be taken into consideration and must be attended through either by enabling safety mechanisms and precautions or educating digital users such as children of such concerns and how they can also protect themselves.

The study embarked on a further discussion on the rights of children, how these rights have developed over time as well as how they are recognised within various international and regional instruments. Chapter 3 detailed a discussion on children's rights as recognised under significant instruments such as the UNCRC and the ACRWC as well as how such rights are protected and recognised profoundly. Taking into consideration the impact the UNCRC as well as the ACRWC has on the recognition and protection of children's rights in general, this chapter drew inferences on how such significant rights as enshrined under these instruments should be implemented and recognised within the digital environment.

This chapter further concluded that the preservation and recognition of children's rights is not conditional or impactful on specific scenarios but applicable on all aspects concerning the child including within the digital environment. This chapter further entailed the extend in which children's rights can be emerged through various platforms that children find themselves in, including the digital environment. It is therefore significant

to note that children's rights are promulgated to protect and serve children as they are amongst the most vulnerable and such protection should not be circumstantial or limited to certain situations. Children's rights are to be protected in all circumstances involving a child, including within the digital environment.

Chapter 4 of this study contextualised this discussion within the South African legal framework. This included placing emphasis on South Africa being a signatory to international child rights instruments such as the UNCRC as well as the ACRWC and how by virtue of that, places an obligation on South Africa to alternatively enact legislative or other measures that will adequately promote and recognise children's rights. This chapter drew inferences on all legislative and constitutional measures that protect and promote children's rights to special care and protection and how such obligations within these legal frameworks must be adhered to protect and recognise children's rights even within the digital environment.

Chapter 4 further outlined the different measures in which the South African legislative framework enacted legislation that gave effect to the provisions of section 28 of the Constitution as well as the obligations imposed by the UNCRC and the ACRWC. With these obligations taken into consideration, the Children's Act was discussed and evaluated as a relevant piece of legislation that could be used to implement and recognise children's rights to special care and protection within the digital environment. This is because the Children's rights were not enacted as a legislation that was meant to be interpreted in isolation but rather in totality. A conclusion was then reached that the Children's Act is relevant in protecting and recognising children's rights to special care and protection within the digital environment.

Furthermore, this discussion further affirmed that the South African legislative framework comprises of other legislations such as the *Film and Publications Act*, and these legislations have both a direct and indirect preservation or recognition of children's rights to special care and protection within the digital environment and should be implemented as such. The outcome of this chapter is to note that current legislative measures within the South African framework may not have a direct implication to the digital environment

but does however have inference when it comes to protecting children's rights that may or have the potential to be violated within the ambit of the digital environment.

Further legislations discussed included the *Protection of Personal Information Act 4 of 2013* (POPI Act). The POPI Act was discussed as an applicable legislation that is critically relevant in considering the adequate protection and recognition of children's rights to special care and protection within the digital environment. The POPI Act itself places abundant emphasis on the preservation to privacy, which is a key aspect that is extensively discussed in this research study. It was concluded that because privacy is mostly infringed within the digital environment, this Act could play a significant role in addressing risks that children encounter within the digital environment as well as risks associated with the infringement of personal data.

Further legislations discussed included the *Protection from Harassment Act 17 of 2011* which outlines certain aspects of relevance within the digital environment. The emphasis is on how individuals are prohibited from harassing each other and this is one of the key challenges faced in the digital environment by children. The provisions of the Protection from Harassment Act therefore finds relevance in protection children from such harm.

5.1 Recommendations

There were several important findings from this study and one being that digital technology has progressed over the years and has introduced an advanced use of digital technology and electronical systems. With such an advanced use in technology, this study managed to conclude that with excessive exposure and use of the digital environment by children, certain detrimental aspects arise that violate children's rights to special care and protection within the digital environment_ and these include cyberbullying, invasion to their privacy, exploitation and exposure to illicit materials and violent content.

Taking into consideration that these detrimental aspects that children encounter within the digital environment bear mostly negative impacts on the wellbeing of children as any other physical or offline impact, it is of importance that these impacts be regulated under

the similar and existing legislative measures to enable accountability on parties that violate or discriminate against children's rights to special care and protection within the digital environment. This entails that there should not be a difference in how, where or when does a child's right to special care and protection are implemented but rather be implemented on all issues concerning the child including within the digital environment.

This research study further makes inference on the significance of the UNCRC and the ACRWC as well as how these two instruments have a legally binding obligation on member states such as South Africa to abide by their provisions and protect the wellbeing of children in all matters concerning the child. These instruments emphasise the significance of the best interests of the child and how it should be of primary consideration in all matters concerning a child. Taking this principle into consideration, state members must, by possible means necessary, implement measures that will promote the best interest of the child through digital device monitoring. Digital device monitoring can be archived through parental control whereby parents undertake to monitor devices that their own children use, and this will assist in preserving children's rights to special care and protection within the digital environment. Though parents currently bear the responsibility to monitor their children's devices, it becomes difficult to do so without the assistance of digital applications that prohibit children from having access to certain digital sites or materials. By implementing social media applications that will achieve this restriction, children will be protected from online digital risks.

The research study entailed a detailed discussion on the South African legislative framework and how it can be applied to preserve children's rights to special care and protection within the digital environment. Reference was made to the Constitution as well as how it is the supreme law of the Republic of South Africa. With the Constitution being the supreme law of the Republic of South Africa, emphasis is made on how it should be implemented and one of the most significant being to implement legislation that will uphold the principles and views of the Constitution. To effectively implement and recognise children's rights to special care and protection within the digital environment, specific legislation regulating the digital environment should be considered. Not only will

this promulgate regulations pertaining to the use of the digital environment but will also enact remedies that will recourse any infringement of rights that children may encounter within the use of the digital environment.

Further recommendations include providing children with digital literacy for their own safety and this will enable them to also take precautionary measures when utilising the digital environment. This would be significant if it is implemented through educational curriculums at schools. Many schools have already adapted to the use of digital devices for educational purposes and this is largely the case after the COVID 19 pandemic hit and this would be a good opportunity to educate children of the risks and challenges associated with the use and adaptation of the digital environment as well as how to handle the situation whereby their rights are being infringed upon within the digital environment.

Digital literacy on its own is also of significance to parents, organisations and other people who have an interest in preserving adequate care and protection of children in general. Parents being the primary care givers must be encouraged to enact parental control mechanisms either through checking the digital platforms that children are engaged in on their digital devices and installing certain digital applications that will monitor the content shared with children or by children. This will also assist in allowing children to know who to engage with on digital platforms and who to not engage with. Furthermore, parents can also be encouraged to minimise digital device usage by children and promote it for educational aspects.

In conclusion, this research study has abundantly discussed how children's rights to special care and protection within the digital environment has significant recognition and protection from various legal frameworks, be it internationally or within the scope of South Africa and has further provided detailed recommendations that may be followed in order to preserve and implement children's rights to special care and protection within the digital environment.

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