



# A child's right to privacy in the age of social media against parental rights and responsibilities

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## **ABSTRACT**

The digital era had brought about changes in the manner in which children exercise their rights. The rise in access to internet is welcomed as it enables children to engage and use digital platforms as learning spaces. The use of social media platforms raises concerns such as privacy infringement. To this end, parents need to act. The *CRC* provides for the right to privacy of the child and in turn provides that it is the duty of the parent to ascertain that children are guided and supported throughout their childhood. Parental responsibilities and rights come into conflict with the child's right to privacy, to which a conflict in rights is initiated. To this end, this mini-dissertation is motivated by the following legal question: Does the child's right to privacy transcend the rights, duties and responsibilities of the parents in the digital age of social media? This mini-dissertation answered the research question through an extensive discussion of the applicable international law, regional law and national law on this topic. The aforementioned was carried out through an investigation of the various points of contention which are; the right to privacy of the child, parental responsibilities and rights and the conflicting rights in this discourse. There are number of key findings that the mini-dissertation had brought forth. The exercise of parental rights and responsibilities by the parents or a primary caregiver of the child – such as providing supervision and guidance whilst the child is on social media, interferes with the child's right to privacy in the digital age of social media. The extent to which a child's right to privacy on social media transcends parental rights and responsibilities lies in consideration of the evolving capacities of the child and the need to ensure that the best interests of the child are a primary consideration in matters affecting the child. This research found that such consideration must strike the balance between all the rights concerned. It was concluded that the child's right to privacy in the digital environment must be balanced with parental rights and responsibilities.

## **KEYWORDS**

Privacy, conflicting rights, children's rights, parental responsibilities and social media

## TABLE OF CONTENTS

**ABSTRACT..... I**

**LIST OF ABBREVIATIONS..... VI**

Chapter 1 INTRODUCTION AND PROBLEM STATEMENT ..... 1

**1.1 Introduction ..... 1**

*1.1.1 Problem statement ..... 3*

1.1.1.1 Research question ..... 8

1.1.1.3 Research methodology..... 9

1.1.1.4 Framework of the study ..... 9

1.1.1.5 Relevance for the research unit .....10

1.1.1.6 Statement regarding ethics .....11

Chapter 2 INTERNATIONAL INSTRUMENTS .... **Error! Bookmark not defined.**

**2.1 Introduction ..... 1**

*2.1.1 The right to privacy in the digital age.....13*

*2.1.2 The child's right to privacy .....14*

2.1.2.1 Article 16(1) of the CRC .....15

2.1.2.1.1 Protection against arbitrary or unlawful interference .....16

2.1.2.2 Article 10 of the ACRWC.....19

2.1.2.3 The Malabo Convention.....20

2.1.3	<i>Parental rights and responsibilities</i> .....	21
2.1.4	<i>Parental rights and responsibilities at regional level</i> .....	25
2.1.5	<i>Conclusion</i> .....	27
Chapter 3	SOUTH AFRICAN LAW.....	29
<b>3.1</b>	<b><i>Introduction</i></b> .....	<b>29</b>
3.1.1	<i>The application of the Bill of Rights</i> .....	29
3.1.2	<i>The right to privacy in the Constitution</i> .....	30
3.1.2.1	The nature of the right to privacy .....	30
3.1.2.2	Informational privacy .....	31
3.1.2.2.1	Section 14(d) of the Constitution .....	32
3.1.2.3	Protection against intrusion .....	35
3.1.3	<i>Protection of the right to privacy under the POPI Act</i> .....	37
3.1.4	<i>The child's right to privacy</i> .....	40
3.1.4.1	Protection of the child's right to privacy under the POPI Act ...	42
3.1.5	<i>Parental rights, duties and responsibilities</i> .....	44
3.1.5.1	The parents' duty to care for the child .....	45
3.1.5.2	The best interests of the child .....	46
3.1.5.3	Survival and the development of the child .....	48
3.1.5.4	The right of the child to be heard .....	49
3.1.6	<i>Conclusion</i> .....	49

Chapter 4	THE CONFLICTING RIGHTS.....	51
<b>4.1</b>	<b><i>Introduction</i></b> .....	<b>51</b>
4.1.1	<i>Interests flowing from protection of the child’s right to privacy.....</i>	<i>52</i>
4.1.2	<i>Interests flowing from the rights, responsibilities and duties of the parents .....</i>	<i>54</i>
<b>4.2</b>	<b><i>The Conflicting rights</i></b> .....	<b>55</b>
4.2.1	<i>Decisional autonomy of the child versus parental supervision and control.....</i>	<i>55</i>
4.2.1.1	Protection of decisional autonomy under ACRWC.....	57
4.2.2	<i>Information privacy of the child versus parental supervision and control .....</i>	<i>58</i>
<b>4.3</b>	<b><i>The different viewpoints in respect of the child’s right to privacy in the digital age of social media</i></b> .....	<b>60</b>
<b>4.4</b>	<b><i>Striking the balance</i></b> .....	<b>62</b>
4.4.1	<i>Guidance in respect of the child should be directed towards the exercise by the child of a specific right.....</i>	<i>64</i>
<b>4.5</b>	<b><i>Conclusion</i></b> .....	<b>67</b>
Chapter 5	CONCLUSION .....	68
	<b>BIBLIOGRAPHY</b> .....	<b>71</b>

## **LIST OF ABBREVIATIONS**

ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
AJIL	American Journal of International Law
CCPR	Covenant on Civil and Political Rights
CRC	Convention on the Rights of the Child
GC	General Comment
PER	Potchefstroom Electronic Law Journal
POPIA	Protection of Personal Information Act
PULP	Pretoria University Law Press
SAIIA	South African Institute of International Affairs
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
UNCRC	United Nations Convention of the Rights of the Child
UNICEF	United Nations Children's Fund

## **STATEMENT ON ETHICS**

The completed checklist on ethics was submitted along with the proposal

# CHAPTER 1 INTRODUCTION AND PROBLEM STATEMENT

## 1.1 Introduction

The *United Nations Convention on the Rights of the Child*,<sup>1</sup> (hereafter referred to as the *CRC*) provides that the best interests of the child is a primary consideration in every matter that concerns the child.<sup>2</sup> It further provides for the child's right to privacy in article 16.<sup>3</sup> The right to privacy recognises that everyone, including children, should enjoy their personal space and autonomy in order to create and grow relationships that are not interfered with.<sup>4</sup> The *Constitution of the Republic of South Africa*,<sup>5</sup> (hereafter referred to as the *Constitution*) provides for everyone's right to privacy in their interactions with other people.<sup>6</sup>

The *CRC* provides that parents have the responsibility to ensure proper upbringing and development of the child.<sup>7</sup> The latter provision is contained in section 28(1)(b) of the *Constitution* and section 18(2)(a) of the *Children's Act*.<sup>8</sup> Parental responsibility entails four separate, but interrelated components: care for the child, maintaining contact with the child, acting as a guardian of the child, and contributing to the maintenance of the child.<sup>9</sup> In this study, the phrase "parental rights, duties and responsibilities" shall be used throughout to curtail these concepts as one. Even though parents – as holders of parental rights, duties and responsibilities – enjoy broad freedoms of choice to choose how best to raise their children,<sup>10</sup> there is a

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<sup>1</sup> United Nations Convention on the Rights of the Child (1989).

<sup>2</sup> Article 3(1) of the United Nations Convention on the Rights of the Child (1989) provides that the child's best interests is the primary consideration in matters concerning such a child.

<sup>3</sup> Article 16 of the United Nations Convention on the Rights of the Child (1989).

<sup>4</sup> Chihwai *A child's right to privacy, a parent's duty to care and social media* 4.

<sup>5</sup> The *Constitution of the Republic of South Africa*, 1996.

<sup>6</sup> Section 14 of the *Constitution of the Republic of South Africa*, 1996 provides that everyone has the right to privacy, which informs us that no one may (d) have the privacy of their communications interfered with.

<sup>7</sup> Article 18(1) of the United Nations Convention on the Rights of the Child (1989).

<sup>8</sup> *Children's Act* 38 of 2005.

<sup>9</sup> Section 18(2) of the *Children's Act* 38 of 2005.

<sup>10</sup> Chihwai *A child's right to privacy, a parent's duty to care and social media* 4.

need to understand the implications of the *CRC* and its confirmation of the equal status of children as subjects of rights.<sup>11</sup>

The *Committee on the Rights of the Child General Comment No 25* on children's rights in the digital environment (hereafter referred to as the *Committee on the Rights of the Child General Comment No 25*) sheds light on what is expected of parents with regard to the rights of the child provided for in the *CRC*. According to the *Committee on the Rights of the Child General Comment No 25*, children's rights should be protected, fulfilled and respected in the digital environment.<sup>12</sup> In addition, the *Committee on the Rights of the Child General Comment No 25* provides for four principles by which the rights of the child in the digital environment can be viewed.<sup>13</sup> Firstly, the best interests of the child are of paramount importance in the digital environment.<sup>14</sup> Secondly, the risks encountered in the digital environment and their effect on the child's development ought to be considered.<sup>15</sup> Thirdly, children's use of digital platforms should be meaningful and safe from discrimination.<sup>16</sup> Lastly, the use of digital technologies should advance the child's participation in all spheres of society.<sup>17</sup>

Social media is creative, but it can endanger a child's life. In light of the latter, the parent's duty to care for the child necessitates the institution of protection measures to enhance the child's safety in the digital age of social media. The parent's duty to care for the child entails due consideration of the child's best interests.<sup>18</sup>

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<sup>11</sup> Committee on the Rights of the Child, General comment No 5 'General measures of implementation of the Convention on the Rights of the Child' CRC/GC/2003/5 (2003) para 66.

<sup>12</sup> Committee on the Rights of the Child, General Comment No 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021) para 4.

<sup>13</sup> Singh and Power 2021 *AHRLJ* 107.

<sup>14</sup> Committee on the Rights of the Child, General Comment No 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021) para 12.

<sup>15</sup> Committee on the Rights of the Child, 'General Comment No 25 Children's rights in relation to the digital environment' CRC/C/GC25 (2021) para 14.

<sup>16</sup> Committee on the Rights of the Child, General Comment No 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021) para 9.

<sup>17</sup> Committee on the Rights of the Child, General Comment No 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021) paras 16-19.

<sup>18</sup> Section 28(2) of the *Constitution of the Republic of South Africa*, 1996.

### 1.1.1 Problem statement

Article 16 of the *CRC* provides that no child shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on their honour and reputation.<sup>19</sup> The right to privacy protects the child's agency, dignity and safety, as well as the child's ability to exercise their rights.<sup>20</sup> Article 16(1) points out that a child's 'correspondence' may not be interfered with.<sup>21</sup> It is not clear from the word 'correspondence' whether the *CRC* intends to protect a child's right to privacy in the digital environment. Sibanda postulates that the inclusion of 'correspondence' is significant, as it implies that children's forms of communication – including through the digital environment – should not be interfered with unlawfully.<sup>22</sup>

The *Committee on the Rights of the Child General Comment No 25* has significantly changed the position of the *CRC* on the child's right to privacy in the digital environment. The *Committee on the Rights of the Child General Comment No 25* affirms that any interference with the child's privacy in the digital environment should be provided for by the law, be intended to serve a legitimate purpose, uphold the principle of data minimisation, be proportionate and designed to observe the best interests of the child, and must not conflict with the provisions, aims or objectives of the *CRC*.<sup>23</sup> This means that interference with the child's right to privacy in the digital environment must be legal, and that necessary legal steps should entail the least intrusive course to conserve the essence of the right to privacy.<sup>24</sup>

The role of parents in terms of article 5 of the *CRC* is worth mentioning with regard to children's privacy in the digital environment. According to article 5, parents have the right, duty and responsibility to provide direction and guidance to their children

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<sup>19</sup> Article 16(1) of the United Nations Convention on the Rights of the Child (1989).

<sup>20</sup> Committee on the Rights of the Child, General Comment No 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021) para 67.

<sup>21</sup> Article 16(1) of the United Nations Convention on the Rights of the Child (1989).

<sup>22</sup> Sibanda 2022 *African Human Rights Yearbook* 162.

<sup>23</sup> Committee on the Rights of the Child, General Comment No 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021) para 69.

<sup>24</sup> *Human Rights Council Report of the United Nations High Commissioner for Human Rights on the right to privacy in the digital age* A/HRC/48/31 (2021) para 8.

when they (the children) are exercising their rights as recognised in the *CRC*.<sup>25</sup> The latter should be consistent with the evolving capacity of the child.<sup>26</sup> This means that parents can provide guidance to their children as they navigate the digital environment, and also control their children's activities in the digital environment.<sup>27</sup> This can be done by means of parental controls that assist with supervision of the child's activities.<sup>28</sup> Parental control settings are designed to enable parents to control the type of content their children can consume and access.<sup>29</sup> Whilst parental control can help protect children in the digital environment, it could also interfere with children's privacy.<sup>30</sup>

In the African region, parents are ill equipped to intervene in matters related to the digital environment due to the generational divide.<sup>31</sup> In some instances, parent's activities in the digital environment place their children at risk, as a parent may be sharing information and images of the child.<sup>32</sup> In this regard, scholars have differing views about the reliance on parental guidance to limit children's right to privacy.<sup>33</sup> A balance must be struck between parental authority over children and access to the right to privacy.<sup>34</sup>

The *African Charter on the Rights and Welfare of the Child* (hereafter referred to as the *ACRWC*) provides for the right to privacy in a manner that does not find similar reference in the *CRC*.<sup>35</sup> It provides that parents shall have the right to exercise reasonable supervision over the conduct of the child.<sup>36</sup> This right is exerted alongside the provision for the protection of the child's right to privacy.<sup>37</sup> The *ACRWC* makes

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<sup>25</sup> Article 5 of the United Nations Convention on the Rights of the Child (1989).

<sup>26</sup> Article 5 of the United Nations Convention on the Rights of the Child (1989).

<sup>27</sup> Sibanda 2022 *African Human Rights Yearbook* 162.

<sup>28</sup> Sibanda 2022 *African Human Rights Yearbook* 162.

<sup>29</sup> Sibanda 2022 *African Human Rights Yearbook* 162.

<sup>30</sup> Sibanda 2022 *African Human Rights Yearbook* 162.

<sup>31</sup> Sibanda 2022 *African Human Rights Yearbook* 163.

<sup>32</sup> Singh and Power 2021 *AHRLJ* 106.

<sup>33</sup> Singh and Power 2021 *AHRLJ* 104.

<sup>34</sup> Singh and Power 2021 *AHRLJ* 105.

<sup>35</sup> Singh and Power 2021 *AHRLJ* 103.

<sup>36</sup> Article 10 of the African Charter on the Rights and Welfare of the Child (1990).

<sup>37</sup> Article 10 of the African Charter on the Rights and Welfare of the Child (1990) provides that no child shall be subjected to arbitrary or unlawful interference with his privacy, family home, or correspondence.

provision for the inclusion of parental power.<sup>38</sup> Ekundayo provides that the perception of children as rights holders is not easy to realise in African communities due to the authority parents exercise over children.<sup>39</sup> Article 31 of the *ACRWC* is a further manifestation of this relationship between children and parents in that it requires children to respect their parents and elders at all times, and preserve and strengthen African cultural values.<sup>40</sup> Article 10 of the *ACRWC* seeks to strike the balance between protecting children's right to privacy and parental supervision. This approach disregards children's participation in matters that affect them, and it is rooted in advancing cultural values above the best interests of the child.<sup>41</sup>

South Africa ratified the *CRC* in 1995.<sup>42</sup> The *Constitution* affirmed the position undertaken to implement international law through the provisions of section 231(4) and section 233. Section 233 exerts the obligation on every Court to choose any reasonable interpretation of the legislation that is consistent with international law.<sup>43</sup>

Section 14 of the *Constitution* provides that everyone has the right to privacy.<sup>44</sup> This protects people from interference with their personal space, regardless of whether the space is intimate or not.<sup>45</sup> Constitutional rights are interdependent and form a single constitutional value system.<sup>46</sup> For example, the best interests of the child are inherently intertwined with the right to privacy. The courts are inclined to apply the best interest criterion to balance the conflicting rights of children against any other rights. For instance, in *Centre for Child law v Media Limited and Others*,<sup>47</sup> the court alluded that privacy is pressing, particularly where the concerned party is a child.<sup>48</sup>

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<sup>38</sup> Singh and Power 2021 *AHRLJ* 103.

<sup>39</sup> Ekundayo 2015 *International Journal of Human Rights* 144.

<sup>40</sup> Article 31 of the African Charter on the Rights and Welfare of the Child (1990).

<sup>41</sup> Singh and Power 2021 *AHRLJ* 105 and 121.

<sup>42</sup> Kilkelly and Liefwaard 2019 *De jure Law journal* 526.

<sup>43</sup> Section 233 of the *Constitution of the Republic of South Africa*, 1996.

<sup>44</sup> Section 14 of the *Constitution of the Republic of South Africa*, 1996

<sup>45</sup> *Centre for Child law v Media Limited* [2019] ZACC para 176.

<sup>46</sup> *Centre for Child law v Media Limited* [2019] ZACC para 50.

<sup>47</sup> *Centre for Child law v Media Limited* [2019] ZACC.

<sup>48</sup> *Centre for Child law v Media Limited* [2019] ZACC 46 para 49.

This court viewed the right to privacy in the context of the child's identity, dignity, autonomy and their integrity.<sup>49</sup>

The *Constitution* states that the best interests of the child are of paramount importance in every matter concerning the child.<sup>50</sup> Applying the best interests of the child as criterion requires a balancing act. The child's safety in the digital environment must be ensured, and they ought to be able to participate in the digital environment.

In order to ensure the child's safety in the digital environment, parents must take action. Section 28(1)(b) of the *Constitution* provides for parental care in respect of the child.<sup>51</sup> The right to parental care infers a duty to care by the parents, who are required to guide and direct the child. In accordance with section 1 of the *Children's Act*, the duty to care can be understood to mean guiding and directing the child in a way that is appropriate for that child's age, maturity, and stage of development.<sup>52</sup> In *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*,<sup>53</sup> the court supported the duty to care conferred upon parents.<sup>54</sup> In contrast, the court showed strong detachment towards abuse of this duty and contended that parents ought to guide and protect children and not expose them to harsh circumstances that would adversely affect their development.<sup>55</sup>

The *Constitution* and courts are very cautious when approaching the potential conflict between the child's right to privacy and parental rights, duties and responsibilities. Cultural diversity is a factor that quickly introduces a variety of views.<sup>56</sup> In South Africa, this potential conflict shows an inclination towards the *CRC*.

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<sup>49</sup> *Centre for Child law v Media Limited* [2019] ZACC 46 para 49.

<sup>50</sup> Section 28(2) of the *Constitution of the Republic of South Africa*, 1996.

<sup>51</sup> Section 28(1)(b) of the *Constitution of the Republic of South Africa*, 1996.

<sup>52</sup> Section 1 of the *Children's Act* 38 of 2005.

<sup>53</sup> *Teddy Bear Clinic for the Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35.

<sup>54</sup> *Teddy Bear Clinic for the Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35 para 1.

<sup>55</sup> *Teddy Bear Clinic for the Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35 para 1.

<sup>56</sup> See Singh and Power 2021 *AHRLJ* 104, in which it is pointed out that the drafting process of the *ACRWC* had drawn inspiration from the fact that the *CRC* does not address African concerns

The reason for this is that section 231(4) of the *Constitution* provides that international agreement becomes law in the Republic once it has been enacted into law, and that international agreement binds the Republic upon its approval.<sup>57</sup> As part of the obligations imposed on states at international level, state parties must enact legislation that addresses children's rights in its domestic law.<sup>58</sup>

The *Protection of Personal Information Act*<sup>59</sup> (hereafter referred to as the *POPI Act*) offers protection of one's personal information. Section 11 provides for instances in which a child's personal information may be processed.<sup>60</sup> According to the *POPI Act*, personal information of a child may be processed when the parent of the child gives consent.<sup>61</sup> In such cases, the parents possess consensual powers that translates to having control of the personal information of the child. In the instance that the parent exercise control over the child's personal information as provided in section 11 of the *POPI Act*, exercise of parental rights, duties, and responsibilities by the parent is exerted. This means that the exercise of parental rights, duties, and responsibilities by parents supersede the child's own right to participate in their own decisions. The *Children's Amendment Act*<sup>62</sup> erroneously adopts this position.

Section 6A of the *Children's Amendment Act* seems to be at odds with the *Constitution*, as it subjects the child's right to privacy and protection of personal information to, *inter alia*, the *POPI Act*.<sup>63</sup> The *POPI Act* narrows the scope of protection of the child's autonomy to the child's control of their personal information. The *Children's Amendment Act* infringes on one of the interests protected by the child's right to privacy, which is the child's right to participate in decisions that affect him or her.

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and cultural contexts. This view is predominant in the African region and in South Africa insofar as children's rights are concerned.

<sup>57</sup> Section 231(4) of the *Constitution of the Republic of South Africa*, 1996.

<sup>58</sup> Section 231(4) of the *Constitution of the Republic of South Africa*, 1996.

<sup>59</sup> *Protection of Personal Information Act* 4 of 2013.

<sup>60</sup> Section 11 of the *Protection of Personal Information Act* 4 of 2013.

<sup>61</sup> Section 11(1)(a) of the *Protection of Personal Information Act* 4 of 2013.

<sup>62</sup> *Children's Amendment Act* 17 of 2022.

<sup>63</sup> Section 6A of the *Children's Amendment Act* 17 of 2022.

The *POPI Act* is a data protection law<sup>64</sup> and a *lex specialis* of the right to privacy.<sup>65</sup> This means that data protection provisions contained in the *POPI Act* are more specific in terms of the protection of personal information, which takes precedence over the right to privacy.<sup>66</sup> The *Constitution* on the other hand addresses the right to privacy in a general sense. As a result of this, it is not clear whether any infringement associated with the processing of the personal information of the child is entirely covered by section 14 of the *Constitution*.<sup>67</sup>

This research makes three assertions. First, the child's right to privacy protects the dignity, safety, and the child's exercise of their rights, such as the right to participation in decisions that affects them. Secondly, parental rights, duties and responsibilities are essential components of the developmental stages of the child's life – a child requires guidance and direction from a parent to make sound decisions in the early stages of their life. Thirdly, application of the right to privacy as provided for in the *Children's Amendment Act* predominantly relies on the *POPI Act*. This is problematic, as data protection laws are specialised privacy laws; this means that they protect personal information and not the privacy of information.<sup>68</sup> In turn, it over-inflates the scope of protection of the right to privacy in the *Constitution*. This does not only dilute the meaning of section 14 of the *Constitution*, but further obfuscates an already vague concept.

#### 1.1.1.1 Research question

Does the child's right to privacy transcend the rights, duties and responsibilities of the parents in the digital age of social media?

#### 1.1.1.2 Aims and objectives

The aim of this study was to untangle which rights of the child and parents are in conflict in the digital environment, and to navigate South Africa's position on the

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<sup>64</sup> Katzav 2022 *SALJ* 433.

<sup>65</sup> Katzav 2022 *SALJ* 433.

<sup>66</sup> Katzav 2022 *SALJ* 433.

<sup>67</sup> Katzav 2022 *SALJ* 433.

<sup>68</sup> Katzav 2022 *SALJ* 433.

rights of the child and parents in the digital age of social media. In this process, the study touches on the subject of the “best interests of the child” criterion, as it is the gold standard in every matter concerning a child. In the context of the study, the best interest of the child would entail a balanced view of children’s rights against that of the parents.

The objectives of this study were to trace the development of the right to privacy of children in the digital environment of social media; to discuss how this right has intensified in society, leading to potential conflict between the rights of the parents against that of the child; and to answer the question of whether a child’s right to privacy transcends the rights, duties and responsibilities of the parents in the digital age of social media.

#### 1.1.1.3 Research methodology

This research was conducted through a review of literature sources. This entailed reviewing available sources on the topic of research. Case law, legislation and textbooks, amongst other things, form the basis of this type of research in law. Research through literature review seeks to derive knowledge from existing legal sources. The literature study comprised the integration of primary and secondary sources. The primary sources included academic writings, case law, legislation and international instruments, and a qualitative method was followed.

#### 1.1.1.4 Framework of the study

Chapter 2 deals with international instruments. This chapter focuses on exploring various international instruments and academic writings to navigate through the core parameters of this study. The purpose of this is to draw the attention of the reader to the development of the focus area of this study.

Chapter 3 covers South African law and South Africa’s perspective on the child’s right to privacy in the digital age of social media. In this chapter, the study critically evaluates South African cases that stemmed from conflict between the rights of parents and children in the digital age of social media.

Chapter 4 on conflicting rights discusses the nature of interests protected by the child's right to privacy and the competing rights of the parents. This chapter discusses and examines the interests expressly stated or implied by the relevant international and regional instruments as they pertain to the rights of the child in the digital environment. It seeks to provide legal certainty and determine how these interests affect the rights of the parents by exploring decided cases on the matter. This is the done because theory tends to be well balanced, whilst the practical aspects are often most challenging. The "best interests" criterion is the primary consideration in all matters that concern a child, and this research cuts across this aspect. The chapter argues that, in cases of competing rights between children and parents, balance is essential.

Chapter 5 contains the conclusion of the study, providing a brief summary of the research. It highlights the core parameters of the research and summarises the issues raised in each chapter.

#### 1.1.1.5 Relevance for the Research Unit

Children are a vulnerable group and need protection in society.<sup>69</sup> Accordingly, this research attempted to highlight the struggles children encounter in their daily lives. With this in mind, the research was structured to fit the research theme of the Law Faculty of the North-West University, but with particular reference to vulnerable societies. The research conducted under this sub-project looks to investigate topics related to vulnerability of members of society.<sup>70</sup> Vulnerability in this area of research refers to the characteristics of an individual or a collective and their circumstances that influence their ability to resist and recover from, *inter alia*, human rights abuses and social protection.<sup>71</sup> The aim of this sub-project is to find legal solutions in this

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<sup>69</sup> Davel *Introduction to Child Law in South Africa* i-ii.

<sup>70</sup> North-West University *Vulnerable societies* <http://law.nwu.ac.za/vulnerable-societies/vulnerable-societies>.

<sup>71</sup> North-West University *Vulnerable societies* <http://law.nwu.ac.za/vulnerable-societies/vulnerable-societies>.

area of research, which looks to better the societies in South Africa and the rest of the world by upholding the best interests of those affected.<sup>72</sup>

#### 1.1.1.6 Statement regarding ethics

The checklist on ethics was completed and signed.

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<sup>72</sup> North-West University *Vulnerable societies* <http://law.nwu.ac.za/vulnerable-societies/vulnerable-societies>.

## CHAPTER 2 INTERNATIONAL INSTRUMENTS

### 2.1 Introduction

The *Convention on the Rights of the Child* (hereafter referred to as the *CRC*) is regarded as the most authoritative international instrument on the subject of children's rights. The right to privacy is provided in article 16(1) of the *CRC* and is mainly a restatement of the formulation of the right to privacy provided for under article 17 of the *International Covenant on Civil and Political Rights* and article 12 of the *Universal Declaration on Human Rights*.<sup>73</sup>

A member state of the *CRC* undertakes to give effect to the rights contained in the Convention.<sup>74</sup> According to article 4 of the *CRC*, States should take appropriate legislative, administrative and other measures in order to implement the rights contained in the *CRC*.<sup>75</sup>

The *African Charter on the Rights and Welfare of the Child* (hereafter referred to as the *ACRWC*) addresses the right to privacy in article 10. Article 10 of the *ACRWC* places a duty on parents to provide reasonable supervision of the conduct of the child.<sup>77</sup> The *African Children's Charter* does not give account of the right to privacy in the digital age.<sup>78</sup> The protection of privacy in the digital age is covered in the *African Union Convention on Cyber Security and Personal Data Protection* (hereafter referred to as the *Malabo Convention*).<sup>79</sup> The *Malabo Convention* is a treaty and soft law standards by the African Union aimed at addressing human rights in the digital age, including the right to privacy.<sup>80</sup> The *Malabo Convention* is the response to

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<sup>73</sup> Tobin and Field "Article 16: the right to protection of privacy, home, family, correspondence, honour and reputation" 551.

<sup>74</sup> Vaghri *et al* *Monitoring State compliance with the UN Convention on the Rights of the Child: an analysis of attributes* 405.

<sup>75</sup> Article 4 of the United Nations Convention on the Rights of the Child (1989).

<sup>77</sup> Article 10 of the African Charter on the Rights and Welfare of the Child (1990).

<sup>78</sup> Sibanda 2022 *African Human Rights Yearbook* 157.

<sup>79</sup> Sibanda 2022 *African Human Rights Yearbook* 157.

<sup>80</sup> Sibanda 2022 *African Human Rights Yearbook* 157.

safeguarding children's privacy online in the normative framework of the African Union.<sup>81</sup>

South Africa is a signatory body of the *CRC* and, as a member State to this particular Convention, it has the inherent obligation to promote values and principles that are underpinned by the *CRC*.<sup>82</sup>

In this chapter, international and regional instruments pertaining to the child's right to privacy and the parental rights, duties and responsibilities are discussed.

### *2.1.1 The right to privacy in the digital age*

As mentioned above, the right to privacy is a fundamental human right that is echoed in article 12 of the *Universal Declaration of Human Rights*, article 17 of the *International Covenant on Civil and Political Rights*, and in various other international instruments and regional human rights instruments.<sup>83</sup> Privacy can be considered as the presumption that individuals should have an area of autonomous development, the freedom of interaction, and anonymity that is protected against interruption from state intervention and excessive intervention by other uninvited individuals.<sup>84</sup> Informational privacy includes existing information and any information that can be obtained about a person.<sup>85</sup>

According to Singh and Power, the right to privacy is a fundamental right that is essential as a right itself and as an enabler of other rights, such as access to information, freedom of expression, freedom of association, public participation, dignity, equality, and non-discrimination.<sup>86</sup> According to the authors, the right to privacy cannot be gainsaid, as it is important in the child's life.<sup>87</sup> Singh and Power

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<sup>81</sup> Sibanda 2022 *African Human Rights Yearbook* 161.

<sup>82</sup> Kilkelly and Liefwaard 2019 *De jure Law journal* 526. This duty is solidified in constitutional law.

<sup>83</sup> *Human Rights Council Report of the United Nations High Commissioner for Human Rights on the right to privacy in the digital age* A/HRC/39/29 (2018) para 5.

<sup>84</sup> *Human Rights Council Report of the United Nations High Commissioner for Human Rights on the right to privacy in the digital age* A/HRC/39/29 (2018) para 5.

<sup>85</sup> *Human Rights Council Report of the United Nations High Commissioner for Human Rights on the right to privacy in the digital age* A/HRC/39/29 (2018) para 5.

<sup>86</sup> Singh and Power 2021 *African Human Rights Law Journal* 101.

<sup>87</sup> Singh and Power 2021 *African Human Rights Law Journal* 101.

state that the right to privacy facilitates the child’s ability to fully self-actualise and self-identify in their own way without undue intrusion that can misdirect their path in a particular social or cultural direction.<sup>88</sup>

According to the United Nations High Commissioner, protection of the right to privacy is broad, extending not only to the substantive information contained in communications, but to the metadata as well. When analysed and compiled, metadata can provide information about an individual’s behaviour, social relationships, private preference and identity that extends beyond what can be learned merely by accessing the content of a communication.<sup>89</sup> The protection of the right to privacy is not limited to private spaces such as the home of a person, but extends to public spaces and information that is publicly available.<sup>90</sup> For example, the right to privacy applies when a government is monitoring a public space – such as a marketplace or a train station – and thereby observes individuals. Similarly, when publicly available information about an individual on social media is collected and analysed, it also implicates the right to privacy.<sup>91</sup> This means that a child can share his or her information on a public platform and be afforded protection under the right to privacy <sup>92</sup>

### *2.1.2 The child’s right to privacy*

The *Committee on the Rights of the Child General Comment No 25* consulted children about their participation in the digital space, and the responses from children who took part were positive.<sup>93</sup> Most children reported enjoying their use of the internet.<sup>94</sup> However, the *Committee on the Rights of the Child General Comment*

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<sup>88</sup> Singh and Power 2021 *African Human Rights Law Journal* 101.

<sup>89</sup> *Human Rights Council Report of the United Nations High Commissioner for Human Rights on the right to privacy in the digital age* A/HRC/39/29 (2018) para 6.

<sup>90</sup> *Human Rights Council Report of the United Nations High Commissioner for Human Rights on the right to privacy in the digital age* A/HRC/39/29 (2018) para 6.

<sup>91</sup> *Human Rights Council Report of the United Nations High Commissioner for Human Rights on the right to privacy in the digital age* A/HRC/39/29 (2018) para 6.

<sup>92</sup> *Human Rights Council Report of the United Nations High Commissioner for Human Rights on the right to privacy in the digital age* A/HRC/39/29 (2018) para 6.

<sup>93</sup> Committee on the Rights of the Child, General Comment 25 ‘Children’s rights in relation to the digital environment’ CRC/C/GC25 (2021) para 1.

<sup>94</sup> Committee on the Rights of the Child, General Comment 25 ‘Children’s rights in relation to the digital environment’ CRC/C/GC25 (2021) para 1.

*No 25* also warns that children's privacy may be threatened where data is collected and processed by the public.<sup>95</sup> It follows that parents should be aware of the possible threats children are exposed to on social media, but it is also necessary to find a middle ground between protecting children's right to privacy without excessive limitations on the child's ability to express themselves and access information.<sup>96</sup> Under international law, the starting point in this regard is the *CRC*.

The *CRC* is the leading international instrument where the human rights of children are concerned.<sup>97</sup> The *CRC* provides minimum legal obligations on member states with respect to children's enjoyment of their rights.<sup>98</sup> The *CRC* considers children as holders of rights. In addition, member states of the Convention ought to give constitutional expression to children's rights, with particular focus on enabling a rights-based approach to children's rights and the inclusion of the *CRC*'s general principles in their implementation.<sup>99</sup>

#### 2.1.2.1 Article 16(1) of the CRC

The child's right to privacy is protected in article 16 of the *CRC*. Article 16(1) of the *CRC* states that a child's right to privacy should not be arbitrarily or unlawfully interfered with in any of the following settings: a child's home or outside the child's home.<sup>100</sup> Article 16(1) further states that state parties to the current Convention must provide children with protection against any interruptions to their privacy.<sup>101</sup>

Article 16(1) of the *CRC* finds expression in the *International Covenant on Civil and Political Rights* in a sense that the right to privacy in both the instruments is provided for in a similar way. However, the *CRC* does not apply the child's right to privacy in isolation.<sup>102</sup> For example, the application of the right to information as provided in

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<sup>95</sup> Committee on the Rights of the Child, General Comment 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021) para 67.

<sup>96</sup> Singh and Power 2021 *African Human Rights Law Journal* 107.

<sup>97</sup> Kilkelly and Liefwaard 2019 *De jure Law journal* 521.

<sup>98</sup> Kilkelly and Liefwaard 2019 *De jure Law journal* 524.

<sup>99</sup> Kilkelly and Liefwaard 2019 *De jure Law journal* 524.

<sup>100</sup> Article 16(1) of the United Nations Convention on the Rights of the Child (1989).

<sup>101</sup> Article 16(2) of the United Nations Convention on the Rights of the Child (1989).

<sup>102</sup> Vaghri *et al* *Monitoring State compliance with the UN Convention on the Rights of the Child: an analysis of attributes* 94.

article 17 of the *CRC* often finds application when the privacy of the child is concerned.<sup>103</sup> The link between article 16 and 17 of the *CRC* is important. Effective protection of privacy requires a framework that regulates the child's right to access information while promoting a child's social, spiritual and moral development.<sup>104</sup> Arbitrary and unlawful interference are explored in the next section.

#### 2.1.2.1.1 Protection against arbitrary or unlawful interference

According to the *Human Rights Commission General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*,<sup>105</sup> (hereafter referred to as the *Human Rights Commission General Comment No. 16*) arbitrary interference in the context of privacy refers to intolerable circumstances that may be provided under the law and that infringe on the rights of people in an unreasonable manner.<sup>106</sup> The *Human Rights Commission General Comment No. 16* does not define what arbitrary interference is, although it suggests circumstances that may constitute an arbitrary interference with the right to privacy. Arbitrary is defined as a decision or action that is without reason and not fair.<sup>107</sup>

Paragraph 4 of the *Human Rights Commission General Comment No. 16* is of less significance in the context of the child's right to privacy. Sibanda<sup>108</sup> is of the view that privacy has evolved. The writer claims that the digital age has changed privacy norms, which has caused a shift in the meaning of the right to privacy.<sup>110</sup> In other words, our right to privacy protected our family, home, reputation and honour. The evolution of the internet and social media has changed the parameters of privacy,

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<sup>103</sup> Vaghri *et al* *Monitoring State compliance with the UN Convention on the Rights of the Child: an analysis of attributes* 94.

<sup>104</sup> Vaghri *et al* *Monitoring State compliance with the UN Convention on the Rights of the Child: an analysis of attributes* 94.

<sup>105</sup> *The Human Rights Commission General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988) para 4.

<sup>106</sup> *The Human Rights Commission General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988) para 4.

<sup>107</sup> Hey and Holloway *Advanced Learner's Dictionary* 63.

<sup>108</sup> Sibanda 2022 *African Human Rights Yearbook* 158.

<sup>110</sup> Sibanda 2022 *African Human Rights Yearbook* 158.

and new threats have changed what our right to privacy is meant to shield us from.<sup>111</sup>

Humble agrees with the assertion that the *International Covenant on Civil and Political Rights*, which came in effect in 1966, is outdated insofar as the right to privacy is concerned. The author postulates that the Covenant was not equipped to consider the threats of data collection and digital technologies to individual privacy, as these technologies simply did not exist.<sup>112</sup> According to Humble, the *Covenant's* definition of privacy is narrow in the context of today's technological advances in communication and data collection.<sup>113</sup>

The *Human Rights Commission General Comment No. 16* reiterates that arbitrary interference can extend to interference provided for by the law.<sup>114</sup> According to the *Human Rights Commission*, interference that is provided by the law is without any exemption and should be reasonable in any event.<sup>115</sup>

In addition, the *Human Rights Commission General Comment No. 16* describes unlawful interference. According to the *Human Rights Commission*, unlawful interference is any interference that is not prescribed by the law.<sup>116</sup> This means that any interference with a child's right to privacy must be prescribed by law, and be necessary and reasonable. The *United Nations Committee on the Rights of the Child General Comment No 25* confirms this position, in that it asserts that any interference with the child's privacy should be provided for by the law that is aimed at serving a legitimate purpose and upholding the principle of data minimization.<sup>117</sup>

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<sup>111</sup> Sibanda 2022 *African Human Rights Yearbook* 158.

<sup>112</sup> Humble 2020 *The International Journal of Human Rights* 3.

<sup>113</sup> Humble 2020 *The International Journal of Human Rights* 3.

<sup>114</sup> *The Human Rights Commission General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988) para 4.

<sup>115</sup> *The Human Rights Commission General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988) para 4.

<sup>116</sup> *The Human Rights Commission General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988) para 3.

<sup>117</sup> Committee on the Rights of the Child, General Comment 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021) para 69.

The latter ought to be proportionate and designed to observe the best interests of the child and, importantly, it must not be in conflict with the provisions, aims or objectives of the Convention.<sup>118</sup>

Arbitrary and unlawful interference are connected in the sense that an arbitrary interference is an act that is unreasonable and unfair. Generally, the act is unlawful because the restrictions under a particular law are not adhered to.

The *CRC* also refers to arbitrary and unlawful interference. No information created by someone for their personal use may be obtained without the consent of that person, unless such information is accessed lawfully and non-arbitrarily.<sup>119</sup> However, article 16 of the *CRC* makes no mention of whether a parent's invasion of the child's privacy is arbitrary or unlawful. Tobin and Field argue that obtaining consent for access to personal information becomes quite complex in the instance of a child and a parent.<sup>120</sup> Parents are in a position of care, and, in most cases, this means that the parent has access to the child's personal information.<sup>121</sup>

Article 16 of the *CRC* does not address the position of the parent (possible) interfering with the child's right to privacy of the child is not dealt with. However, it is included in article 5 of the *CRC*. The position differs in the African region. Article 10 of the *ACRWC* deals with the child's right to privacy and it also provides that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children.<sup>122</sup>

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<sup>118</sup> Committee on the Rights of the Child, General Comment 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021) para 69.

<sup>119</sup> Tobin and Field "Article 16: the right to protection of privacy, home, family, correspondence, honour and reputation" 569.

<sup>120</sup> Tobin and Field "Article 16: the right to protection of privacy, home, family, correspondence, honour and reputation" 569.

<sup>121</sup> Tobin and Field "Article 16: the right to protection of privacy, home, family, correspondence, honour and reputation" 569.

<sup>122</sup> Article 10 of the African Charter on the Rights and Welfare of the Child (1990).

### 2.1.2.2 Article 10 of the ACRWC

The *ACRWC* has a different approach to children's right to privacy not present in the *CRC*.<sup>123</sup> It affords children the right to privacy given that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of the children.<sup>124</sup> Arguably, subjecting the child's right to privacy to parental supervision limits the enjoyment and exercise of the right by the child.<sup>125</sup> On the other hand, children may lose control of their personal information as a result of their lack of insight into which information is private on social media.<sup>126</sup> The risks enumerated here negate parental supervision and guidance.

The *African Committee of Experts on the Rights and Welfare of the Child* concedes that, in an African context, childhood is not understood as a period in which children rely on parents for everything.<sup>127</sup> According to the *African Committee's* perspective, children are able to function independently as they develop through the stages of life, and they can begin to assume certain roles in the family.<sup>128</sup> The *African Committee of Experts* further postulates that the need to enhance and promote one's family should not prevent the child from exercising their rights.<sup>129</sup> This means that rights like the child's right to privacy cannot be justified by supervision over the conduct of the child.<sup>130</sup>

Sibanda asserts that the *ACRWC* is limited in scope insofar as it relates to the child's right to privacy.<sup>131</sup> According to Sibanda, the right to privacy in the digital

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<sup>123</sup> Centre for Human Rights 2022 *PULP* 7.

<sup>124</sup> Article 10 of the African Charter on the Rights and Welfare of the Child (1990).

<sup>125</sup> Centre for Human Rights 2022 *PULP* 8.

<sup>126</sup> Sibanda 2022 *African Human Rights Yearbook* 158.

<sup>127</sup> *African Committee of Experts on the Rights and Welfare of the Child General Comment on Article 31 of the African Charter on the Rights and Welfare of the Child on the responsibilities of the child* (2017) para 28.

<sup>128</sup> *African Committee of Experts on the Rights and Welfare of the Child General Comment on Article 31 of the African Charter on the Rights and Welfare of the Child on the responsibilities of the child* (2017) para 28.

<sup>129</sup> *African Committee of Experts on the Rights and Welfare of the Child General Comment on Article 31 of the African Charter on the Rights and Welfare of the Child on the responsibilities of the child* (2017) para 32.

<sup>130</sup> Centre for Human Rights 2022 *PULP* 8.

<sup>131</sup> Sibanda 2022 *African Human Rights Yearbook* 157.

environment is not covered in the *ACRWC*.<sup>132</sup> In recognition of the need for a legal framework that addresses the right to privacy in the digital age in the African region, the *Malabo Convention* was adopted.

### 2.1.2.3 The Malabo Convention

The *Malabo Convention* was adopted in 2014.<sup>133</sup> Having struggled to reach the minimum number of ratifications required,<sup>134</sup> the *Malabo Convention* came into effect in 2023, after Mauritania were the latest to sign and ratify the Convention. To date, South Africa has not ratified the *Malabo Convention*. The *Malabo Convention* finds application in South African law by virtue of section 39(b) and (c) of the *Constitution* which requires a consideration of international law and foreign law in the interpretation of the Bill of Rights.<sup>135</sup>

The *Malabo Convention* imposes obligations on member states to come up with policy, and legal and regulatory framework to curb cybercrime and enhance personal data protection.<sup>136</sup> According to Turianskyi, the *Malabo Convention* does not establish a unified set of rules that member States can draw reference from when dealing with the rights of individuals in the digital environment.<sup>137</sup> It rather guides member States towards setting up their own legal framework to deal with cybercrime and the protection of personal data in the digital environment.<sup>138</sup>

The *Malabo Convention* is premised on the understanding that protection of personal information and private life is challenging in the digital environment due to the imbalance between use of computer technologies and the protection of citizens in their day-to-day and professional lives.<sup>139</sup>

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<sup>132</sup> Sibanda 2022 *African Human Rights Yearbook* 157.

<sup>133</sup> Turianskyi 2020 *SAIIA* 2.

<sup>134</sup> According to Turianskyi, in 2014 the *Malabo Convention* was sitting at 14 signatures and only 7 ratifications, which indicated that the Convention was encountering a steady move in order to into effect. A low turnover from African countries. See Turianskyi 2020 *SAIIA* 2.

<sup>135</sup> Section 39(1)(b) and (c) of the *Constitution of the Republic of South Africa*, 1996.

<sup>136</sup> Turianskyi 2020 *SAIIA* 2.

<sup>137</sup> Turianskyi 2020 *SAIIA* 22.

<sup>138</sup> Turianskyi 2020 *SAIIA* 22.

<sup>139</sup> Sibanda 2022 *African Human Rights Yearbook* 164.

According to article 9 of the *Malabo Convention*, the Convention applies to collection, processing and sharing of the personal data of a natural person by private or public entities.<sup>140</sup> In terms of article 13 of the *Malabo Convention*, the principle of consent and legitimacy of personal data processing determines how one should obtain personal data of another person.<sup>141</sup>

The *Malabo Convention* refers to natural persons in addressing the protection of personal data and does not mention children.<sup>142</sup> Arguably, this may jeopardise the privacy of children in digital environments, as state parties are not provided with any guidance on protecting children's personal data.<sup>143</sup>

### *2.1.3 Parental rights and responsibilities*

According to the *United Nations Committee on the Rights of the Child General Comment No 25*, social media may threaten children's privacy due to their own activities and the activities of others on social media.<sup>144</sup> For instance, a parent may share photos of their child that can be used in criminal activities at a later stage.<sup>145</sup> This example demonstrates the need to find an appropriate balance between protecting children's privacy and restricting their ability to express themselves and access information.<sup>146</sup> This responsibility lies with the children's parents or guardians.

Article 5 of the *CRC* stipulates that parents have the duty to provide appropriate direction and guidance to the child.<sup>147</sup> Article 18 of the *CRC* further states that parents have the primary responsibility for the upbringing of the child.<sup>148</sup> Article

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<sup>140</sup> Article 9 of the African Union Convention on Cyber Security and Personal Data Protection (2014).

<sup>141</sup> Article 13 of the African Union Convention on Cyber Security and Personal Data Protection (2014).

<sup>142</sup> Sibanda 2022 *African Human Rights Yearbook* 164

<sup>143</sup> Sibanda 2022 *African Human Rights Yearbook* 164

<sup>144</sup> Committee on the Rights of the Child, General Comment 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021) para 5.

<sup>145</sup> Committee on the Rights of the Child, General Comment 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021) para 5.

<sup>146</sup> Singh and Power 2021 *African Human Rights Law Journal* 106.

<sup>147</sup> Article 5 of the United Nations Convention on the Rights of the Child (1989).

<sup>148</sup> Article 18(1) of the United Nations Convention on the Rights of the Child (1989).

18(1) of the *CRC* is complementary to article 27(2) of the *CRC*.<sup>149</sup> Article 27(2) bestows parents with the responsibility to provide the conditions of living necessary for the child's development.<sup>150</sup> The rights afforded to parents in the *CRC* equally apply to legal guardians and primary caregivers of the child. Parents play an active role in the upbringing of children in which they can decide which information children can access and share on social media.<sup>151</sup>

Article 5 of the *CRC* is unique, as it introduces a triangle of responsibilities and duties between the child and the parents.<sup>152</sup> The rights and duties of the parents change as the child develops and their capacity evolves.<sup>153</sup> In other words, the parent's exercise of parental responsibilities must cater for the ability of the child to take increasing responsibilities for their own self.<sup>154</sup> In addition, when a parent exercise parental guidance, it should be directed towards the exercise by the child, a specific right that is provided in the *CRC*.<sup>155</sup>

*The human rights treaty bodies statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child*, (hereafter referred to as the *Human Rights Treaty Bodies Statement on article 5 of the CRC*) notes that parental responsibilities, duties and rights are not absolute.<sup>156</sup> The human rights treaty bodies comprise of committees of experts that monitor the implementation of various international human rights instruments. On October 11, 2023, the human rights treaty bodies issued a statement on article 5 of the *CRC*. The statement serves as a guideline for member states on how to implement article 5 of the *CRC*. According to paragraph 1 of the *Human Rights Treaty Bodies' Statement on article*

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<sup>149</sup> Vaghri *et al* *Monitoring state's compliance with UN Convention on the Rights of the Child* 154.

<sup>150</sup> Article 27(2) of the United Nations Convention on the Rights of the Child (1989).

<sup>151</sup> Singh and Power 2021 *African Human Rights Law Journal* 113.

<sup>152</sup> Vaghri *et al* *Monitoring state's compliance with UN Convention on the Rights of the Child* 118.

<sup>153</sup> Vaghri *et al* *Monitoring state's compliance with UN Convention on the Rights of the Child* 118.

<sup>154</sup> Vaghri *et al* *Monitoring state's compliance with UN Convention on the Rights of the Child* 118.

<sup>155</sup> Vaghri *et al* *Monitoring state's compliance with UN Convention on the Rights of the Child* 118.

<sup>156</sup> *The United Nations Human Rights Treaty Bodies statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child* (2023) para 7.

5 of the CRC, its aim is to clarify the concept of parental guidance and evolving capacities of the child.<sup>157</sup>

The *Human Rights Treaty Bodies Statement on article 5 of the CRC* points out that parents' exercise of guidance and direction towards their children should be in the manner that respect and ensure children's rights.<sup>158</sup> On this note, article 18 of the CRC provides that the primary responsibility of the parents is the upbringing and the development of the child.<sup>159</sup> These responsibilities should be carried out according to the best interests of the child.<sup>160</sup> It bears mentioning that article 18 of the CRC is an addition to article 5.<sup>161</sup> Article 18 of the CRC bestows child rearing and development of the child on parents, whilst underlining that decisions by parents should be made with due consideration of the best interests of the child.<sup>162</sup>

Article 27(2) of the CRC posits that parents' duty and responsibility is to secure the conditions of living necessary for the child's development.<sup>163</sup> Parents must adjust the manner in which they exercise guidance and direction over children.<sup>164</sup> Similarly, parents are required to solicit and hear the child's views when providing direction and guidance.<sup>165</sup> The *Human Rights Treaty Bodies Statement on article 5 of the CRC* points out that, as a child grows and matures, their views ought to be given greater weight.<sup>166</sup>

Article 5 draws on the concept of 'evolving capacities' to refer to the process of maturing and learning.<sup>167</sup> This process allows children to gain competencies,

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<sup>157</sup> *The United Nations Human Rights Treaty Bodies statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child* (2023) para 1.

<sup>158</sup> *The United Nations Human Rights Treaty Bodies statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child* (2023) Para 7.

<sup>159</sup> Article 18(1) of the United Nations Convention on the Rights of the Child (1989).

<sup>160</sup> Article 18(1) of the United Nations Convention on the Rights of the Child (1989).

<sup>161</sup> Vaghri *et al* *Monitoring state's compliance with UN Convention on the Rights of the Child* 154.

<sup>162</sup> Vaghri *et al* *Monitoring state's compliance with UN Convention on the Rights of the Child* 154.

<sup>163</sup> Article 27(2) of the United Nations Convention on the Rights of the Child (1989).

<sup>164</sup> *The United Nations Human Rights Treaty Bodies statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child* (2023) para 8.

<sup>165</sup> *The United Nations Human Rights Treaty Bodies statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child* (2023) para 8.

<sup>166</sup> *The United Nations Human Rights Treaty Bodies statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child* (2023) para 8.

<sup>167</sup> Vaghri *et al* *Monitoring state's compliance with UN Convention on the Rights of the Child* 122.

understanding, and increasing levels of autonomy to assume responsibilities and exercise their rights.<sup>168</sup>

Evolving capacities plays a vital role in maintaining the balance contained in the *CRC*. An essential part of the balance is considering children as embodiments of rights, worthy of being listened to, respected, given autonomy in the exercise of their rights, whilst at the same time ensuring that each child receives unique protection as per their maturity.<sup>171</sup> In the discussion to follow, the concept of the evolving capacity is broken down into three functions as follows; (1) an enabling principle, (2) determine the decision-making abilities of the child and (3) to strengthen their participatory role in promoting and safeguarding their own rights.

Firstly, the evolving capacity of the child is recognised as the enabling principle.<sup>172</sup> This is because the evolving capacities is used to empower children's agency in order to exercise their rights under the *CRC*.<sup>173</sup> As an enabling principle, the evolving capacities of the child has four functions, namely: (1) regarding children as rights holders according to the *CRC*; (2) granting children the autonomy to make decisions; (3) allowing children, even very young children, to be consulted for every decision made on their behalf; (4) for parents to provide guidance and direction to enable the child's enjoyment and exercise of their rights.<sup>174</sup>

As children grow, parents should allow them to exercise increasing agency over their own rights.<sup>175</sup> In other words, any sign of development and maturity must be recognised and considered by parents so they can adjust their guidance and direction based on these small changes.<sup>176</sup> Secondly, the evolving capacities of the child are determine the decision-making abilities of the child. A point of contention in this instance is that the evolving capacities of a child should not obviate a state's obligation to protect children. For example, a child's evolving capacities applies to

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<sup>168</sup> Vaghri *et al* *Monitoring state's compliance with UN Convention on the Rights of the Child* 122.

<sup>171</sup> Varadan 2019 *International Journal of Children's Rights* 322.

<sup>172</sup> Vaghri *et al* *Monitoring state's compliance with UN Convention on the Rights of the Child* 122.

<sup>173</sup> Varadan 2019 *International Journal of Children's Rights* 309.

<sup>174</sup> Varadan 2019 *International Journal of Children's Rights* 317.

<sup>175</sup> Varadan 2019 *International Journal of Children's Rights* 318.

<sup>176</sup> Varadan 2019 *International Journal of Children's Rights* 318.

their ability to make decisions about their own health. The state could offer protection by allowing the child to have the upper hand and make their own decision, or by obligating parents to assess the child's health and take appropriate action.

The third function of the child's evolving capacities is to strengthen their participatory role in promoting and safeguarding their own rights. The fourth function informs parents that their role in their children's life should be to guide and direct. The evolving capacities principle should be seen as a positive and enabling process, and not a leeway for authoritarian practices emanating from parents to limit children's self-expression and autonomy.

#### *2.1.4 Parental rights and responsibilities at regional level*

Article 10 of the *ACRWC* contains an internal limitation clause in respect to the child's right to privacy.<sup>177</sup> The *ACRW* in turn solidifies the right of parents and primary care givers as holders of parental rights and responsibilities, as article 10 of the *ACRWC* stipulates that parents should exercise supervision over the conduct of their children.<sup>178</sup> Article 10 of the *ACRWC* does not define the ambit of reasonable supervision.<sup>179</sup> Arguably, this leaves room for parents and legal guardians to circumvent the child's right to privacy.<sup>180</sup> Singh and Power concede that article 10 and 20 of the *ACRWC* must be read together.<sup>181</sup>

Article 20 of the *ACRWC* provides for parental responsibilities and confers a duty on parents and guardians to promote the best interests of the child.<sup>182</sup> Steinberg explains the aforementioned dilemma as follows:02

Children have an interest in privacy. Yet parents' rights to control the upbringing of their children and parents' rights to free speech may trump this interest. When parents share information about their children on the social media, they do so without their children's consent. These parents act as both gatekeepers of their

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<sup>177</sup> Singh and Power 2021 *African Human Rights Law Journal* 114.

<sup>178</sup> Article 10 of the African Charter on the Rights and Welfare of the Child (1990).

<sup>179</sup> Singh and Power 2021 *African Human Rights Law Journal* 114.

<sup>180</sup> Singh and Power 2021 *African Human Rights Law Journal* 114.

<sup>181</sup> Singh and Power 2021 *African Human Rights Law Journal* 114.

<sup>182</sup> Article 20 of the African Charter on the Rights and Welfare of the Child (1990).

children's personal information and as story tellers of their children's personal stories. This dual role of parents in their children's digital identity gives children little protection as their digital presence and identity evolves. A conflict of interests exists as children might one day resent the disclosures made years earlier by their parents.<sup>183</sup>

In other words, parents can provide guidance over children as they explore the digital environment and also control children's activities on social media.<sup>184</sup>

The *African Committee of Experts on the Rights and Welfare of the Child, General Comment No. 7 on article 27 of the ACRWC: Sexual exploitation* (hereafter referred to as *African Committee of Experts General Comment no. 7*) notes that there is no difference between a child who takes part in a digital environment and a child who does not.<sup>185</sup> It also notes that children under the age of 18 years must be protected by parents.<sup>186</sup> However, the *African Committee of Experts General Comment no. 7* concedes that the responsibility of the parent to protect their child ought to be balanced with the child's right to access information and participate in the digital environment.<sup>187</sup> In addition, the *African Committee of Experts General Comment no. 7* postulates that the parental responsibilities and the duty to afford children protection must be exercised in the context of the child's evolving capacities.<sup>188</sup>

It is only in article 9 of the *ACRWC* that the evolving capacities of the child in the context of parental responsibilities and duties is recognised when it mentions freedom of thought, conscience and religion as the rights of the child.

The African Commission on Human and Peoples' Rights adopted the *Declaration of Principles on Freedom of Expression and Access to Information*.<sup>189</sup> It is worth noting that principle 8 of the *Declaration of Principles on Freedom of Expression and Access*

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<sup>183</sup> Steinberg 2017 *66 Emory Law Journal* 839.

<sup>184</sup> Sibanda 2022 *African Human Rights Yearbook* 162.

<sup>185</sup> African Committee of Experts on the Rights and Welfare of the Child, General Comment 7 'article 27 of the ACRWC: Sexual exploitation' (2021) para 4.6.

<sup>186</sup> African Committee of Experts on the Rights and Welfare of the Child, General Comment 7 'article 27 of the ACRWC: Sexual exploitation' (2021) para 4.6.

<sup>187</sup> African Committee of Experts on the Rights and Welfare of the Child, General Comment 7 'article 27 of the ACRWC: Sexual exploitation' (2021) para 4.6.

<sup>188</sup> African Committee of Experts on the Rights and Welfare of the Child, General Comment 7 'article 27 of the ACRWC: Sexual exploitation' (2021) para 4.6.

<sup>189</sup> *African Commission on Human and People's Rights Declaration of Principles on Freedom of Expression and Access to Information* (2019).

*to Information* calls for recognition and respect for the evolving capacities of the child.<sup>190</sup> Principle 8 also provides that the best interests of the child shall remain the primary consideration when a child exercises their right to freedom of expression and to access information.<sup>191</sup>

The African Commission on Human and Peoples' Rights is founded in terms of article 30 of the *African Charter on Human and Peoples' Rights*. The objectives of the African Commission on Human and Peoples' Rights includes the protection and promotion of human and peoples' rights, and interpretation of the *African Charter on Human and Peoples' Rights*.<sup>192</sup> The *Declaration of Principles on Freedom of Expression and Access to Information* aims to strengthen these three pillars. The introductory statement to the *Declaration of Principles on Freedom of Expression and Access to Information* provides that the Declaration is a soft law corpus to article 9 of the *African Charter on Human and Peoples' Rights*.<sup>193</sup> This means that there are no obligations that arise from *Declaration of Principles on Freedom of Expression and Access to Information*.

Whereas the *Declaration of Principles on Freedom of Expression and Access to Information* expresses its will to ascertain the position of children in respect of the right to privacy in the digital age, it is only a soft law, which makes its area of application less effective.

### *2.1.5 Conclusion*

The international and regional framework provides for the child's right to privacy and for its protection by other rights holders. The right to privacy addresses arbitrary and unlawful interferences with the child's privacy at home, with family or in correspondence, honour and reputation. Children have the right to share and seek

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<sup>190</sup> *African Commission on Human and Peoples' Rights Declaration of Principles on Freedom of Expression and Access to Information* (2019) principle 8.

<sup>191</sup> *African Commission on Human and Peoples' Rights Declaration of Principles on Freedom of Expression and Access to Information* (2019) principle 8.

<sup>192</sup> Sibanda 2022 *African Human Rights Yearbook* 170.

<sup>193</sup> *African Commission on Human and Peoples' Rights Declaration of Principles on Freedom of Expression and Access to Information* (2019) paragraph 2 of the introductory statement.

information through social media and this right is protected by the *CRC*. On the other hand, parents as primary caregivers of children have rights and responsibilities, one of which is the duty to protect the child. This means that the child's right to privacy is qualified by parental supervision or control.

The international and regional frameworks deal with the parent-to-child relationship but, because of the rapid growth of technology and social media, the relationship between parents and children has become more complex. Children have the right to privacy on their social media platforms, which excludes everyone – including their parents – from interfering with its content. On the other hand, parents are responsible for knowing what their children are doing on those sites, which is the duty arising from parental care. Parents can infringe upon their child's privacy if they are exercising their parental duty to care as long as they are acting in the best interests of the child at all times. The extent to which parents can infringe upon the child's privacy when exercising their duty to care is not dealt with in international legal framework, which means there is a need for improvement. The chapter to follow focuses on the South African law in relation to the child's right to privacy and parental rights and responsibilities in the digital age of social media.

## CHAPTER 3 SOUTH AFRICAN LAW

### 3.1 Introduction

In the previous chapter, this study established the international law dealing with the child's right to privacy and the parental rights, duties and responsibilities. This chapter discusses the child's right to privacy as well as parental rights, duties and responsibilities in the South African context. The first part of the chapter draws attention to the Bill of Rights, which bestows fundamental rights to both adults and children, who then become subjects of these rights and are bound by them. The second part focuses on the right to privacy as provided for in the *Constitution*. The third part focuses on the child's right to privacy on social media against parental rights, duties and responsibilities.

#### 3.1.1 The application of the Bill of Rights

According to section 7 of the *Constitution*, the Bill of Rights is the cornerstone of democracy in South Africa.<sup>194</sup> Section 7 further notes that the Bill of Rights embodies the rights of all people in South Africa, affirming the values such as human dignity, equality and freedom.<sup>195</sup> According to section 8(2) of the *Constitution*, the Bill of Rights binds a natural person or a juristic person, if applicable, and the nature of the right and the duty it imposes warrants the application of the Bill of Rights.<sup>196</sup> In principle, section 8(2) provides that any persons may not infringe on the constitutional rights of other persons.<sup>197</sup> Section 8(2) of the *Constitution* governs the direct horizontal application of the Bill of Rights.<sup>198</sup>

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<sup>194</sup> Section 7(1) of the *Constitution of the Republic of South Africa*, 1996.

<sup>195</sup> Section 7(1) of the *Constitution of the Republic of South Africa*, 1996.

<sup>196</sup> Section 8(2) of the *Constitution of the Republic of South Africa*, 1996.

<sup>197</sup> Rautenbach and Venter *Rautenbach-Malherbe Constitutional law* 302.

<sup>198</sup> De Vos and Freedman *South African Constitutional law in context* 417.

Horizontal application of the Bill of Rights entails that the *Constitution* confers rights on people and, in turn, it imposes obligations on them to respect the Bill of Rights.<sup>199</sup> This horizontal application is the primary focus of this research. Section 8(2) of the *Constitution* applies in instances where, in exercising their rights, powers or freedoms, a person interferes with the rights of others.<sup>200</sup> The relationship between a parent and a child is of a private nature, which means that there is a direct horizontal application of the Bill of Rights, and both parents and children are bound by these rights.

### 3.1.2 *The right to privacy in the Constitution*

Section 14 of the *Constitution* provides that everyone has the right to privacy.<sup>201</sup> It further states that the right to privacy safeguards citizens against interferences with their homes, possessions, property and communications.<sup>202</sup>

Protection in respect of the right to privacy is twofold.<sup>203</sup> The right to privacy protects an individual's ability to limit access to personal data by others and the ability to control the obtaining, processing, possession and publication of personal data by others.<sup>204</sup> The first aspect of the right to privacy is referred to as protection against intrusion, while the second is the protection of information. According to Rautenbach and Venter, the latter is known as informational privacy.<sup>205</sup>

#### 3.1.2.1 The nature of the right to privacy

The right to privacy protects the sphere of private intimacy and autonomy.<sup>206</sup> This means that the right to privacy protects an individual's ability to control access to what he or she is doing.<sup>207</sup> In addition, privacy protects the obtaining, processing

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<sup>199</sup> De Vos and Freedman *South African Constitutional law in context* 417-418.

<sup>200</sup> Rautenbach and Venter *Rautenbach-Malherbe Constitutional law* 302.

<sup>201</sup> Section 14 of the *Constitution of the Republic of South Africa, 1996*.

<sup>202</sup> Section 14 of the *Constitution of the Republic of South Africa, 1996*.

<sup>203</sup> Rautenbach and Venter *Rautenbach-Malherbe Constitutional law* 376.

<sup>204</sup> Rautenbach and Venter *Rautenbach-Malherbe Constitutional law* 376.

<sup>205</sup> Rautenbach and Venter *Rautenbach-Malherbe Constitutional law* 376.

<sup>206</sup> De Vos and Freedman *South African Constitutional law in context* 587.

<sup>207</sup> Rautenbach and Venter *Rautenbach-Malherbe Constitutional law* 376.

and publication of information about us and our activities.<sup>208</sup> The protection afforded through the right to privacy enables individuals to establish and nurture personal relationships without intrusion from anyone.<sup>209</sup> The core concerns of privacy are sphere of private intimacy, home life and family, physical and moral integrity, and honour and reputation.<sup>210</sup>

In the case of *Bernstein v Bester* 1996 (2) SA 751 (CC) (hereafter referred to as *Bernstein v Bester*) the Constitutional Court stated that an individual's privacy covers those aspects that a legitimate expectation of privacy should include.<sup>211</sup> A legitimate expectation is an expectation deemed reasonable by society.<sup>212</sup> The legitimate expectation of privacy comprises two components: a subjective expectation of privacy and an objectively reasonable expectation of privacy.<sup>213</sup> A subjective expectation of privacy is not identifiable if the person who seeks to employ the protection of the right to privacy agrees to waive their privacy.<sup>214</sup> Subjective expectation of privacy is discussed below.

### 3.1.2.2 Informational privacy

Neethling and others are of the view that privacy consists of all personal facts related to a person in their private sphere of life.<sup>215</sup> In this sense, personal facts serve as functionary role of self-determination and the subjective view of an individual.<sup>216</sup> Accordingly, Neethling and others formulated the definition of informational privacy as follows:

Privacy is an individual condition of life characterised by sphere of private life and exclusion of the public and publicity. This condition embraces all those personal facts which the person concerned has himself or herself determined to be excluded

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<sup>208</sup> Rautenbach and Venter *Rautenbach-Malherbe Constitutional law* 376.

<sup>209</sup> De Vos and Freedman *South African Constitutional law in context* 587.

<sup>210</sup> De Vos and Freedman *South African Constitutional law in context* 587.

<sup>211</sup> *Bernstein v Bester* 1996 (2) SA 751 (CC) para 75.

<sup>212</sup> Rautenbach and Venter *Rautenbach-Malherbe Constitutional law* 378.

<sup>213</sup> De Vos and Freedman *South African Constitutional law in context* 587.

<sup>214</sup> De Vos and Freedman *South African Constitutional law in context* 587.

<sup>215</sup> Neethling, Potgieter and Roos *Neethling on personality rights* 46.

<sup>216</sup> Katzav 2022 *SALJ* 445.

from the knowledge of outsiders and in respect of which he or she has the will that they be kept private.<sup>217</sup>

This definition of informational privacy maintains that informational privacy is subjective in the sense that a justifiable infringement of privacy occurs when an intruder acquires true personal facts about an individual who is protected by the right to privacy and opposed to disclosure or the intrusion of such personal facts.<sup>218</sup>

Neethling and others continue to frame privacy in terms of personality rights and common law,<sup>219</sup> a formulation the Constitutional Court is predominantly inclined towards. The latter is evident in the discussion of informational privacy as provided in the Constitution below. An infringement on the right to privacy is claimed under common law application of the *actio iniuriarum*, in which the claimant must prove wrongfulness, that their privacy was intruded upon, and the required fault.<sup>220</sup> Whether there was intrusion or disclosure of true personal facts in an unreasonable manner is a matter determined at the wrongfulness stage.<sup>221</sup> The latter is tested against the legitimate expectations of privacy.<sup>222</sup> Evidently, this criterion is a two-stage test, as it comprises a subjective and objective test. It then opposes the formulation that infringement against informational privacy protection extends to subjective expectation only. Ostensibly, if one is of the subjective view that their privacy has been infringed on, such infringement is not unlawful unless he or she regards the conduct as offensive.<sup>223</sup>

#### 3.1.2.2.1 Section 14(d) of the Constitution

The *Constitution* refers to informational privacy in section 14(d), which reads as follows:

Everyone has the right to privacy, which includes the right not to have -

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<sup>217</sup> Neethling, Potgieter and Roos *Neethling on personality rights* 48.

<sup>218</sup> Katzav 2022 *SALJ* 446.

<sup>219</sup> Neethling, Potgieter and Roos *Neethling on personality rights* 48.

<sup>220</sup> Katzav 2022 *SALJ* 446.

<sup>221</sup> Katzav 2022 *SALJ* 446.

<sup>222</sup> Katzav 2022 *SALJ* 446.

<sup>223</sup> Katzav 2022 *SALJ* 446.

d) the privacy of their communications infringed.<sup>224</sup>

The provision of section 14(d) of the *Constitution* poses as a data protection law. This is because this section of the *Constitution* refers to the protection of one's communications, which means that anyone is protected against unlawful disclosure and use of their personal information and the unlawful collection and storage of their personal information.<sup>225</sup> Data protection laws ensure that the processing and control of personal information is done in an acceptable manner and is legitimate.<sup>226</sup>

In order to determine if there is any infringement to the right to informational privacy in terms of the *Constitution*, the Constitutional Court differentiates between forms of privacy in a concentric circle that sees privacy arranged in accordance to the depth of protection that is afforded to an individual.<sup>227</sup> The distinction is drawn between the inner-sanctum privacy and periphery privacy.<sup>228</sup> Inner-sanctum privacy is family life and home affairs and it is afforded absolute protection.<sup>229</sup> Whilst periphery privacy upholds public life and participation, affording little protection of privacy because of societal interests that can be rooted in the contention that subjective privacy expectations are baseless.<sup>230</sup>

In *Bernstein v Bester*, it was argued that there is no absolute right.<sup>231</sup> Every right is maintained by other individual and community rights.<sup>232</sup> *In casu*, the distinction was made between privacy that is shielded from corrosion by competing rights of the society, and privacy outside an individual's personal realm.<sup>233</sup> The court proclaimed that a person's privacy is inviolable when it is within family life and home environment and most likely to be infringed on when external relationships from family life and their home environment.<sup>234</sup> In addition, the *Bernstein v Bester* case

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<sup>224</sup> Section 14(d) of the *Constitution of the Republic of South Africa*, 1996.

<sup>225</sup> Townsend and Thaldar 2019 *South African Journal on Human Rights* 333.

<sup>226</sup> Townsend and Thaldar 2019 *South African Journal on Human Rights* 333.

<sup>227</sup> Rautenbach and Venter *Rautenbach-Malherbe Constitutional law* 379.

<sup>228</sup> Rautenbach and Venter *Rautenbach-Malherbe Constitutional law* 379.

<sup>229</sup> Rautenbach and Venter *Rautenbach-Malherbe Constitutional law* 379.

<sup>230</sup> Rautenbach and Venter *Rautenbach-Malherbe Constitutional law* 379.

<sup>231</sup> *Bernstein v Bester* 1996 (2) SA 751 (CC) para 79.

<sup>232</sup> *Bernstein v Bester* 1996 (2) SA 751 (CC) para 79.

<sup>233</sup> *Bernstein v Bester* 1996 (2) SA 751 (CC) para 79.

<sup>234</sup> *Bernstein v Bester* 1996 (2) SA 751 (CC) para 67.

held that the inviolable core of privacy is dependent on whether an individual has a legitimate expectation of privacy.<sup>235</sup> The latter is a reflection on Neethling's formulation of informational privacy and it is established through use of subjective and objective test.<sup>236</sup>

Determining legitimate expectation of privacy has to cut through the legal convictions of the community. Katzav holds that the protective nature of the legal convictions of the community would assert every communication as private.<sup>237</sup> This may indicate that any piece of information that relates to a person ought to be protected by section 14 of the *Constitution*.<sup>238</sup>

In the *AmaBhungane* case, Judge Madlanga made the assertion that the *Regulation of Interception of Communications and Provision of Communication-Related Information Act* had breached privacy of those concerned along the entire length and continuum.<sup>239</sup> Katzav agrees with this finding on the basis that, in the case in question, the infringement on interests which the Court had to determine was on someone's intimate personal communications. Both of these interests are covered under the scope of protection in section 14(d) of the *Constitution*. In as much as the assertion made above would be correct for the particular case, Katzav implores scholars to be attentive to details when reading the *AmaBhungane* case, especially the assertion made by Judge Madlanga.<sup>240</sup> This is because the assertion made by Judge Madlanga denotes that the infringement of the right to privacy lies with the lower-end infringement of the right, the extent to which trivial information that, even the type of information that would not bother a person if disclosed, is seen as deserving of the protection by the right to privacy.<sup>241</sup>

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<sup>235</sup> *Bernstein v Bester* 1996 (2) SA 751 (CC) para 75.

<sup>236</sup> Katzav 2022 SALJ 447.

<sup>237</sup> Katzav 2022 SALJ 449.

<sup>238</sup> Katzav 2022 SALJ 449.

<sup>239</sup> *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] ZACC 31 para 24.

<sup>240</sup> Katzav 2022 SALJ 448.

<sup>241</sup> Katzav 2022 SALJ 448.

At this point, a distinction must be made between private information and information that is not private. Trivial information does not fall within the protective ambit of section 14(d) of the *Constitution*. Section 14(d) of the *Constitution* can be interpreted in two ways. Firstly, it could mean that all communications are subject to the right to privacy. It could also mean that the protective ambit of these communications is qualified by the privacy of such transmissions and correspondence. In other words, infringement of privacy can only be claimed if an individual purposely indicated such communications to be private and thereby invoked the protection of the right to privacy. This, in turn, creates a legitimate expectation of privacy for the bearer of the right.

### 3.1.2.3 Protection against intrusion

Neethling and others write that, when information about an individual is collected, the result of such appropriation of these personal facts is such that the individual in question would like to restrict external people from knowing about their information.<sup>242</sup> It is once again emphasised that not all information viewed in isolation constitutes private information that warrants informational privacy protection.<sup>243</sup> In addition, the general rule is that when one gathers data record and obtains knowledge thereof, what follows is an intrusion into a private sphere of a person.<sup>244</sup> Protection against intrusion of privacy rests upon a reasonable expectation of privacy. In the following discussions, intrusion is framed against privacy in reference to section 14 of the *Constitution* and the *POPI Act* in order to clarify the link between 'intrusion against privacy' and 'reasonable expectation of privacy'.

In sections 14(a) to (c), the *Constitution* asserts that privacy protects the person or their home, their property and aggregation of their possessions.<sup>245</sup> In other words, these provisions prohibit search and seizure of the individual's personal facts. Protection in respect of personal facts is substantive in nature. Substantive

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<sup>242</sup> Neethling, Potgieter and Roos *Neethling on personality rights* 369.

<sup>243</sup> Katzav 2022 *SALJ* 449.

<sup>244</sup> Katzav 2022 *SALJ* 450.

<sup>245</sup> Section 14(a) to (c) of the *Constitution of the Republic of South Africa*, 1996.

provision, such as sections 14(a) to (c) of the *Constitution* affords a person the right to make personal decisions about certain interests, including relationships and one's personal life.<sup>246</sup>

Any variety of details can be considered personal information, to the extent that almost any information associated with an identifiable person could be regarded as personal information.<sup>247</sup> By this argument, Neethling and others point out that personal information is not private information.<sup>248</sup> In respect of section 14(a) to (c) of the *Constitution*, this would mean that the personal facts of a person and their personal information is not private. This contention can be seen from the assertion made in the case of *NM v Smith*,<sup>249</sup> in which it was emphasised by the Constitutional Court that privacy is concerned with personal matters.<sup>250</sup> *In casu*, the Court emphasised that personal matters referred to details of which the disclosure would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence in the same circumstances, and in which there is a will to keep them private.<sup>251</sup> This means that section 14(a) to (c) invokes a protection of privacy through the reasonable expectation of privacy. In order for protection of privacy to occur in terms of these provisions, the bearer should have made a substantial decision undertaken by the bearer of the right to privacy to keep their personal information private.

In *NM v Smith*, the reasonable expectation of privacy was said to be present if the disclosure of one's personal information resulted in mental distress and injury to the person.<sup>252</sup> The foregoing contentions do not properly explain how the mere aggregation of personal information directly affects privacy. It has already been stated that a person ought to hold a reasonable subjective expectation of privacy in order to claim that their personal information is private. In the discussion that

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<sup>246</sup> Chihwai *A child's right to privacy, a parent's duty to care and social media* 44.

<sup>247</sup> Katzav 2022 *SALJ* 450.

<sup>248</sup> Neethling, Potgieter and Roos *Neethling on personality rights* 369.

<sup>249</sup> *NM v Smith* 2007 5 SA 250 (CC).

<sup>250</sup> *NM v Smith* 2007 5 SA 250 (CC) para 34.

<sup>251</sup> *NM v Smith* 2007 5 SA 250 (CC) para 34.

<sup>252</sup> *NM v Smith* 2007 5 SA 250 (CC) para 34.

follows, the difference between the concept of personal information in terms of the *POPI Act* and personal information, which forms part of the private realm of an individual is discussed.

### *3.1.3 Protection of the right to privacy under the POPI Act*

Thus far, this research has outlined that infringement of privacy can occur through intrusion into the private sphere of the person, or through the disclosure of one's personal facts.<sup>253</sup> Now the focus turns to the *POPI Act* and the manner in which protection of personal information is dealt with in relation to the right to privacy.

Section 1 of the *POPI Act* defines personal information as information relating to an identifiable person.<sup>254</sup> The definition further points out that personal information includes an identifying number, email address, physical address, telephone number, location information, online identifier, or any other method of assignment to a person.<sup>255</sup> In addition, the biometrics of a person is their personal information.<sup>256</sup> The *POPI Act* leaves out areas such as purely personal or household activities and personal information, which has been de-identified in its scope of protection.<sup>257</sup> The list is extensive, and for the purpose of this research, only the two mentioned are dealt with.

The right to the protection of personal information comes from the right to privacy as provided for in section 14 of the *Constitution*.<sup>258</sup> Section 14 of the *Constitution* is not concerned with personal information or data in particular. However, the inclusion of the protection of an individual's communications in section 14(d) of the *Constitution* provides for the protection of personal information, which constitutes personal data.<sup>259</sup> It is the opinion of the researcher that the protection of personal information in terms of section 14 of the *Constitution* corresponds with the

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<sup>253</sup> Burns and Burger-Smidt *A commentary on the Protection of Personal Information Act* 3.

<sup>254</sup> Section 1 of the *Protection of Personal Information Act* 4 of 2013.

<sup>255</sup> Section 1(c) of the *Protection of Personal Information Act* 4 of 2013.

<sup>256</sup> Section 1(d) of the *Protection of Personal Information Act* 4 of 2013.

<sup>257</sup> Burns and Burger-Smidt *A commentary on the Protection of Personal Information Act* 9.

<sup>258</sup> Burns and Burger-Smidt *A commentary on the Protection of Personal Information Act* 15.

<sup>259</sup> Burns and Burger-Smidt *A commentary on the Protection of Personal Information Act* 15.

protection of personal information provided for in terms of the *POPI Act*. This is because any identifiable personal information would be protected by section 14 of the *Constitution* and the *POPI Act*,<sup>260</sup> while personal information from an individual's private realm requires something more specific about the information.<sup>261</sup>

If one were to combine bits of non-personal information, the infringement of privacy would hinge on whether the data subject has cause for protection of privacy over the processing of their personal information.<sup>262</sup> It is also worth mentioning that the infringement in any of the instances highlighted above is possible. For instance, a person may collect information about someone, such as their marital status, age, gender, nationality and personal opinions to make findings that the data subject is a 25 year-old South African male who shares no political views that are similar to that of someone else.<sup>263</sup> If the owner of this personal information had desired to keep this information out of the public eye, the disclosure thereof may result in infringement of his privacy.<sup>264</sup> This could be the profile of someone on Twitter for all users of Twitter to see. The assumption would be that collecting personal information does not necessarily intrude into the private realm of the individual.<sup>265</sup>

In addition, Neethling's theory of privacy points out that privacy infringements may occur through intrusion upon or disclosure of true personal facts.<sup>266</sup> However, when read alongside section 16(1) of the *POPI Act*, Neethling's theory is contradictory. Section 16(1) of the *POPI Act* states that a data subject ought to take necessary steps to ensure that their personal information is complete, accurate, not misleading and updated.<sup>267</sup> The assumption is that section 16(1) of the *POPI Act* relates to the information broadcast on digital platforms and social media, as it is encompassed under condition 5 of the *POPI Act*, which deals mainly with the quality of

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<sup>260</sup> Katzav 2022 *SALJ* 450.

<sup>261</sup> Katzav 2022 *SALJ* 450.

<sup>262</sup> Katzav 2022 *SALJ* 450.

<sup>263</sup> Katzav 2022 *SALJ* 450.

<sup>264</sup> Katzav 2022 *SALJ* 450.

<sup>265</sup> Katzav 2022 *SALJ* 450.

<sup>266</sup> Katzav 2022 *SALJ* 451.

<sup>267</sup> Section 16(1) of the *Protection of Personal Information Act 4* of 2013.

information.<sup>268</sup> However, the provision contained in section 16(1) of the *POPI Act* does not seem an appropriate application of the *POPI Act* to the right to privacy. If the scope of the *POPI Act* as it relates to the right to privacy is obscured, perhaps it should focus on data protection instead of the protection of privacy.

The principal concern of data protection is private information of an intimate nature.<sup>269</sup> Personal information is incidental to data protection, which means that the protection afforded by its scope is neither intended nor equipped to address claims that arise from the violation of someone's privacy.<sup>270</sup> It is incorrect to presume, as a starting point, that any illegal data processing infringes upon privacy.<sup>271</sup> Arguably, these contentions are indefensible as they lead to legal uncertainty and overinflate the bounds of privacy law.<sup>272</sup> A privacy infringement inflicted by data processing practices depends on the individual concerned.<sup>273</sup> That is he or she had caused for their personal information to not be processed by anyone.

Condition 2 of the *POPI Act* stipulates that personal information must be processed in a manner that is lawful and reasonable.<sup>274</sup> Burns and Burger-Smidt point out that the requirement of reasonableness refers to exercising minimalism,<sup>275</sup> and that the purpose of processing must be adequate, relevant and not excessive.<sup>276</sup> Thus, compliance with condition 2 requires an objective approach and respect for the bounds of another's privacy. Katzav argues that a reasonable expectation of privacy is a haphazard criterion for determining the processing limitations of personal information.<sup>277</sup> For example, a social media user who applies the most stringent privacy settings has a greater expectation of privacy than a user who is not applying

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<sup>268</sup> Condition 5 of the *Protection of Personal Information Act* 4 of 2013.

<sup>269</sup> Monti and Wacks *Protecting personal information: The right to privacy reconsidered* 58.

<sup>270</sup> Monti and Wacks *Protecting personal information: The right to privacy reconsidered* 58.

<sup>271</sup> Katzav 2022 *SALJ* 451.

<sup>272</sup> Katzav 2022 *SALJ* 451.

<sup>273</sup> Katzav 2022 *SALJ* 451.

<sup>274</sup> Section 9(a) and (b) of the *Protection of Personal Information Act* 4 of 2013.

<sup>275</sup> Burns and Burger-Smidt *A commentary on the Protection of Personal Information Act* 47.

<sup>276</sup> Burns and Burger-Smidt *A commentary on the Protection of Personal Information Act* 47.

<sup>277</sup> Katzav 2022 *SALJ* 453.

any settings.<sup>281</sup> Applied in a real life situation, if an individual decides to hide their status on WhatsApp when deciding to post their 16 years birthday to certain individuals, then the user in such instance has a high expectancy of privacy than a WhatsApp user who post status on the same app and does not enhance his or she privacy settings.

Section 11(1)(a) of the *POPI Act* states that consent of the data subject is a prerequisite for the processing of personal information.<sup>282</sup> Section 1 of the *POPI Act* defines consent to mean any voluntary, specific and informed expression of will in terms of which permission is given for the aggregation of personal information.<sup>283</sup> Consent in terms of the *POPI Act* features in an instance that the data subject sets or aims to fulfil an agreement in terms of section 11(b) of the *POPI Act*.<sup>284</sup> Even so, the contractual agreement entered into with social media platforms such as Facebook, Twitter and WhatsApp, is one that requires the data subject's consent to applicable terms and conditions before access is granted.<sup>285</sup> Very often users or data subjects do not read these agreements, in which case social media has adverse implications for one's reasonable expectation of privacy.<sup>286</sup>

### 3.1.4 *The child's right to privacy*

The rights of children are provided for in section 28 of the *Constitution*.<sup>287</sup> Section 28 of the *Constitution* applies to children only, and is regarded as the children's clause.<sup>288</sup> This does not mean that the rights of children can only be drawn from the children's clause. In fact, the children's clause is silent on children's right to privacy. In principle, all the rights in the Bill of Rights apply to everyone, including children.<sup>289</sup> The only exceptions are voting and holding of public office, which children cannot

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<sup>281</sup> Katzav 2022 *SALJ* 454.

<sup>282</sup> Section 11(1)(a) of the *Protection of Personal Information Act* 4 of 2013.

<sup>283</sup> Section 1 of the *Protection of Personal Information Act* 4 of 2013.

<sup>284</sup> Section 11(1)(b) of the *Protection of Personal Information Act* 4 of 2013 provides that processing of personal information is warranted in contractual agreements to which a data subject is part of.

<sup>285</sup> Katzav 2022 *SALJ* 454.

<sup>286</sup> Katzav 2022 *SALJ* 454.

<sup>287</sup> Songca *Vulnerable children in South Africa* 33.

<sup>288</sup> Songca *Vulnerable children in South Africa* 33.

<sup>289</sup> Songca *Vulnerable children in South Africa* 33.

partake in. In addition, section 1 of the *Children's Act* refers to a child as a person under the age of 18 years.<sup>290</sup> The inclusion of section 28 in the *Constitution* highlights the importance of upholding the rights of children, and in *Bhe v Magistrate, Khayelitsha*,<sup>291</sup> the Court reiterated this fact and pointed out that other rights in the *Constitution* are conferred upon children.<sup>292</sup>

In essence, children ought to be afforded the protection of the right to privacy in accordance to section 14 of the *Constitution*. In *Centre for Child Law v Media 24 Limited*,<sup>293</sup> the Court considered the child's right to privacy under the lens of section 14 of the *Constitution*.<sup>294</sup> It is argued that any constitutional right may be limited, especially in light of the best interest of the child,<sup>295</sup> which prioritises the needs of the child above anything else. At the same time, introducing other components to the right to privacy – such as individual self-determination – further complicates an assessment of the best interests of the child. It requires a balance between all other competing interests.

According to section 6A of the *Children's Amendment Act*, protection of personal information of the child is framed under the scope of the *POPI Act*.<sup>296</sup> The decision to frame the protection of personal information of the child under the *POPI Act* lies with the fact that the *Constitution* requires an integration and inclusive approach to the interpretation of rights of a natural person. For example, section 39(2) of the *Constitution* provides that when interpreting any legislation, every Court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.<sup>297</sup> Although, the *Constitution* provides for integration of other legislation in order to protect rights of natural person, the *Constitution* is the supreme law. Further, the application of

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<sup>290</sup> Section 1 of the *Children's Act* 38 of 2005.

<sup>291</sup> *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC).

<sup>292</sup> *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 52.

<sup>293</sup> *Centre for Child Law v Media 24 Limited* [2019] ZACC 46.

<sup>294</sup> *Centre for Child Law v Media 24 Limited* [2019] ZACC 46 para 44.

<sup>295</sup> Centre for Child Law *20 years of imagining children constitutionally-strategic litigation and advocacy for children's rights in South Africa* 49.

<sup>296</sup> Section 6A of the *Children's Amendment Act* 17 of 2022.

<sup>297</sup> Section 39(2) of the *Constitution of the Republic of South Africa*, 1996.

the *Constitution* in terms of section 8, is that the Bill of Rights is central to any enacted law.<sup>298</sup> This means that the Bill of Rights binds any legislation.

Section 6A of the *Children's Amendment Act* is at odds with *Constitution* for the following reasons. The right to privacy and data protection rights exist in different cohort.<sup>299</sup> In chapter one it was mentioned that, the *Constitution* is a *lex generalis* of the right to privacy, whereas the *POPI Act* is *lex specialis* of the right to privacy in that the *POPI Act* is a data protection law, particularly the protection of personal information. To frame the right to privacy of the child under the *POPI Act*, such in the case of section 6A of the *Children's Amendment Act* is not purposeful and does not promote the right to privacy in section 14 of the *Constitution*. This is because the *Constitution* provides for the right to privacy and does not eliminate on other centric circumstances that may be regarded as privacy concerns whereas in the instance of the *POPI Act*, this would not materialise as the *POPI Act* specifically deals with the infringement of the personal information of an individual.

Katzav argues that data protection rights are irreducible to privacy protection.<sup>300</sup> However, one cannot detach the right to privacy from data protection rights.<sup>301</sup> For this point, one need to understand the scope of protection of the *POPI Act* insofar as the right to privacy of the child is concerned.

#### 3.1.4.1 Protection of the child's right to privacy under the POPI Act

The use of social media to share information may have a devastating effect on the child's safety and security.<sup>302</sup> To this end, it is of paramount importance that information concerning children is shared legally and properly.<sup>303</sup> The *POPI Act* sets out rights and privileges of the data subjects. Anyone who processes the personal information of a child must consider the child's right to have their information

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<sup>298</sup> Section 8 of the *Constitution of the Republic of South Africa*, 1996.

<sup>299</sup> Katzav 2022 *SALJ* 444.

<sup>300</sup> Katzav 2022 *SALJ* 444.

<sup>301</sup> Katzav 2022 *SALJ* 444.

<sup>302</sup> Songca *Vulnerable children in South Africa* 194.

<sup>303</sup> Songca *Vulnerable children in South Africa* 194.

protected.<sup>304</sup> For example, section 5 of the *POPI Act* states that anyone has the right to have their personal information accessed under conditions of lawful processing.<sup>305</sup> Condition 2 of lawful processing of personal information was discussed above. Processors of personal information, which can be a parent of a child, must get consent first before processing personal information of the child.<sup>306</sup> This is reiterated in section 11(1)(a) of the *POPI Act*.<sup>307</sup>

What follows will be to determine how one deals with the competing interests between the data subject and the responsible party where a privacy interest cannot be reasonably identified. A practical example of the violation of privacy in the context of personal information, is sharenting, which is the sharing of the child's personal data especially where the child did not give consent for their personal data to be shared on social media.<sup>308</sup> For instance, instead of inviting a classroom of students to an entertainment centre for a birthday party, parents might opt for a small, at-home gathering for their child but post real-time photos to Instagram Stories to include other family and friends.<sup>309</sup>

In the above scenario, a privacy infringement is not a clear one as a parent had acted in the interest of his or her child, in that the parent went online to share with the public the media taken at the child's party. In light of the parent's duties, rights and responsibilities, parents can act in the interest of the child to see to it that their child's happiness is advanced. In light of the Condition 2 of the *POPI Act* as discussed above, a parent who unlawfully process the child's personal information would have infringed on the child's privacy.<sup>310</sup> However, it can be argued that the *POPI Act* is not child centred piece of legislation for the fact that, section 11(1)(a) of the *POPI Act* provides that in the instance where consent need to be obtained

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<sup>304</sup> Songca *Vulnerable children in South Africa* 194.

<sup>305</sup> Section 5 of the *Protection of Personal Information Act* 4 of 2013.

<sup>306</sup> Songca *Vulnerable children in South Africa* 194.

<sup>307</sup> Section 11(1)(a) of the *Protection of Personal Information Act* 4 of 2013, requires that one must obtain the consent of the other before processing their personal information.

<sup>308</sup> Ong, Fox and Alexa *et al* 2022 *Journal of Consumer Affairs* 1107.

<sup>309</sup> Ong, Fox and Alexa *et al* 2022 *Journal of Consumer Affairs* 1107.

<sup>310</sup> Condition 2 of the *Protection of Personal Information Act* 4 of 2013, stipulates that personal information must be processed in a manner that is lawful and reasonable.

for the purpose of processing the personal information of another person, if such person is the child, the parent would be a competent individual to consent to the processing of the child's personal information.<sup>311</sup>

Sharenting is evasive of the child's privacy. Evidently, the *POPI Act* opens the floodgates for infringement on the child's privacy to be exploited by parents in their exercise of parental rights and responsibilities.

In addition, the *POPI Act* should not be dealt with in isolation, because safeguarding children's interests across the social media spectrum requires parental intervention. The *Children's Act* clarifies the rights, duties and responsibilities of parents. The *Children's Act* requires that parents raise their children to ensure that their roles are implemented with due consideration to the need to safeguard and promote the welfare of children.<sup>312</sup> This includes managing the child's personal data and information.<sup>313</sup>

### *3.1.5 Parental rights, duties and responsibilities*

Section 28(1)(b) of the *Constitution* provides that children have the right to family or parental care.<sup>314</sup> In light of section 28(1)(b) of the *Constitution*, the scope of the right to parental care cannot include parental care that is detrimental to the safety and well-being of a child.<sup>316</sup> The *Children's Act* was enacted to give effect to the rights of the child contained in section 28 of the *Constitution*. In this study, it is the duty to care for the child that is discussed as encompassed by parental rights, duties and responsibilities. Parental responsibilities and rights in the *Children's Act* are characterised by four components.<sup>318</sup>

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<sup>311</sup> Section 11(1)(a) of the *Protection of Personal Information Act* 4 of 2013.

<sup>312</sup> Songca *Vulnerable children in South Africa* 196.

<sup>313</sup> Songca *Vulnerable children in South Africa* 196.

<sup>314</sup> Section 28(1)(b) of the *Constitution of the Republic of South Africa*, 1996.

<sup>316</sup> *C & others v Department of Health and Social Development, Gauteng & others* 2012 (2) SA 208 (CC) para 115.

<sup>318</sup> Section 18(2) of the *Children's Act* 38 of 2005; provides that the parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right:

- (a) To care for the child;
- (b) To maintain contact with the child;
- (c) To act as a guardian of the child and

### 3.1.5.1 The duty of parental care

The duty of care refers to the responsibility and moral obligation of everyone with the capacity in society to ensure the safety of others.<sup>319</sup> Parents as bearers of parental rights and responsibilities have the duty to care for the child in accordance to section 28(1)(b) of the *Constitution* and section 18(2)(a) of the *Children's Act*. In the case of *C v Department of Health and Social Development Gauteng*,<sup>320</sup> section 28 of the *Constitution* was seen as an enabler of distinct rights of children that were not subject to any internal qualification.<sup>321</sup> The latter can be reiterated as far as section 28(1)(b) is concerned, that the Court remarked that the interpretation of this section envisages that parental care is an entitlement to which every child holds its parents.<sup>322</sup> Section 28(1)(b) of the *Constitution* creates an obligation that is to be fulfilled by parents, whereas section 18(2)(a) of the *Children's Act* creates both a right and a duty to be upheld by a parent in respect of their child.

Section 1(1) of the *Children's Act* defines care as encompassing, inter alia, safeguarding and promoting the child's well-being, protection from exploitation and any other physical and moral harm and hazards, respecting, protecting, promoting and securing the fulfilment of the child's rights, and guarding against any infringement of the child's constitutional rights and the rights set out in the *Children's Act*. In addition, care means guiding and directing the child's education and upbringing in a manner that is appropriate to their age, and also guiding their behaviour in a humane manner. The responsibility and the right to care for the child is a cementation of the child's best interests. Section 1(1)(h) of the *Children's Act* highlights this point and provides that, generally, the responsibility and the right to care for the child mean ensuring that the child's best interests are paramount in all matters that affect the child.

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(d) To contribute to the maintenance of the child.

<sup>319</sup> Geyer 2022 *Medpharm* 6.

<sup>320</sup> *C v Department of Health and Social Development Gauteng* 2012 2 SA 208 (CC).

<sup>321</sup> *C v Department of Health and Social Development Gauteng* 2012 2 SA 208 (CC) para 26.

<sup>322</sup> *C v Department of Health and Social Development Gauteng* 2012 2 SA 208 (CC) para 24.

The parent's role to care for the child is guided by four general principles that underpin children's rights: these are the best interests of the child, survival and development of the child, the right to life, and the right to be heard.<sup>323</sup> These principles are considered a lens through which children's rights in the digital age of social media can be understood.<sup>324</sup>

### 3.1.5.2 The best interests of the child

The best interests of the child is provided for in section 28(2)) of the *Constitution*. It serves as a benchmark against which all law and conduct that affects children can be tested.<sup>325</sup> It bears highlighting that section 28 of the *Constitution* is prescriptive.<sup>326</sup> This means that the right to parental care provided in section 28(1)(b) and the best interests of the child provided for in section 28(2) are not merely interpretive guidelines, but enforceable rules.<sup>327</sup>

In *Minister for Welfare and Population development v Fitzpatrick* 2000 3 SA 422 (CC), the Constitutional Court remarked that:

Section 28(1) is not exhaustive of children's rights. 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 section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1).<sup>328</sup>

In the above case, the Court's interpretation of section 28(2) shows that it is not merely a guiding principle, but a principle that can strengthen other rights.

In the case of *B v M*,<sup>329</sup> the Court noted that the word "best" in "best interests" had two distinctive meanings. First was the fact that it relates to the child's welfare. Secondly, it relates to interests that favour the child. On the other hand, the Court

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<sup>323</sup> Singh and Power 2021 *African Human Rights Law Journal* 107.

<sup>324</sup> Committee on the Rights of the Child, General Comment 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021).

<sup>325</sup> Rautenbach and Venter *Rautenbach-Malherbe Constitutional law* 446.

<sup>326</sup> Rautenbach and Venter *Rautenbach-Malherbe Constitutional law* 446.

<sup>327</sup> Rautenbach and Venter *Rautenbach-Malherbe Constitutional law* 446.

<sup>328</sup> *Minister for Welfare and Population development v Fitzpatrick* 2000 3 SA 422 (CC) para 17.

<sup>329</sup> *B v M* 2006 9 BCLR 1034 (W).

noted that, insofar as the concept “interests” is concerned, one should consider all rights contained in section 28 of the *Constitution* and that children’s interests are not only drawn from section 28.<sup>331</sup> Similarly, the duty of a parent to care for the child should be looked at holistically.

It is argued that the Constitutional Court had relied too easily on section 28(2) and, in doing that, it capitalised on the permissiveness of the text.<sup>332</sup> The observation made is that the Constitutional Court at times fails to construct its reasoning on the more structured requirements of relevant section 28(1) provisions.<sup>333</sup> An example of the latter point is seen in the case of *De Reuck v Director of Public Prosecutions* where, in the High Court, the limitations analysis weighed in other competing rights and interests to determine whether the infringements were justified and reasonable.<sup>334</sup> In the Constitutional Court, a different approach was applied. The Court viewed the weighing of rights not as a balancing act, and remarked that the best interests of the child is always in the winning corner.

The case of *De Reuck v Director of Public Prosecutions* pointed out that the court may find that a particular law on conduct, on the face of it, infringes a particular right. However, as all rights may be limited, the limitations analysis must weigh other competing rights and interests to determine whether the infringement is reasonable and justifiable.<sup>335</sup> The Court applies best interests as a weighting factor in the limitations analysis highlights that, in an instance of competing rights and interests, the manner in which one should deal with the matter is by considering the actual right that is breached or at risk as more preferable.<sup>336</sup> A detailed attention on this subject indicates that the paramountcy principle is not an overbearing and unrealistic trump, and it cannot be interpreted to mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other

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<sup>331</sup> *B v M* 2006 9 BCLR 1034 (W) para 142-163.

<sup>332</sup> Skelton 2019 *De Jure Law Journal* 561.

<sup>333</sup> Skelton 2019 *De Jure Law Journal* 561.

<sup>334</sup> Skelton 2019 *De Jure Law Journal* 563.

<sup>335</sup> *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC).

<sup>336</sup> Skelton 2019 *De Jure Law Journal* 564.

considerations.<sup>337</sup> In *S v M*, it was found that section 28(2) was not absolute and that it was subject to limitations in terms of section 36 of the *Constitution*.<sup>338</sup>

Ann Skelton exposition on the best interests of the child is interestingly set out. The author sets out that the best interests criterion ought to be carefully applied for this reason.<sup>339</sup> Children's rights discourse varies and that there are some areas of law to which the best interests' criterion has not been tested. What the author finds to be practical in the application of the best interest is that, not all situations will be in the child's best interests of the child and some situations may require those applying the principle to adopt a position that is unfavourable to the child, however in his or her best interests.

### 3.1.5.3 Survival and the development of the child

In exercising their duty to care for the child, parents need to understand their role and responsibility as one that promotes an environment conducive to the child's right to privacy.<sup>340</sup> It is imperative that parents themselves do not violate the privacy rights of the child.<sup>341</sup> Singh and Power set out various examples of how parents can infringe on the child's privacy and at the same time affect the child's social media identity as they evolve.<sup>342</sup> Parents can make disclosures about the child on websites without properly considering the privacy policies of the websites. This could lead to harassment of the child.<sup>343</sup> Another way in which parents can infringe upon the child's right to privacy is through monitoring what the child is doing on social media.<sup>344</sup> Parents ought to strike a balance when exercising their duty to care for the child by considering the proper ambit of reasonable supervision.<sup>345</sup> This means

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<sup>337</sup> Skelton 2019 *De Jure Law Journal* 565.

<sup>338</sup> *S v M* (3) SA 232 (CC) para 26.

<sup>339</sup> Skelton 2019 *De Jure Law Journal* 563-568.

<sup>340</sup> Singh and Power 2021 *African Human Rights Law Journal* 114.

<sup>341</sup> Singh and Power 2021 *African Human Rights Law Journal* 114.

<sup>342</sup> Singh and Power 2021 *African Human Rights Law Journal* 114.

<sup>343</sup> Singh and Power 2021 *African Human Rights Law Journal* 114.

<sup>344</sup> Singh and Power 2021 *African Human Rights Law Journal* 115.

<sup>345</sup> Singh and Power 2021 *African Human Rights Law Journal* 115.

a parent's action must be driven by legitimate aim, be necessary, and be proportionate.<sup>346</sup>

#### 3.1.5.4 The right of the child to be heard

Parents decide on the scope and nature of information that younger children can post and consume on social media.<sup>347</sup> This should be done bearing in mind the views and opinions of children.<sup>348</sup> Singh and Power argue that parental supervision can have a negative impact on the child's privacy.<sup>349</sup> Reasonable supervision may be confused with monitoring the child, and one must determine what qualifies as reasonable supervision. In determining what constitutes reasonable supervision, regard must be given to the age, maturity and level of understanding of the child.<sup>350</sup>

In practice, the decision of who can consent – the child or the parent – is often a confusing and concerning matter.<sup>351</sup> Consent plays a vital role in the child's right to be heard, as they obtain the opportunity to express themselves and exert autonomy on those likely to disregard their views. Similarly, the parent's duty to care for the child plays a role in this respect, because pertinent to this is the consequence of denying the child access to social media if the parent does not consent for their child to gain access to social media. In this instance, the child's age would be of issue. Parental consent to access social media is not a reasonable exercise of supervision by the parents. On the face of it, it is a deprivation of the child's right to privacy in their engagement on social media.<sup>352</sup>

#### 3.1.6 Conclusion

The right to privacy under section 14 of the *Constitution* provides for the protection against intrusion of an individual's information. The scope of the right to privacy is not limited to protection in respect of private intimacy and autonomy. The scope of

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<sup>346</sup> Singh and Power 2021 *African Human Rights Law Journal* 115.

<sup>347</sup> Singh and Power 2021 *African Human Rights Law Journal* 113.

<sup>348</sup> UNICEF Children's online privacy and freedom of expression 4.

<sup>349</sup> Singh and Power 2021 *African Human Rights Law Journal* 115-116.

<sup>350</sup> Singh and Power 2021 *African Human Rights Law Journal* 115.

<sup>351</sup> Singh and Power 2021 *African Human Rights Law Journal* 115.

<sup>352</sup> Singh and Power 2021 *African Human Rights Law Journal* 115.

the protection of the right to privacy extends to physical and moral integrity, honour and reputation.

Whereas the right to privacy under the Constitution extends further than protection of one's information, protection of the right to privacy in terms of the *POPI Act* is limited to protection in respect of one's personal information. In this chapter, the implications of such a limited scope were touched on.

It was established that, in order to safeguard the children's interests across the social media spectrum, parent's intervention is required. This is ironed out by the *Children's Act* as far as it provides for the rights, duties and responsibilities of parents. The parent's role to care for the child is guided by four general principles that include the best interests of the child, survival and development of the child, the right to life, and the right to be heard. These principles were outlined. The next chapter focuses on the conflict between the child's right to privacy and parental rights and responsibilities.

## CHAPTER 4 THE CONFLICTING RIGHTS

### 4.1 Introduction

Social media can be educative and lead to meaningful engagements. Moreover, it can be a space where children meet and become friends. The preceding chapters also mentioned the negative aspects of social media. Some of the risks are associated with children's lack of understanding of private information and the threats that can result from this.<sup>353</sup> Parents are also regarded as role players in the dissemination of private information about the child that could potentially ruin the child's reputation.<sup>354</sup>

What can be noted is that children's right to privacy on social media is connected to the protection of personal information.<sup>355</sup> Failure to protect one's personal information can result in the violation of the right to privacy.<sup>356</sup> In order for children to exercise their right to privacy, parents should offer appropriate guidance and direction.<sup>357</sup> In this manner, the rights and responsibilities of the parent are invoked. However, the rights, responsibilities and duties of parents to guide the child are not absolute.<sup>358</sup> The status of children as rights holders limits the ambit of parental responsibilities and rights.<sup>359</sup>

Varadan argues that the idea that children can exercise, claim and enjoy certain rights in international law has not been achieved yet.<sup>360</sup> According to Varadan, the traditional parent-child relationship is still the one taking centre stage in discourses about children's rights.<sup>361</sup> The traditional parent-child relationship refers to the

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<sup>353</sup> Sibanda 2022 *African Human Rights Yearbook* 158.

<sup>354</sup> Sibanda 2022 *African Human Rights Yearbook* 158.

<sup>355</sup> Sibanda 2022 *African Human Rights Yearbook* 158.

<sup>356</sup> Sibanda 2022 *African Human Rights Yearbook* 159.

<sup>357</sup> *The United Nations Human Rights Treaty Bodies statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child* (2023) para 6.

<sup>358</sup> *The United Nations Human Rights Treaty Bodies statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child* (2023) para 6.

<sup>359</sup> *The United Nations Human Rights Treaty Bodies statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child* (2023) para 6.

<sup>360</sup> Varadan 2019 *International Journal of Children's Rights* 307.

<sup>361</sup> Varadan 2019 *International Journal of Children's Rights* 307.

relationship in which a child is not subject of rights, rather is subjected to parents' authority. For instance, article 5 of the *CRC* introduces the child as an agent of their own rights under the *CRC* and encourages parents to respect the child's developing capacity as they grow older. The reference to 'evolving capacities' in article 5 of the *CRC* does little to afford the child the right to exercise their rights in accordance with their age and maturity. Instead, article 5 of the *CRC* recognises the right of a child to receive guidance and direction from the parent in order to enjoy various rights in a manner that is consistent with their evolving capacities.<sup>362</sup> This is regarded as a conflict of interests and rights and it is not only visible in article 5 of the *CRC*. In respect to the child's right to privacy in the digital age of social media article 16 of the *CRC* is in conflict with articles 5 and 18 of the *CRC*.

This chapter discusses the varying views on the abovementioned conflict of rights.

#### *4.1.1 Interests flowing from protection of the child's right to privacy*

According to Tobin and Field, the child's right to privacy consists of five dimensions that form the basis of the interests requiring protection.<sup>363</sup> These are physical and psychological integrity, decisional autonomy, personal identity, informational privacy, and physical privacy.<sup>364</sup> It is the view of the author that article 16 of the *CRC* reaches beyond its primary aim, which is the right to be left alone.<sup>365</sup> This study addresses two aspects of the protection of the right to privacy: decisional autonomy and informational privacy. Decisional autonomy and informational privacy are rights or interests that stem from the protection of the right to privacy in the digital age of social media. Parents can potentially interfere with these rights when exercising their parental rights, responsibilities and duties.

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<sup>362</sup> Varadan 2019 *International Journal of Children's Rights* 308.

<sup>363</sup> Tobin and Field "Article 16: the right to protection of privacy, home, family, correspondence, honour and reputation" 559.

<sup>364</sup> Tobin and Field "Article 16: the right to protection of privacy, home, family, correspondence, honour and reputation" 560.

<sup>365</sup> Tobin and Field "Article 16: the right to protection of privacy, home, family, correspondence, honour and reputation" 560.

The right to privacy includes the ability of an individual to make decisions that affect the manner in which he or she chooses to lead their life.<sup>366</sup> This particular interest in the advancement of the child's right to privacy is known as decisional autonomy. Decisional autonomy is embraced in article 12 of the *CRC*. Article 12 of the *CRC* is a general principle that governs the implementation of the Convention in international and domestic law.<sup>367</sup>

Article 12 of the *CRC* provides for the participation of the child in matters that affect them.<sup>368</sup> Moyo postulates that the scheme of article 12 challenges the traditional notion that children are property or citizens in the making.<sup>369</sup>

According to Livingstone and others, privacy of the child can be very crucial in the developmental areas of the child's life, such as assuming responsibility, awareness of their identity, and critical thinking.<sup>370</sup> Livingstone and others relate these developmental areas to the child's autonomy, which is key to the child's development.<sup>371</sup>

Article 10 of the *ACRWC* provides for unfettered protection of the child's right to privacy. According to article 10 of the *ACRWC*, parents and the primary caregivers of the child are key to the recognition of the African child's right to privacy in the digital age of social media. Parents must exercise reasonable supervision of the conduct of the child.<sup>372</sup>

In the case of *Centre of Child Law v Media 24 Limited*, the Constitutional Court maintained that the right to privacy is central to a child's identity and autonomy.<sup>373</sup> This means that the Court viewed the right to privacy not only as a self-standing

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<sup>366</sup> Tobin and Field "Article 16: the right to protection of privacy, home, family, correspondence, honour and reputation" 564.

<sup>367</sup> Moyo 2015 *SAJHR* 174.

<sup>368</sup> Article 12(1) of the United Nations Convention on the Rights of the Child (1989).

<sup>369</sup> Moyo 2015 *SAJHR* 174.

<sup>370</sup> Livingstone *et al* 2019 *London School of Economics and Political Science* 17.

<sup>371</sup> Livingstone *et al* 2019 *London School of Economics and Political Science* 17.

<sup>372</sup> Article 10 of the African Charter on the Rights and Welfare of the Child (1990).

<sup>373</sup> *Centre of Child Law v Media 24 Limited* 2020 (3) BCLR 245 (CC) para 49.

right, but also as a right that enabled the child to fully self-actualise in a manner of their own choosing.

The right to privacy also extends to the ability to control personal information.<sup>374</sup> Informational privacy refers to protection against the collection, use and dissemination of personal information in exercising other rights.<sup>375</sup> In this regard, when parents exercise the supervisory role or guidance in accordance to article 5 of the *CRC* and article 10 of the *ACRWC*, he or she accesses and collects the personal information of the child. Informational privacy in the parent-child relationship offers protection against the any intrusion upon the child's right to privacy.

#### *4.1.2 Interests flowing from the rights, responsibilities and duties of the parents*

Article 18 of the *CRC* is about parental responsibilities rather than rights.<sup>376</sup> According to article 18 of the *CRC*, member states of the Convention are charged with an obligation to respect the role of parents. A *CRC* member state should not arbitrarily interfere with the exercise of parental responsibilities. The state's duty is limited to enacting legislative framework that will assist in the fulfilment of the obligations vested upon parents through article 18(2) of the *CRC*.<sup>377</sup> Article 18 of the *CRC* offers parents limited and functional rights in respect to child rearing and development.<sup>378</sup> The interests of parents in terms of article 18 of the *CRC* are limited insofar as the best interests of the child are concerned.<sup>379</sup> In addition, where the evolving capacity of the child is invoked, there is a limitation on parental responsibilities.<sup>380</sup>

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<sup>374</sup> Tobin and Field "Article 16: the right to protection of privacy, home, family, correspondence, honour and reputation" 569.

<sup>375</sup> Rautenbach and Venter *Rautenbach-Malherbe Constitutional law* 376.

<sup>376</sup> Vaghri *et al Monitoring State compliance with the UN Convention on the Rights of the Child: an analysis of attributes* 155.

<sup>377</sup> Vaghri *et al Monitoring State compliance with the UN Convention on the Rights of the Child: an analysis of attributes* 155.

<sup>378</sup> Article 18(2) of the United Nations Convention on the Rights of the Child (1989).

<sup>379</sup> Vaghri *et al Monitoring State compliance with the UN Convention on the Rights of the Child: an analysis of attributes* 155.

<sup>380</sup> Vaghri *et al Monitoring State compliance with the UN Convention on the Rights of the Child: an analysis of attributes* 156.

In the African region, parental responsibility is premised on the child's respect for parental authority and cultural values that underpin the society the child lives in.<sup>381</sup> Arguably, parents retain the entitlement to give effect to various rights of the child.<sup>382</sup> For instance, article 10 of the *ACRWC* requires a parent to exercise reasonable supervision of the conduct of the child insofar as the child's right to privacy is concerned.<sup>383</sup> This means that a parent has consensual decision-making powers in respect to the conduct of the child. Of course, there are differing views on the subject;<sup>384</sup> with some pointing out that respect for parents cannot be the only measure to limit the child's right to privacy.<sup>385</sup> Ekundayo concedes that perhaps respect for the authority exerted by parents is akin to positive African traditions.<sup>386</sup>

## **4.2 The Conflicting rights**

The duty to provide appropriate direction and guidance results in parental supervision and control over the child. The latter nullifies the scope article 12(1) of the *CRC* aims to cover, which is that children's views should influence decisions that affect them, and their views should carry weight.<sup>387</sup> During decision-making, the child's views do not determine the decision.<sup>388</sup> The decision-maker is a parent who assesses the child's age and level of maturity to gauge the child's rational decision-making abilities.<sup>389</sup> This balancing act sets the scene for potential conflicting rights.

### *4.2.1 Decisional autonomy of the child versus parental supervision and control*

Article 12(1) of the *CRC* stipulates that, where a child is capable of forming their own views, a state should afford the child the right to express those views freely in

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<sup>381</sup> Singh and Power 2021 *African Human Rights Law Journal* 104.

<sup>382</sup> Singh and Power 2021 *African Human Rights Law Journal* 104.

<sup>383</sup> Article 10 of the African Charter on the Rights and Welfare of the Child (1990).

<sup>384</sup> *African Committee of Experts on the Rights and Welfare of the Child General Comment on Article 31 of the African Charter on the Rights and Welfare of the Child on the responsibilities of the child* (2017) at paragraph 34 points out that there should be balance between the authority exercised by parents the responsibility owed by children to be respectful and mindful of their parent's status as their immediate representative in all matters that affects him or her.

<sup>385</sup> Singh and Power 2021 *African Human Rights Law Journal* 104.

<sup>386</sup> Ekundayo 2015 *International Journal of Human Rights* 155.

<sup>387</sup> Article 12(1) of the United Nations Convention on the Rights of the Child (1989).

<sup>388</sup> Tisdal and Cuevas-Parra 2021 *The International Journal on Human Rights* 794.

<sup>389</sup> Tisdal and Cuevas-Parra 2021 *The International Journal on Human Rights* 795.

all matters affecting him or her, and that their views should be given due weight in accordance with their age and maturity.<sup>390</sup> Article 12(1) forms the basis of a child's participation and reflects respect for the views of the child.<sup>391</sup>

In the consultation process of the *Committee on the Rights of the Child General Comment No 25*, children reported that the digital environment enabled their voices to be heard in matters that affected them.<sup>392</sup> The same committee recognises that children should be able to express their views through the digital environment.<sup>393</sup> It adds that children's participation in the digital environment should be equivalent to that of their parents, and – where necessary – a child should be able to participate anonymously in the digital environment.<sup>394</sup>

Daly argues that parents do not have respect for children's autonomy,<sup>395</sup> and adds that decision-making is a binary process insofar as it involves the child.<sup>396</sup> In other words, a decision that has to be made regarding the child is dependent on the parent of the child. Daly understands that young children lack the abilities to form their own views, and gain the ability to make decisions once they turn 18.<sup>397</sup>

Article 12(1) of the *CRC* played a major role in this regard, as it recognises that decision-making is a gradual process and that parent's guidance and control over the child should decrease accordingly.<sup>398</sup> According to Daly, article 12 leaves it unclear as to the extent a child can influence decisions that affect them.<sup>399</sup>

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<sup>390</sup> Article 12(1) of the United Nations Convention on the Rights of the Child (1989).

<sup>391</sup> Tisdal and Cuevas-Parra 2021 *The International Journal on Human Rights* 794-796.

<sup>392</sup> Committee on the Rights of the Child, General Comment 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021) para 16.

<sup>393</sup> Committee on the Rights of the Child, General Comment 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021) para 16.

<sup>394</sup> Committee on the Rights of the Child, General Comment 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021) para 16.

<sup>395</sup> Daly "Introduction: Children, Autonomy and the Courts: Beyond the Right to be Heard" 1.

<sup>396</sup> Daly "Introduction: Children, Autonomy and the Courts: Beyond the Right to be Heard" 3.

<sup>397</sup> Daly "Introduction: Children, Autonomy and the Courts: Beyond the Right to be Heard" 3.

<sup>398</sup> Article 12(1) read with article 5 of the United Nations Convention on the Rights of the Child (1989).

<sup>399</sup> Daly "Introduction: Children, Autonomy and the Courts: Beyond the Right to be Heard" 4.

Children's autonomy encompasses interrelated rights, such as self-determination, the right to influence outcomes and bodily integrity, which is closely linked to privacy.<sup>400</sup> Autonomy of the child should be promoted alongside the best interests of the child.<sup>401</sup> According to the *Committee on the Rights of the Child General Comment No.12*, two things must happen once a parent notices that their child has the ability to express their own views. Firstly, the parent must include the child in matters that affect them.<sup>402</sup> Secondly, the parent should stop making decisions for the child and include them in possible decisions.<sup>403</sup> This encourages the child's autonomy.

#### 4.2.1.1 Protection of decisional autonomy under ACRWC

Protection and consideration of the views of the child is encouraged under article 4 and 7 of the *ACRWC*. Article 4 of the *ACRWC* provides for the best interests of the child and states that if a child is capable of forming their own views, he or she shall be heard and their views be taken into consideration.<sup>404</sup> Article 4 of the *ACRWC* relates to court proceedings or administrative matters that affect the child. In this regard, it is directed to the state in which the child stays.<sup>405</sup>

Article 7 of the *ACRWC* states that every child who is capable of communicating their views shall be afforded the right to express their views in all matters that affect them. If there are any restrictions, the law ought to be prescriptive in that regard.<sup>406</sup> In other words, if the law affords the child a specific right to enjoy and there are restrictions on the enjoyment thereof, the restrictions are regarded lawful only if they are prescribed by the law. It is safe to say that article 10 of the *ACRWC* is a manifestation of article 7 of the *ACRWC* in that it seeks to strike the balance between protecting children's right to privacy and parental supervision. This approach

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<sup>400</sup> Anderson 2023 *Sage* 1.

<sup>401</sup> Anderson 2023 *Sage* 3.

<sup>402</sup> Committee on the Rights of the Child, General Comment 12 'The right of the child to be heard' CRC/C/GC/12 (2009) para 25.

<sup>403</sup> Committee on the Rights of the Child, General Comment 12 'The right of the child to be heard' CRC/C/GC/12 (2009) para 25.

<sup>404</sup> Article 4 of the African Charter on the Rights and Welfare of the Child (1990).

<sup>405</sup> Article 4 of the African Charter on the Rights and Welfare of the Child (1990).

<sup>406</sup> Article 7 of the African Charter on the Rights and Welfare of the Child (1990).

disregards children's participation in matters that affect them, and it is rooted in advancing cultural values instead of the best interest of the child.<sup>407</sup>

#### *4.2.2 Information privacy of the child versus parental supervision and control*

Livingstone and others identify four different understandings that children have of the value of privacy.<sup>408</sup> According to Livingstone and others, children understand privacy as contextual, relational, performative and dialectical.<sup>409</sup> A relational understanding of privacy is based on forming relationships rooted in trust and transparency.<sup>410</sup> According to Livingstone and others, relationships formed in the digital environment are one-dimensional.<sup>411</sup> This means that the child can only engage with a robot or system-generated responses. If the child wants to participate on a social media platform, consent to the terms and conditions of use is not reciprocated.<sup>412</sup>

As mentioned above, the right to privacy extends to the control of personal information.<sup>413</sup> This means that information that is created by an individual for their personal use cannot be accessed, obtained or shared without the owner's prior approval.<sup>414</sup> Hence, the focus is on the relationship between the owner of the information and the other party, who is regarded as the 'intruder'. This study draws the attention to this relationship, where the child and their parents are concerned.

According to Lievens and others, the digital environment provides children with the opportunity to express their opinions and connect with others.<sup>415</sup> For instance, children can actively participate in social media or blogs, and they can seek information on topics that are important to them, such as their health, identity or

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<sup>407</sup> Singh and Power 2021 *AHRLJ* 105 and 121.

<sup>408</sup> Livingstone et al 2019 *London School of Economics and Political Science* 11.

<sup>409</sup> Livingstone et al 2019 *London School of Economics and Political Science* 11.

<sup>410</sup> Livingstone et al 2019 *London School of Economics and Political Science* 11.

<sup>411</sup> Livingstone et al 2019 *London School of Economics and Political Science* 11.

<sup>412</sup> Livingstone et al 2019 *London School of Economics and Political Science* 11.

<sup>413</sup> Tobin and Field "Article 16: the right to protection of privacy, home, family, correspondence, honour and reputation" 569.

<sup>414</sup> Tobin and Field "Article 16: the right to protection of privacy, home, family, correspondence, honour and reputation" 569.

<sup>415</sup> Lievens *et al* "Children's rights and digital technologies" 7.

sexuality.<sup>416</sup> The right to access information is provided for in article 13 of the *CRC*. Article 13 of the *CRC* importantly points out that a child has a right to seek, receive and impart information through any media of their choice.<sup>417</sup> Article 13(2) of the *CRC* also provides that the child's exercise of their right to information be restricted by the law and only if necessary.<sup>418</sup> Access to information is not provided for in the *ACRWC*.

Whereas the *ACRWC* is silent on the child's right to information, the *African Committee of Experts on the Rights and Welfare of the Child General Comment No. 7 on Article 27 of the ACRWC: sexual exploitation*, recognises that a child taking part in the digital environment has the same rights as a child who does not, and that they must be afforded the same right to information when engaging in the digital environment.<sup>419</sup> Protection of the right to information is addressed in article 16 of the *Malabo Convention*. However, as mentioned in Chapter 2 of this study, the *Malabo Convention* is a general framework on the subject of protection of personal information and it does not specifically address protection of personal information of children.<sup>420</sup>

Sibanda points out that parents control children's activities in the digital environment.<sup>421</sup> Parents do so by setting up parental controls on their child's devices.<sup>422</sup> Parental controls enable parents to manage the type of content the child can access and obtain in the digital environment.<sup>423</sup> Setting up parental controls emanates from fear of the risks of social media that children may not be aware of.<sup>424</sup> Third and others concede that parental controls are the only viable option for

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<sup>416</sup> Lievens *et al* "Children's rights and digital technologies" 7.

<sup>417</sup> Article 13(1) of the United Nations Convention on the Rights of the Child (1989).

<sup>418</sup> Article 13(2) of the United Nations Convention on the Rights of the Child (1989).

<sup>419</sup> African Committee of Experts on the Rights and Welfare of the Child, General Comment 7 'Article 27 of the ACRWC: sexual exploitation' (2021) para 55.

<sup>420</sup> Sibanda 2022 *African Human Rights Yearbook* 165.

<sup>421</sup> Sibanda 2022 *African Human Rights Yearbook* 162.

<sup>422</sup> Sibanda 2022 *African Human Rights Yearbook* 162.

<sup>423</sup> Sibanda 2022 *African Human Rights Yearbook* 162.

<sup>424</sup> Third *et al* "Recognizing children's rights in relation to digital technologies: Challenges of voice and evidence, principle and practice" 21.

parents who are anxious about their children and online safety.<sup>425</sup> Although parental controls are a preventative method and a safety measure, the child libertarian point of view is that it impedes the child's right to access information and opposes the child's right to privacy in the digital sphere.

Consent and the ability to withdraw it are integral components of the right to privacy.<sup>426</sup> Parents can exert control by setting up parental controls on the basis that the child is unable to give consent and make reasonable choices. Here, parental control is at odds with the child's right to access information.

### ***4.3 The different viewpoints on the child's right to privacy in the digital age of social media***

According to Livingstone and others, the evolving capacities and immaturity of children forms the basis of the restrictions on children's autonomy and self-expression.<sup>428</sup> Seen in light of the *Committee on the Rights of the Child General Comment No 25*, a child's rights approach requires a system of protection that is aimed at affording children optimal development and well-being.<sup>429</sup>

Children's needs and understanding varies with age and developmental stage.<sup>430</sup> Livingstone concedes that children's development can be different because of the personal circumstances of the child concerned.<sup>431</sup> As such, an evaluation of a child's development should include cognitive, emotional, social and cultural factors.<sup>432</sup> As far as the child's role in participating in any decision that affects them, the *CRC* is alert to the challenges the child may face. It incorporates the principle of the child's evolving capacity as a benchmark that policy makers and parents should bear in

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<sup>425</sup> Third *et al* "Recognizing children's rights in relation to digital technologies: Challenges of voice and evidence, principle and practice" 21.

<sup>426</sup> *Report of the Special Rapporteur on the right to privacy* A/76/220 (2021) para 39.

<sup>428</sup> Livingstone *et al* "Children vs adults: negotiating UNCRC General Comment No. 25 on children's rights in the digital environment" 418.

<sup>429</sup> Livingstone *et al* "Children vs adults: negotiating UNCRC General Comment No. 25 on children's rights in the digital environment" 417.

<sup>430</sup> Livingstone *et al* 2019 *London School of Economics and Political Science* 17.

<sup>431</sup> Livingstone *et al* 2019 *London School of Economics and Political Science* 17.

<sup>432</sup> Livingstone *et al* 2019 *London School of Economics and Political Science* 17.

mind when testing the child's views.<sup>433</sup> According to Tobin and Field, the determination of the child's development depends on the child's age and maturity.<sup>434</sup> In addition, Kilkelly and Liefwaard contend that those who work with children must be well trained to allow for effective implementation of the *CRC*.<sup>435</sup>

Cultural diversity is a factor that can introduce a variety of views on the scope and application of the right to privacy in the digital age of social media.<sup>439</sup> For example, the *CRC* is often criticised for being a Western model and legal framework.<sup>440</sup> Ekundayo posits that the *CRC* lacks diversity and inclusivity, as it gives little account of the social and cultural dimensions an African child is faced with.<sup>441</sup>

Article 31 of the *ACRWC* provides for the responsibilities of the African child. An African child is expected to promote and bring honour to the family name and uphold the cultural values of the society they live in. According to Singh and Power, article 31 of the *ACRWC* creates the question of how children are to enjoy the rights contained in the *ACRWC* when they are simultaneously assuming the responsibilities created by the *ACRWC*.<sup>442</sup>

Article 31 of the *ACRWC* provides for participation of the child. This is backed by the *African Committee of Experts on the Rights and Welfare of the Child General Comment on article 31*, which provides guidelines on the interpretation and understanding of the responsibilities vested on an African child. According to the *African Committee of Experts on the Rights and Welfare of the Child*, the responsibilities of the child as provided in article 31 of the *ACRWC*, present an

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<sup>433</sup> Article 5 of the United Nations Convention on the Rights of the Child (1989).

<sup>434</sup> Tobin and Field "Article 16: the right to protection of privacy, home, family, correspondence, honour and reputation" 565.

<sup>435</sup> Kilkelly and Liefwaard 2019 *De Jure Law Journal* 525.

<sup>439</sup> Singh and Power 2021 *AHRLJ* 104.

<sup>440</sup> Ekundayo 2015 *International Journal of Human Rights* 147.

<sup>441</sup> Ekundayo 2015 *International Journal of Human Rights* 147.

<sup>442</sup> Singh and Power 2021 *AHRLJ* 119.

indication of the values vested in children as active role players and contributors to the greater good of society.<sup>443</sup>

Article 12(1) of the *CRC* informs parents as bearers of rights and responsibilities that they ought to act and give consent on behalf of the child who cannot form their own views and are not mature.<sup>445</sup> Privacy is the right that allows one to control their own personal information.<sup>447</sup> The conflict lies in the fact that the child needs parental consent and supervision, which encroaches upon their right to privacy. The balance required to resolve this conflict lies somewhere in the middle.

#### **4.4 Striking the balance**

Firstly, the best interests of the child are of paramount importance in the digital space.<sup>449</sup> Secondly, the risks encountered in the digital space and how they affect the child's development ought to be considered.<sup>450</sup> Thirdly, children's use of digital platforms should be meaningful and safe from discrimination.<sup>451</sup> Lastly, the use of digital technologies should advance the child's participation in all spheres of society.<sup>452</sup>

The *Committee on the Rights of the Child General Comment No 25* notes that the child's evolving capacities enables him or her to acquire competencies.<sup>453</sup> The competency in the context of privacy on social media are *inter alia* the ability of the child to form their own views and opinions and have them respected. It further notes that respect for the views of the child is important in the digital age of social

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<sup>443</sup> *African Committee of Experts on the Rights and Welfare of the Child General Comment on Article 31 of the African Charter on the Rights and Welfare of the Child on the responsibilities of the child* (2017) para 11.

<sup>445</sup> Article 12(1) of the United Nations Convention on the Rights of the Child (1989).

<sup>447</sup> Barrett-Maitland and Lynch 2020 [https://www.intechopen.com/books/8423\\_2](https://www.intechopen.com/books/8423_2).

<sup>449</sup> Committee on the Rights of the Child, General Comment 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021) para 12.

<sup>450</sup> Committee on the Rights of the Child, General Comment 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021) para 14.

<sup>451</sup> Committee on the Rights of the Child, General Comment 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021) para 9.

<sup>452</sup> Committee on the Rights of the Child, General Comment 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021) paras 16-19.

<sup>453</sup> Committee on the Rights of the Child, General Comment 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021) para 19.

media, because it allows children to engage independently from parental supervision.<sup>454</sup> Parental supervision gives parents the leeway to intrude on their child's right to privacy.<sup>455</sup> Parents should consider the child's views and opinions when acting because of the roles provided for in article 5 of the *CRC*.<sup>456</sup>

Article 12 of the *CRC* informs parents that the child is not required to agree with their parents' decision and may choose to be silent or form an opinion.<sup>457</sup> In any case, if a parent and a child are unable to reach a working arrangement and the case goes to Court, the burden of proof is on a Court of law to make sure that the best interests of the child is attained at all cost.<sup>458</sup> This is because a child's views and wishes are not automatically equal to the child's best interests.<sup>459</sup>

It is proposed that the right to be heard should move beyond safeguarding the views of the child and focus on the autonomy of the child. The autonomy of the child is not recognised as a right in international law, particularly not by the *CRC*. This does not mean that the *CRC* disregards the child's autonomy. In fact, the *Committee on the Rights of the Child General Comment No.12* balances this aspect and points out that article 12 of the *CRC* makes no mention of age limit in the application of the right of the child to be heard and express their views.<sup>460</sup> States should refrain from introducing age limits pertaining to this right, be it in law or in practice.<sup>461</sup> This proves that article 12 of the *CRC* embraces the autonomy of the child and that it is a right inherent to children.

In *S v M*, the court pronounced that any approach that is child-centred requires paying a special attention to the particular child's case and to assess the merit of

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<sup>454</sup> Committee on the Rights of the Child, General Comment 25 'Children's rights in relation to the digital environment' CRC/C/GC25 (2021) para 19.

<sup>455</sup> Singh and Power 2021 *African Human Rights Law Journal* 114.

<sup>456</sup> UNICEF Children's online privacy and freedom of expression 10.

<sup>457</sup> Article 12(1) of the United Nations Convention on the Rights of the Child (1989).

<sup>458</sup> Fokala 2019 *Nordic Journal of International law* 626.

<sup>459</sup> Fokala 2019 *Nordic Journal of International law* 626.

<sup>460</sup> Committee on the Rights of the Child, General Comment 12 'The right of the child to be heard' CRC/C/GC/12 (2009) para 21.

<sup>461</sup> Committee on the Rights of the Child, General Comment 12 'The right of the child to be heard' CRC/C/GC/12 (2009) para 21.

the case with utmost care.<sup>462</sup> This Court emphasised giving the best interests of the child the necessary attention in all matters that affects the child.<sup>463</sup>

This Court not only penned down the paramountcy principle as the starting point for any case involving a child, it highlighted the difficulty of applying the paramountcy principle in real-life situations.<sup>464</sup> The Court stressed the difficulty of arriving at a more defined and operational concept of the paramountcy principle.<sup>465</sup> It would appear that the problem is applying the best interests of the child in a meaningful way without encroaching on other protected interests.

After concluding that the best interests of the child as criterion can be overbearing and intrusive upon other rights, the Court in *S v M* decided that the best interests criterion should be considered capable of limitations.<sup>466</sup> This Court noted that the “best interests” principle is not absolute.<sup>467</sup>

The conflicting rights of the child and the parent should be compared according to the merits of each side.<sup>468</sup> It is the context and proportionality that should guide the concerned parties in each case.<sup>469</sup> For instance, by virtue of being the bearer of rights, duties and responsibilities, the parent should consider the views of the child in the same light as if the child had been another adult.

#### *4.4.1 Guidance in respect of the child should be directed towards the child’s exercise of a specific right*

The inclusion of this provision reaffirms the stance of the *CRC* in aiming to place boundaries on the exercising of any arbitrary control over the child by the parent.<sup>470</sup> Article 5 of the *CRC* ought to be read as a whole.<sup>471</sup> Consideration should be given

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<sup>462</sup> *S v M* 2008 (3) SA 232 (CC) para 24.

<sup>463</sup> *S v M* 2008 (3) SA 232 (CC) para 24.

<sup>464</sup> *S v M* 2008 (3) SA 232 (CC) para 25.

<sup>465</sup> *S v M* 2008 (3) SA 232 (CC) para 25.

<sup>466</sup> *S v M* 2008 (3) SA 232 (CC) para 26.

<sup>467</sup> *S v M* 2008 (3) SA 232 (CC) para 26.

<sup>468</sup> *S v M* 2008 (3) SA 232 (CC) para 37.

<sup>469</sup> *S v M* 2008 (3) SA 232 (CC) para 37.

<sup>470</sup> Vaghri *et al* *Monitoring state’s compliance with UN Convention on the Rights of the Child* 118.

<sup>471</sup> *The United Nations Human Rights Treaty Bodies statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child* (2023) para 12.

to objectives and purposes of the *CRC* and, at the same time, to the point that children are rights holders.<sup>472</sup>

Accordingly, where parents exercise their responsibilities, duties or rights in a manner that is contrary to the rights of the child under the *CRC*, the State's obligation shifts from support for the responsibilities, rights and duties of parents towards a greater focus on the obligation to protect or uphold children's rights.<sup>473</sup>

Equally, it is argued that subjecting the child's right to privacy to parental supervision under article 10 of the *ACRWC* limits the exercise of the right for children, as it would be difficult to establish the reasonableness of such supervision.<sup>474</sup> Violations of the rights of the child, including privacy, cannot be justified by supervision over the conduct of the child.<sup>475</sup> Kilkelly and Liefwaard add to this point and they contend that, in certain circumstances, it may be difficult to reconcile the child's right to privacy with the legitimate parental interest in protecting children from harm in the digital environment.<sup>476</sup> The authors postulate that the potential risks associated with certain activities in the digital environment must be balanced against ensuring that the child's right to privacy is not disregarded.<sup>477</sup>

In ensuring that a child's privacy is protected in social media, focus should not only be one aspect of privacy, but all aspects of privacy.<sup>478</sup> Singh and Power note this point and contend that the right to privacy is important as a right and an enabler of other rights, such as freedom of expression, access to information and freedom of expression.<sup>479</sup>

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<sup>472</sup> *The United Nations Human Rights Treaty Bodies statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child* (2023) para 12.

<sup>473</sup> *The United Nations Human Rights Treaty Bodies statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child* (2023) para 12.

<sup>474</sup> Centre for Human Rights 2022 *PULP* 8.

<sup>475</sup> Centre for Human Rights 2022 *PULP* 7.

<sup>476</sup> Kilkelly and Liefwaard 2019 *De Jure Law Journal* 497.

<sup>477</sup> Kilkelly and Liefwaard 2019 *De Jure Law Journal* 497.

<sup>478</sup> Sibanda 2022 *African Human Rights Yearbook* 160.

<sup>479</sup> Singh and Power 2021 *African Human Rights Law Journal* 101.

Parents should consider the views of children when they provide guidance and direction to children.<sup>480</sup> The manner in which parents care for their children should cater for the child's age and their stages of development, because, as a child grows and matures, greater consideration should be given to their views.<sup>481</sup> The idea is that parents should prepare children through dialogue and examples, instead of supervising all their interactions.<sup>482</sup> It is submitted that this enables children, including younger children, to exercise their rights, and it minimises parental control and arbitrary family control.<sup>483</sup>

No consideration has yet been given to the fact that some children are aware of the dangers to their privacy in the digital age of social media.<sup>484</sup> Arguably, parents are aware of these dangers as well. However, this point is debatable in the context of African parents, who are ill-equipped to intervene in issues related to social media.<sup>485</sup> This position could further raise varying opinions with regard to the reliance on parental guidance to limit children's privacy.<sup>486</sup>

It seems that children's rights in this discourse are gaining dominance, with parents fighting an uphill battle. The researcher argues for positivism and purposeful use of social media by children, with less involvement of parents in their child's online behaviour.

Social media platforms has educational programmes appropriate to the child's age and stage of development. If this were an option, parents' scrutiny of the social media platform would be less important, and a child would not require parental consent to access the social media page. Similarly, parent's duty to care for the child is qualified. Singh and Power contends that the child's age, maturity and level of

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<sup>480</sup> *The United Nations Human Rights Treaty Bodies statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child* (2023) para 8.

<sup>481</sup> *The United Nations Human Rights Treaty Bodies statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child* (2023) para 8.

<sup>482</sup> *The United Nations Human Rights Treaty Bodies statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child* (2023) para 9.

<sup>483</sup> *The United Nations Human Rights Treaty Bodies statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child* (2023) para 9 and 10.

<sup>484</sup> Sibanda 2022 *African Human Rights Yearbook* 163.

<sup>485</sup> Sibanda 2022 *African Human Rights Yearbook* 163.

<sup>486</sup> Singh and Power 2021 *African Human Rights Law Journal* 104.

understanding qualifies that which would constitute a reasonable supervision in the exercise of duty to care for the child by a parent.<sup>487</sup> This point proves that, as the child grows, the parent would rarely have to supervise their child's social media interactions.

#### **4.5 Conclusion**

This chapter established that children's right to privacy in the social media is connected to the protection of personal information.<sup>488</sup> Failure to protect one's personal information can result in the violation of the right to privacy.<sup>489</sup> In order for children to exercise their right to privacy, parents should provide appropriate guidance and direction.<sup>490</sup> The right to privacy in the digital age of social media invokes various interests such as decisional autonomy and informational privacy. Parents have responsibilities and duties towards their children, and have the parental right to ensure the upbringing and development of their child.

It was outlined that the child's decisional autonomy and informational privacy conflict with parental responsibilities of supervising and controlling their child. Where this conflict occurs, the child's evolving capacities are affected. Parental responsibilities and rights need to be exercised with due consideration given to the child's evolving capacities and the best interests of the child.

Parents' exercising their responsibilities over their child in the digital age of social media may appear to be justified. However, one needs to balance the child's right to privacy with the rights and responsibilities of the parents. The child's right to privacy cannot be applied in isolation, the child's evolving capacities and their best interests should always be accounted for. The following chapter provides concluding remarks on the subject matter

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<sup>487</sup> Singh and Power 2021 *African Human Rights Law Journal* 104.

<sup>488</sup> Sibanda 2022 *African Human Rights Yearbook* 158.

<sup>489</sup> Sibanda 2022 *African Human Rights Yearbook* 159.

<sup>490</sup> *The United Nations Human Rights Treaty Bodies statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child* (2023) para 6.

## CHAPTER 5 CONCLUSION

The main objective of this study was to determine whether the child's right to privacy transcends the rights and responsibilities of the parents in the context of social media. In order to achieve this goal, this research explored the concept of children's right to privacy and parental rights and responsibilities in the digital age of social media. This chapter evaluates and summarises the research while identifying the findings in each chapter.

This research was divided into five distinct but interlinked chapters, each addressing the topic of this research. Chapter 2 of this research dealt with international law instruments, Chapter 3 dealt with the South African law, whilst Chapter 4 discussed the conflicting rights in the digital age of social media.

It was contended that the right to privacy is the subject of various international law instruments, which are the *CRC*, *International Covenant on Civil and Political Rights* and the *Universal Declaration on Human Rights* in Chapter 2 of this research. On a regional level, it was contended that the right to privacy is provided in the *ACRWC* and the *Malabo Convention* amongst other prominent regional instruments. It was contended that the *CRC* and the *ACRWC* provides for the child's right to privacy in article 16 and 10 respectively.

Chapter 2 of this research gave a comprehensive scheme of the international law and regional law framework that relate to the child's right to privacy in the digital age of social media, as well as parental rights and responsibilities. In Chapter 2, it was contended that the child's right to privacy protects the child against arbitrary or unlawful interferences. The concepts 'arbitrary and unlawful' were then defined. The *Human Rights Commission General Comment No. 16* defines arbitrary interference in the context of privacy and points out that the latter refers to intolerable circumstances that may be provided under the law, and that infringes on the rights of people in an unreasonable manner. Unlawful interference is described as any interference that is not prescribed by the law. In Chapter 2 it was maintained that any information created by a person for their personal use cannot be obtained

without the consent of that person, unless such information is lawfully and non-arbitrarily accessed. Article 16 of the *CRC* gives no account of whether an invasion of privacy of the child by a parent is arbitrary or unlawful.

The child's right to privacy was further discussed with particular attention to the African region. The *ACRWC* provides for the privacy of the child in article 10 and limits this particular right by providing for parental supervision of the conduct of the child in the child's exercising of their right. It was contended that the latter may be a focus inspired by African cultures and values. The *ACRWC* notably provides for the responsibilities an African child must fulfil in article 31. Amongst these responsibilities is the duty to uphold the family name, uphold the cultural and societal values, and enable their nation to progress.

The last point of contention in Chapter 2 addressed the rights and responsibilities of the parents. Article 5 and 18 of the *CRC* is central to the rights and responsibilities of the parents. In the *ACRWC*, article 10 and 20 are central to this subject. In this part, it was contended that the rights and duties of the parents ought to be provided in light of the child's rights and their evolving capacity. It was also contended that, insofar as article 10 of the *ACRWC* is concerned, parents can provide guidance for their children as they explore the digital environment and also control children's activities on social media.

In Chapter 3, it was contended that the child's right to privacy is provided in section 14 of the *Constitution*. The *POPI Act* provides for the protection of personal information as based on section 14 of the *Constitution*. Section 14 and the *POPI Act* provide protection of the right to privacy to everyone. In Chapter 3, this was pointed out and, as far as the *Constitution* is concerned, section 28 of the *Constitution* was invoked. Section 28 of the *Constitution* is the children's clause, and requires that the best interests of the child be considered paramount in all relevant matters. This approach was adopted when addressing the child's right to privacy under the *POPI Act*.

In the discussion on parental rights and responsibilities under Chapter 3, the focus was on section 28(1)(b) and section 18(2)(a) of the *Children's Act*. It was contended

that parental rights and responsibilities under the latter two sections encompassed four interrelated concepts, which are to care for the child, to maintain contact with the child, to act as a guardian of the child, and to contribute to the maintenance of the child. The first component was dealt with in detail, as it forms part of this research. It was pointed out that the right to care for the child is guided by four general principles underpinning all children's rights: the best interests of the child, survival and development of the child, the right to life, and the right to be heard.

Chapter 4 looked to highlight the competing interests that flows from the child's right to privacy and interests that flow from parental rights and responsibilities. It was contended that the child's right to privacy in the digital age of social media protects informational privacy and the decisional autonomy of the child. On the other hand, parental rights and responsibilities mean that a parent inherently enjoys protection against interference from the state. The latter entails that, in the exercising of their right and responsibility to provide care and proper upbringing to the child, the parents and caregivers of the child should not face interferences from the state.

Chapter 4 touched on the conflicting rights that were evident in this research. The right to decisional autonomy of the child is in conflict with parental supervision and control, as is informational privacy. In Chapter 4, various viewpoints from scholars were visited and the conclusion was that the child's evolving capacities and immaturity form the basis of the restrictions on children's autonomy and self-expression. Cultural diversity is likely to be a factor that introduces a variety of views on the scope and application of the right to privacy in the digital age of social media. It was contended that the *CRC* lacks diversity and inclusivity, which means that it may receive less regard in the discourse on children's rights in the African region, as it gives little account of the social and cultural dimensions an African child is faced with.

Following the evidence from scholars, international law and regional law frameworks, it was contended in Chapter 4 that there should be a balance between the child's right to privacy and parental rights and responsibilities in the digital era

of social media. This approach requires one to recognise the best interests of the child as paramount in the digital environment. The risks encountered in the digital environment and how they affect the child's development ought to be considered. Children's use of digital platforms should be meaningful and safe from discrimination. Lastly, the use of digital technologies should advance the child's participation in all spheres of society.

This research made the following major findings. The exercise of parental rights and responsibilities by the parents or a primary caregiver of the child – such as providing supervision and guidance whilst the child is on social media, interferes with the child's right to privacy in the digital age of social media. For example, article 5 of the *CRC* requires that parents provide appropriate guidance and direction to the child with proper thought to the child's evolving capacities. Article 5 of the *CRC* does not only limit parental rights and responsibilities, but gives weight to the argument that children's right to privacy in the digital environment partially transcend the rights and responsibilities of the parents.

The extent to which a child's right to privacy on social media transcends parental rights and responsibilities lies in consideration of the evolving capacities of the child and the need to ensure that the best interests of the child are a primary consideration in matters affecting the child. This research found that such consideration must strike the balance between all rights concerned. The child's right to privacy in the digital environment must be balanced with parental rights and responsibilities.

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