

CHILDREN'S RIGHT TO PRIVACY IN THE DIGITAL AGE

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ABSTRACT

Children today are born into a digital age, and their parents have obligations, including protecting their children's rights in the digital environment. Many children have a digital footprint throughout their early life, owing largely to their parents' behaviors on social media. Children's use of social media, on the other hand, rises with age, and most teenagers have many social media profiles. A developing online environment can provide many benefits to children's development, but it can also pose threats to their mental health and physical well-being, especially given children's sensitivity due to their age in general and in the online realm. These facts create additional obstacles to the implementation and preservation of children's rights, particularly the right to privacy. These difficulties occurred for parents first and foremost because of their primary duty to the child's upbringing and development. As a result, it is critical to provide broader digital literacy education to enable children, as well as their parents, to explore technologies in intelligent, rights-respecting, and secure ways. The state's responsibilities in assuring the protection of a child's privacy, data protection, and safety in the digital age, i.e. its well-being, should also be considered through enacting suitable laws and procedures. It should also be recognized that required information on exercising children's rights should be made available to them. The purpose of this article is to examine the potential for improving children's privacy protection within the existing legal framework.

Key words: *children's rights, privacy, internet, digital environment.*

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1. INTRODUCTION

Children's lives were typically kept private before the emergence of social media, and the only children who garnered publicity, or whose photographs or tales were made public, were child actresses and models, children of celebrities, and the odd, extraordinary youngster highlighted in a newspaper or magazine.¹

Today, private information about children frequently enters the digital space before the child is born, as children's lives begin to be public before birth, with in-utero images shared on social media by parents and families.² Sharing images of their children is a popular method for many parents to remain in touch with friends and family, and it has also become a popular way for first-time parents to form a community, offer parenting advice, and connect with other families.³ Around 80% of children in developed Western countries have a digital footprint before the age of two, owing largely to their parents' actions.⁴ A new UNICEF Innocenti study found that while the majority of older children can handle their online privacy settings, only a few younger children can.⁵ Many parents share personal information about their children without thinking about the consequences for the child's well-being, putting their children at risk because they frequently forget that they are not the owners of their children's data, but rather the legal representatives of the child, bound to act only in the best interests of the child.⁶ This necessitates informed and conscientious parental participation when posting personal information about their children on social media, as well as addressing the problem of children's privacy rights, which may be compromised by their presence on social media.⁷

¹ Sorensen, S.: *Protecting Children's Right's Right to Privacy in the Digital Age: Parents as Trustees of Children's Rights*, 2021.

² *Ibid.*

³ Mak, L.: *The Dangers of Sharenting – How to Protect Your Kids' Privacy*, 2022. "Sharenting" comes from the words "sharing" and "parents" and refers to the way parent use social media distribute photos, videos or other updated about their children. See: Blecher-Prigat, A.: *Children's Right to Privacy*, 2020, p. 373.

⁴ Children's right to privacy in the digital age must be improved, 2021.

⁵ Viola de Azevedo Cunha, M.: Child privacy in the age of the Web 2.0 and 3.0 : challenges and opportunities for policy, *Innocenti Discussion Paper*, 03 2017, p. 15 & Byrne, J., Kardefelt-Winther, D., Livingstone, S., Stoilova, M.: *Global Kids Online Research Synthesis 2015-2016*. UNICEF Office of Research Innocenti and London School of Economics and Political Science, 2016.

⁶ Iskül, A-M., Kristi, J.: Child Right to Privacy and Social Media – Personal Information Oversharing Parents, *Baltic Journal of Law and Politics*, 14(2) 2021, p. 103.

⁷ Iskül, A-M., Kristi, J.: *op. cit.*, note 6, p. 103.

Children have a right to privacy in theory under various international and regional treaties, as well as under national legal norms.⁸ However, the adoption of such norms predates the Internet and, in general, does not adequately protect children's online privacy, which is mostly dependent on parental intervention.⁹ It completely “opposes the concept of children's participation in the decision-making process which is anchored in the CRC”.¹⁰

This article explores the legal elements of parents' oversharing of children's photographs and personal information in social media without the child's participation in the decision-making process and its impact on the exercise of the child's right to privacy based on international, regional, and national legal standards.¹¹ The purpose of this article will be to determine if the current legal framework is appropriate to protect children's privacy rights in the conflict between a parent's right to free expression (and parental rights in general) and a child's right to privacy.

2. LEGAL FRAMEWORK OF CHILD'S RIGHT TO PRIVACY

When parents post about their children on social media, they leave a permanent digital footprint that follows them for the rest of their lives.¹² According to a 2015 research performed by the Internet business Nominet, a child will have approximately 1,000 online images of themselves by the age of five.¹³ Most of the time, children do not consent to being photographed or videotaped, and they have little to no control over, or ability to consent to, the public disclosure of every sensitive detail of their existence.

⁸ Hughes, K.: The Child's Right to Privacy and Article 8 European Convention on Human Rights, in: Freeman, M. (ed.): *Law and Childhood Studies: Current Legal Issues*, Oxford, 2012, p. 462.

⁹ Viola de Azevedo Cunha, M.: *op. cit.* note 5, p. 11.

¹⁰ Viola de Azevedo Cunha, M.: *op. cit.* note 5, p. 15 & Jasmontaite, L., de Hert, P.: The EU, children under 13 years, and parental consent: A human rights analysis of a new, age-based bright-line for the protection of children on the Internet, *International Data Privacy Law*, 5(1) 2015, pp. 20-33.

¹¹ The parental sharing of information about children online, indicates that many parents, who have the capacity to — and do — control their children's private information and consent to its online dissemination, do not wish to actively protect their child's informational privacy, or are at best ignorant of or indifferent to it. This is called the phenomenon of „sharenting“. Gligorijević, J.: Children's Privacy: The Role of Parental Control and Consent, *Human Rights Law Review*, 19(2) 2019, p. 202.

¹² Hall, H. K.: Oversharenting: Is It Really Your Story to Tell?, *UIC John Marshall Journal of Information Technology & Privacy Law*, 33(3) 2018, p. 121.

¹³ Hall, H. K.: *op. cit.* note 12, p. 121.

The University of Pennsylvania's Benjamin Shmueli and Ayelet Blecher-Prigat argue that "children should have an individual right to privacy against their parents," and that this right "should be qualified according to the child's age and evolving capacities."¹⁴ *"Implementing children's rights to privacy in the digital age necessitates not only adherence to human rights and values, but also empowerment and participation of children, which fosters their creativity, innovation, and societal engagement."*¹⁵ There is little doubt that international legal conventions acknowledge children's private rights and that they should be respected. Thus, as one of the fundamental international documents, Article 12 of the Universal Declaration of Human Rights (UDHR) guarantees everyone (adults and children) the right to privacy.¹⁶

Children's right to privacy is specifically recognized under Article 16 of the United Nations Convention on the Rights of the Child (UNCRC), which states: "(1) No child shall be subjected to arbitrary or unlawful interference with child privacy, family, home or correspondence, nor to unlawful attacks on child honor and reputation; (2) The child has the right to the protection of the law against such interference or attacks."¹⁷

Although UNCRC expressly states that children have the right to privacy it makes no mention of children's online privacy as "*the digital environment was not originally designed for children*".¹⁸ However, in General Comment No. 25 (2021) on children's rights in the digital environment, the Committee on the Rights of the Child emphasizes privacy as essential to children's agency, dignity, and safety, as well as the exercise of their rights.¹⁹ Interference with a

¹⁴ Shmueli, B., Blecher-Prigat, A.: Privacy for Children, *Columbia Human Rights Law Review*, 42 2011., p. 763 & Steinberg, S. B.: Sharenting Children 's Privacy in the Age of Social Media, *Emory Law Journal*, 66 2017, p. 862.

¹⁵ Viola de Azevedo Cunha, M.: *op. cit.* note 5, p. 14 & Livingstone, S.; Carr, J.; Byrne, J., One in Three: Internet Governance and Children's Rights, *Office of Research – Innocenti Discussion Paper*, 2016-01, UNICEF Office of Research – Innocenti, 2016.

¹⁶ Viola de Azevedo Cunha, M.: *op. cit.* note 5, p. 14 & UN General Assembly, Universal Declaration of Human Rights, (217 A (III) 10 December 1948).

¹⁷ Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, *Official Journal of the European Communities*, C 325/5 24, December 2002 & *Charter of Fundamental Rights of the European Union* (2007/C 303/01), 14 December 2007, C 303/1, 7 June 2016 & European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to the rights of the child*.

¹⁸ "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, or correspondence, nor to unlawful attacks on his or her honor and reputation". See: Convention on the Rights of the Child, *United Nations Treaty Series*, 20 November 1989, p. 3.

¹⁹ UN Committee on the Rights of the Child: *General comment No. 25 (2021) on children's rights in relation to the digital environment*, United Nations, Geneva, 2012.

child's privacy is permissible only if it is neither arbitrary nor criminal.²⁰ As a result, any interference must serve a legitimate purpose, adhere to the data minimization principle, be reasonable and aimed to protect the child's best interests, and not contradict the UNCRC's principles, aims, or objectives.²¹ Before processing a child's data, consent should be informed and freely given by the child or, depending on the child's age and evolving capacity, by the parent or caregiver.²² The Committee on the Rights of the Child states that the state should ensure that children and their parents or caregivers have easy access to stored data, that inaccurate or outdated data is corrected, and that data that has been unlawfully or unnecessarily stored by public authorities, private individuals, or other bodies is deleted, subject to reasonable and lawful limitations.²³ Furthermore, the state should protect children's right to withdraw consent and object to the processing of personal data when the data controller fails to demonstrate legitimate, overriding grounds for the processing.²⁴ It is worth noting the 2017 resolution of the United Nations Human Rights Council on the right to privacy in the digital age, which specifically mentions the UNCRC as a guiding human rights instrument and acknowledges that violations of the right to privacy online can have a disproportionate impact on children.²⁵

The Council of Europe (CoE) and the European Union (EU) both guarantee the right to privacy and the right to data protection. Thus, Article 8 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the 1981 Convention for the Protection of Individuals Regarding Automatic Processing of Personal Data (Convention 108) guarantee the right to privacy. Despite the absence of a specific reference to children's rights, the legal norms of both conventions apply to all natural persons, including children.

The European Court of Human Rights (ECtHR) has repeatedly interpreted Article 8 of the ECHR, and in that context, preserving the right to (respect for) private life is critical.²⁶ In interpreting Article 8, the ECtHR has provided some clarity on the nature and scope of the right to privacy, finding in its case law

²⁰ Committee on the Rights of the Child in General comment, (No. 25 2021), *op. cit.* note 19, para. 69.

²¹ *Ibid.*, para. 69.

²² *Ibid.*, para. 71.

²³ *Ibid.*, para. 72.

²⁴ *Ibid.*, para. 72.

²⁵ Viola de Azevedo Cunha, M.: *op. cit.* note 5, p. 14.

²⁶ Milkaite, I., Lievens, E.: Children's Rights to Privacy and Data Protection Around the World: Challenges in the Digital Realm, *European Journal of Law and Technology*, 10(1) 2019, pp. 1-24.

that states have an affirmative duty to safeguard, notably minors, in a range of scenarios.²⁷ As a result, states must regularly update and alter their national legislation to safeguard children from the latest technological and social advances on the internet.²⁸ There is no case law on the breach of a child's right to privacy by social media outlets. However, given the number of cases filed in national courts across Europe in recent years, these cases are likely to reach the Court soon.²⁹

The Convention 108 is the first legally binding international treaty that protects persons from abuses that may occur during the gathering and processing of personal data, proposes basic principles and protections, and grants data subjects rights.³⁰ The Convention 108 was recently updated and now explicitly requires the authorities to pay “*specific attention [...] to the data protection rights of children and other vulnerable individuals*” in the context of the different responsibilities of the supervisory authorities (article 15).³¹

The emphasis on child protection in the digital environment is particularly visible in the many proposals and declarations issued by the CoE Committee of Ministers. For example, the Committee of Ministers' 2008 Declaration on Protecting the Dignity, Security, and Privacy of Children on the Internet (Committee of Ministers, 2008), the 2014 Recommendation on a Guide to Human Rights for Internet Users (Committee of Ministers, 2014), and the 2016-2021 Strategy for the Rights of the Child (Council of Europe, 2016) have all recognized the importance of protecting children's rights to privacy and data protection in the digital environment. The Council of Europe Strategy for the Rights of the Child explicitly states that “*the digital world exposes children to a wealth of opportunities, whether through computers, gaming consoles, tablets, or smartphones*”.³²

The most recent development in this context is the Recommendation on Guidelines to Respect, Protect, and Fulfil the Rights of the Child in the Digital Environment

²⁷ Groothuis, M.: The Right to Privacy for Children on the Internet: New Developments in the Case Law of the European Court of Human Rights, in: Van der Hof, S., van den Berg, B., Ermer, B. (eds.): *Minding Minors Wandering the Web: Regulating Online Child Safety*, 2014, p. 145.

²⁸ Groothuis, M.: *op. cit.* note 27, p. 155.

²⁹ *Ibid.*, p. 153.

³⁰ Milkaite, I., Lievens, E.: *op. cit.* note 26, pp. 1-24.

³¹ *Ibid.*

³² Council of Europe, *Strategy for the Rights of the Child (2016-2021) Children's human rights*, 2016, p. 9.

adopted by the CoE Committee of Ministers in July 2018.³³ It emphasizes that, among other things, states must respect, protect, and fulfill the right of the child to privacy and data protection by making certain that relevant stakeholders (particularly those who process personal data), the child's peers, parents, or caregivers, and educators, are aware of and respect the child's right to privacy and data protection.³⁴ Furthermore, it recommends that the state review child-protection legislation, practices, and policies; familiarize competent bodies with the Recommendation and clearly explain its provisions to children; and familiarize business entities with the Recommendation and take appropriate measures to protect children.³⁵

Aside from the Recommendation, the CoE published the Strategy for the Rights of the Child (2016-2021), which outlines the objectives for protecting children from potential threats to their safety, security, and privacy in the digital environment.³⁶ It is worth noting that the current Strategy for the Rights of the Child was adopted by the CoE's Committee of Ministers on 23 February 2022 and launched at the High-level Conference "*Beyond the Horizon: a New Era for the Rights of the Child*" in Rome on 7-8 April 2022 with the goal of further developing actions to support relevant provisions of this Strategic Framework as well as protecting human rights, democracy, and the rule of law in the digital environment.³⁷

On 28 April 2021, the CoE's Committee of Ministers issued a Declaration on the protection of children's privacy in the digital environment, in which member states are urged to strengthen the protection of children's privacy and personal data, particularly health-related data and data collected in educational settings, to minimize potential negative effects, such as public identification of a child as a Covid-19 carrier.³⁸

³³ Council of Europe: *Guidelines to respect, protect and fulfil the rights of the child in the digital environment - Recommendation CM/Rec(2018)7 of the Committee of Ministers*, 2018.

³⁴ Milkaite, I., Lievens, E.: *op. cit.* note 26, p. 1-24 & Guidelines to respect, protect and fulfil the rights of the child in the digital environment - Recommendation CM/Rec (2018)7 of the Committee of Ministers, Council of Europe, 2018 & Contribution prepared by the Secretariat of the Council of Europe on the subject of the right to privacy of children, in response to the consultation carried out by the UN Special Rapporteur on the right to privacy (UNSRP), Strasbourg, 5 October 2020, p.2.

³⁵ Guštin, M.: Challenges of Protecting Children's Rights in the Digital Environment, EU and Comparative Law *Issues and Challenges Series (ECLIC)*, Vol. 6, p. 459.

³⁶ Council of Europe, *Strategy for the Rights of the Child (2016-2021)*, 2016, pp. 20-21.

³⁷ Council of Europe, *Strategy for the Rights of the Child (2022-2027) Children's Rights in Action: from continuous implementation to joint innovation*, 2022, p. 5.

³⁸ *Declaration by the Committee of Ministers on the need to protect children's privacy in the digital environment*, (Adopted by the Committee of Ministers on 28 April 2021 at the 1402nd meeting of the Ministers' Deputies).

The European Union guarantees both the right to privacy and the right to be forgotten through main and secondary legislation. Thus, Article 16(1) of the Treaty on the Functioning of the European Union (TFEU) and Article 8(1) of the Charter of Fundamental Rights of the European Union (CFREU) provide that “*everyone has the right to the protection of personal data.*”³⁹ Article 24 of the CFREU expressly states that “*children have the right to protection and care as is necessary for their well-being.*” Article 24 CFREU emphasizes, as does Article 3 UNCRC, that “*the child’s best interests must be a primary consideration in all actions relating to children, whether taken by public authorities or private institutions.*”⁴⁰

Since 1995, the Data Protection Directive (DPD) has been the fundamental legal document controlling data protection in EU Member States in terms of secondary legislation in the European Union.⁴¹ The General Data Protection Regulation (GDPR) was adopted by the European Union’s Council and Parliament in April 2016 as part of the EU data protection reform, and it went into effect on May 25, 2018.⁴² As part of the child’s right to privacy, this legal act is also crucial to the protection of a child’s personal data.⁴³ Unlike the DPD, the GDPR has several clauses that explicitly aim to protect children’s right to data protection.⁴⁴ To begin with, recital 38 GDPR recognizes that “*children deserve special protection concerning their personal data, as they may be less aware of the risks, consequences, and safeguards involved, as well as their rights about personal data processing.*”⁴⁵ According to the recital, such specialized safeguards are especially important in the collecting of children’s data for marketing and profiling reasons.⁴⁶ Article 8 GDPR specifies precise conditions for a child’s consent to handle data regarding directly supplied information society services. When consent is the basis for data processing and information society services are offered directly to a child, data processing is legal if the data subject is at least 16 years old, according to this article. To be lawful under the GDPR, consent must be granted or allowed by the person

³⁹ Ogrodnik-Kalita, A.: Protection of the child’s right to privacy in the convention on the rights of the child, the general data protection regulation and the Polish law, in: Marrus, E.; Laufer-Ukeles, P. (eds.): *Global Reflections on Children’s Rights and the Law 30 Years After the Convention on the Rights of the Child*, Routledge, London, 2021, p. 173.

⁴⁰ Milkaite, I., Lievens, E.: *op. cit.* note 26, pp. 1-24.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

with parental responsibility for the child in circumstances where the child is under the age of 16.⁴⁷ The GDPR strengthens the protection of children's rights by requiring that information be provided to children in a concise, transparent, intelligible, and easily accessible format, using clear and plain language (recital 58 and article 12), as well as providing children with the right to be forgotten (article 17 and recital 65).⁴⁸

The Privacy and Electronic Communications Directive 2002/58/EC (ePrivacy Directive) establishes rules for personal data processing in the electronic communications sector and aims to ensure an equivalent level of protection of fundamental rights and freedoms (particularly the right to privacy) in the electronic communications sector, as well as the free movement of such data.⁴⁹ The European Commission proposed the ePrivacy Regulation in January 2017. The European Union is in the process of replacing its ePrivacy Directive with an ePrivacy Regulation, which would include internet-based voice and messaging services such as WhatsApp, Facebook Messenger, and Skype.⁵⁰ It was meant to take effect on May 25, 2018, the same day as the EU GDPR (General Data Protection Regulation), and aims to preserve and strengthen privacy and data protection in the realm of electronic communications.⁵¹ However, the legislative process is still ongoing because talks have been stalled for several years.⁵²

In terms of policies aimed at protecting and allowing the full implementation of children's rights, the EU took an important step forward in regulating children's rights in 2006, with the approval of the first Strategy on the Rights of the Child.⁵³ The European Commission emphasizes the goals that must be met at the Member State level to protect children's rights in its EU Strategy on the Rights of the Child, and because of the pervasiveness of digitalization and the

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), (Official Journal L 201 31 July 2002), art. 1, para 1.

⁵⁰ Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), COM/2017/010 final - 2017/03 (COD), art. 18.

⁵¹ Milkaite, I., Lievens, E.: *op. cit.* note 26, pp. 1-24.

⁵² European Union, *Children's Online Privacy and Data Protection in Selected European Countries*, The Law Library of Congress & Global Legal Research Directorate, 2021, p. 6.

⁵³ Council of Europe Strategy for the Rights of the Child (2016-2021), Council of Europe, 2016, pp. 20-21.

COVID-19 pandemic, the European Commission has decided to update the Strategy on the Rights of the Child in 2021, as a strategic document for shaping policies for the protection of children's rights, such as children's rights in the digital age.⁵⁴ It commits the Commission to putting children and their best interests at the core of EU policies, based on the UNCRC.⁵⁵

3. BALANCING THE CONFRONTED PARENTAL RIGHTS AND CHILD'S RIGHT TO PRIVACY

The UNCRC's legal norms provide parents major discretion in upholding children's rights, demonstrating significant support for the concept that parents are the greatest arbiters of the child's best interests and allow them discretion in raising their children.⁵⁶ The UNCRC also crystallizes and actualizes the modern concept that children should be treated as subjects and bearers of rights, rather than as objects or possessions.⁵⁷ As a result, children have the right to special protection as well as the progressive exercise of their rights following their developing capacities.⁵⁸

The application of a child's right to privacy is raising worry in today's technology society. Although the right to privacy of a child is not entirely distinct from the right to privacy of an adult, children's privacy needs and interests are still understudied, and there is a significant knowledge gap regarding children's online privacy.⁵⁹ Nonetheless, even very young children require privacy, and its availability has an impact on their well-being.⁶⁰ Children's dignity, and safety, as well as the exercise of their rights, require privacy, and threats to their privacy might exist even when parents share photographs and information about

⁵⁴ Hrabar, D.: Prava djece u EU – pravni okvir, in: Korać Graovac, A., Majstorović, I. (eds.): *Europsko obiteljsko pravo*, Narodne novine, Zagreb, 2013, pp. 53-72 & Guštin, M.: *op. cit.* note 35, p. 461 & Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU strategy on the rights of the child, COM/2021/142 final, 24 March 2021.

⁵⁵ *Ibid.*

⁵⁶ Laufer-Ukeles, L.: Upholding children's civil rights as relational rights, The example of childhood circumcision, in: Marrus, E., Laufer-Ukeles, P. (eds.): *Global Reflections on Children's Rights and the Law 30 Years After the Convention on the Rights of the Child*, Routledge, London, 2021, p. 158 & See: Article 5, 7 and 14 of the UNCRC.

⁵⁷ Laufer-Ukeles, L.: *op. cit.* note 55, p. 157.

⁵⁸ UN Committee on the Rights of the Child (CRC), (General comment No. 7 2005), Implementing Child Rights in Early Childhood, 20 September 2006, CRC/C/GC/7/Rev. 1., para. 3.

⁵⁹ Blecher-Prigat, A.: *op. cit.* note 3, pp. 377-378 & Hughes, K., *op. cit.* note 8, p. 456.

⁶⁰ Blecher-Prigat, A.: *op. cit.* note 3, pp. 377-378.

them online.⁶¹ According to a study on the misuse of child's photographs and information on social media, many parents rarely consider the child's perspective, defending their stance by arguing that parents have the right to "decide and control the information shared."⁶² They are unaware that the photographs of their children and information about them, that they share to connect with friends and family or to receive feedback and social support are personal data that can impact their right to privacy.⁶³ To be sure, the fundamental function and obligation of parents is to safeguard their children because they are the primary and proactive participants in the child's development, while the state and society play a secondary role in assisting parents in completing this demanding and unique task.⁶⁴

If we examine current conceptions of privacy, we will notice that they combine three related aspects of privacy: informational privacy (the right to control over information pertaining to a person, specifically preventing others from obtaining or using that information), constitutional, or decisional privacy (the right or ability to make autonomous life choices without outside interference or intimidation), and finally privacy.⁶⁵ All of these views on privacy require that children's rights to privacy have to be respected in their contact with others, including their parents. Children as rightsholders, on the other hand, are not always capable of exercising affirmative control over photographs or information about themselves that are released online, such as when photos of intrauterine life are uploaded on social media.⁶⁶ The right to privacy should be invoked in such instances by the parents, who may enforce the right on behalf of the child.⁶⁷ When exercising a child's right to privacy, parents must keep the

⁶¹ General comment No. 25 (2021) on children's rights in relation to the digital environment, UN Committee on the Rights of the Child, *op.cit.* note 19, para. 67.

⁶² Donovan, S.: „Sharenting“ The Forgotten Children of the GDPR, *Peace Human Rights Governance*, 4(1) 2020, p. 43.

⁶³ Kaesling, K.: Children digital right realizing the potential of CRC, in: Marrus, E.; Laufer-Ukeles, P. (eds.): *Global Reflections on Children's Rights and the Law 30 Years After the Convention on the Rights of the Child*, Routledge, London, 2021, p. 189 & Donovan, S.: *op.cit.* note 61, p. 40.

⁶⁴ Hrabar, D.: Uvod u prava djece, in: Hrabar, D. (ed.): *Prava djece – multidisciplinarni pristup*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2016, p. 32.

⁶⁵ Gligorijević, J.: *op.cit.* note 11, p. 202.

⁶⁶ The notion of power is used in the classical taxonomy of rights proposed by Hohfeld, W. N.: Fundamental Legal Conceptions as Applied in Judicial Reasoning, *The Yale Law Journal*, 26(8) 1917, pp. 710–770 & Wenar, Leif, *Rights*, in: Zalta; E. N., Nodelman, U. (eds.): *The Stanford Encyclopedia of Philosophy*, 2023.

⁶⁷ Giesinger, J., Children, Rights, and Powers, *The International Journal of Children's Rights*, 27(2) 2019, pp. 251-265.

child's best interests in mind, even if it means limiting the child's freedom of expression or family life.⁶⁸ As a result, child privacy should be viewed not just as a right, but also as one of the best interests of the child.⁶⁹ In legal theory, the right to privacy does not stand out as (at the same time) a principle of the UN-CRC, but, like certain other rights, it should be protected and realized under the "cap" of the child's best interests. Because any restriction on a child's rights must be in the child's best interests.

In this way, parental duty involves the moral standard of taking any action, even if it is to their own cost, to safeguard their child.⁷⁰ This method, in particular, would help to enhance privacy protection "because it requires authorities to take it into consideration, 'in all actions concerning children, and will ensure that they allocate the appropriate weight to it while balancing it with the rights of others.'"⁷¹

Since parents are primarily responsible for their children's well-being, and the state's role is to assist parents in their demanding role, i. e. to intervene when necessary to protect the child, the question arises as to what happens when parents, very often completely unconsciously, have a potentially harmful effect on the rights or interests of one's own child through their Internet activities.

A feasible approach would be to obligate or legally define parents' responsibilities to protect children's privacy rights. In this regard, the existing legal solutions in Croatian family law when it comes to the responsibility of parents in protecting the rights and best interest of the child will be analyzed in the continuation of the work, in order to, starting from the above, review the possibility of possible changes *de lege ferenda* with the aim of stronger protection of the child's privacy, but also of raising parents' awareness of the importance of their role in realizing this child's rights. Furthermore, because the best interest of the child is one of the fundamental principles of the UNCRC, all the rights guaranteed by the Convention, including the child's right to privacy, should be interpreted following this principle "to guarantee the physical, psychological, moral, and spiritual integrity of the child and to promote child's human dignity both online and offline."⁷²

⁶⁸ Hohfeld, W. N.: *op. cit.* note 65, pp. 710-770 & Wenar, L., Rights, in: Zalta, E. N., Nodelman, U. (eds.): *The Stanford Encyclopedia of Philosophy*, 2023.

⁶⁹ Kravchuk, N.: Privacy as a New Component of "The Best Interests of the Child" in the New Digital Environment, *The International Journal of Children's Rights*, 29(1) 2021, p 101.

⁷⁰ Hrabar, D.: *op. cit.* note 63, p. 33.

⁷¹ Kravchuk, N.: *op. cit.* note 68, p. 99.

⁷² Kravchuk, N., *op. cit.* note 68, p. 102.

4. THE CHILD'S RIGHT TO PRIVACY AND PARENTAL RESPONSIBILITY IN PROTECTING THE CHILD'S PRIVACY *DE LEGE FERENDA*

In the part of the Family Law Act (FLA) on the rights and duties of the child and the acquisition of legal capacity⁷³, the legislator emphasized the personal rights of the child, which include⁷⁴:

- the child's right to care for life and health,
- the right to safety and upbringing in the family appropriate to the child's physical, psychological, and other developmental needs,
- the right to live with one's parents, and if the parents live apart, the right to parental care of both parents,
- the right to have contact with parents and other close people with whom he/she does not live, as well as the right to accurate information about important circumstances related to parents and other close people,
- the right to choose education and occupation and the right to employment following one's abilities and one's well-being.

In a special provision, the child's right to express child's opinion is stated, even though it should also be considered a child's personal right. Between these two provisions on the rights of the child, there is a provision on the limited legal capacity of the child. In addition to the above, the child's right to initiate proceedings regarding the realization of child rights and interests if he/she is older than 14 years and the child's right to a special guardian is stated⁷⁵.

Art. 88. regulates the child's right to informed consent to medical procedures, while the next two articles specify the child's duties in the family (Art. 89) as well as the child's duty to contribute to the child's own support (Art. 90).

Considering that the UNCRC specifically emphasizes the child's right to privacy and bearing in mind the challenges of protecting this child's right, we believe that it would be desirable to specifically highlight this right of the child in the FLA, emphasizing in particular the necessity of protecting the child's data in information technologies, *i. e.* in general, digital environment. Having in mind the complementary relationship between a child's rights and parental care, *i. e.*, the correlation of each child's right with the corresponding responsi-

⁷³ Family Law Act, (Official Gazette No. 103/15, 98/19, 47/20, 49/23, Art. 84-90).

⁷⁴ Art. 84. FLA.

⁷⁵ Art. 87. FLA.

bilities, rights, and duties of parents⁷⁶, it is necessary to consider the provisions of the FLA within the institute of parental care.

Namely, under the provisions of Art. 91. para. 1. “Parental care consists of the responsibilities, duties, and rights of the parents, for the purpose of protecting and promoting the child’s personal and property rights and well-being. Parents are obliged to provide parental care in accordance with the child’s developmental needs and capabilities.”

As the basic contents of parental care, the FLA defines “the right and duty to protect the personal rights of the child to:

1. health, development, care, and protection
2. upbringing and education
3. realization of personal relationships and
4. determining the place of residence”.

Parental care also includes the duty of parents to manage the child’s property and the right and duty to represent the child’s personal and property rights and interests. Parental responsibility is a personal right of both parents and at the same time, a human right protected, among others, by the ECHR, because according to the interpretation of the ECHR, it is a right that is included in the right to respect for family life from Art. 8 of the ECHR.⁷⁷

When we talk about the child’s right to privacy, it is a personal right of the child, but also a human right that is guaranteed to every individual, regardless of age, by the numerous international documents mentioned above.

Regarding the parental role, which is directed through the best interests of the child, and consists, among other things, in realizing and protecting the rights of the child, it is worth pointing out that parents are primarily obliged to respect the rights of the child. There are some situations as we have already mentioned, for example, “sharenting” when a child’s right to privacy comes into conflict with the rights of parents. In these cases, the rights of the child should have priority and it is important to make parents aware that their actions in the digital environment, very often completely unwittingly, in fact, violate the fundamental human rights of their child.

⁷⁶ Hrabar, D.: *Obiteljskopравни odnosi roditelja i djece*, in: Hrabar, D. (ed.): *Obiteljsko pravo*, Narodne novine, Zagreb, 2021, pp. 212-213.

⁷⁷ Korać Graovac, A.: *Od zajedničkog do samostalnog ostvarivanja roditeljske skrbi i natrag – kako zaštititi prava djece i roditelja*, *Godišnjak Akademije pravnih znanosti Hrvatske*, VIII(-posebni broj) 2017, pp. 52-53.

To emphasize parental responsibility in this regard, we believe that it would be necessary to include a provision in the basic family law regulation that parents are obliged to respect and protect the child's right to privacy. Such a solution would represent a step on the way to strengthening the protection of the child's privacy in the digital environment precisely by highlighting the responsibility of the parents, which would certainly contribute to greater awareness of this child's rights in general.⁷⁸ The competent authorities could impose certain measures against parents who do not respect the child's privacy under existing legislation, but this is where problems arise: how will the competent authority find out, insufficient information (*i.e.* ignorance) on the part of the parents that the child's right is being violated, and insufficient legal regulations.

5. CONCLUSION

Today's children are born into a digital age and a child's digital identity begins before birth, with in-utero photographs and personal information shared by parents and families throughout the web. There is a strong assumption that parents always act in the best interests of their child even when they are sharing photographs and private information about their children. However, the majority of them lack an understanding of social media environments, the number of third parties with whom the information will be shared, and the longevity of photographs and private information about their child. Children's privacy rights are especially infringed in cases of "sharenting," which represents one of the first invasions into a minor's digital identity, resulting in youngsters' identities being fashioned as irreversible digital tattoos.

According to research, the majority of parents while uploading their child's photographs argue that parents have the right to determine and manage the material posted. However, they are not aware that posting photos or information about their child without their consent represents an infringement of a child's right to privacy, autonomy, and protection which can have long-term consequences for the child's privacy and private identity that can last well into the child's adult life. Although it is quite at the level of abstract deliberation; it is still not impossible to imagine that one day we will encounter lawsuits by children against their parents for violating the right to privacy.

Therefore, it is critical to consider children as subjects in the digital world, whose access and active involvement must be secured in the same way that

⁷⁸ Proposals of the working group of the Croatian Ministry for Demography, Family, Youth and Social Policy for a new Family act in 2017 were going in that direction in creating new provisions of Family Act.

they must be protected from dangerous content and contacts. Privacy and data protection rules, which focus on parental consent and control, do not adequately respect children's rights as outlined in the UNCRC. Realizing the UNCRC's promise for children in the digital age requires countries to rethink existing legislation and policies with children's rights in mind. The privacy of a child is an ongoing topic in European Commission policy aimed at making online spaces safer for children. Policies, however, must be implemented at the national level as well.

The role of parents in raising and upbringing a child is extremely important and demanding, moreover priceless. The increasing development of communication, as well as digital technologies, confronts parents with numerous challenges in achieving their already complex task of caring for the welfare of their child. Bearing in mind the dynamic concept of "the best interest of the child", as we mentioned, it certainly includes the child's privacy. In this sense, raising parents' awareness of the necessity of protecting their child's privacy in this digital age and the legal regulation of their responsibility in this regard should definitely contribute to a stronger protection of the child's interests. This is especially important when it comes to situations in which the child's right to privacy conflicts with parents' right to their freedom of expression, which is the case, for example, in the increasingly widespread practice of "sharenting". We would agree with the statement that "of all the contemporary threats to the privacy of children, the one created by parental activity online seems to be the most difficult to address".⁷⁹

Considering all the above, a step in the right direction of a stronger protection of the child's best interests when it comes to child's privacy online but also offline could be the creation of legal norms in domestic family law that would present *inter alia* effective implementation of the child's right to privacy from Article 16 of the UNCRC, including regulation of the appropriate responsibility of the parents regarding protection of this child's right.

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