



Strathmore University
Law School

**A LEGAL ANALYSIS OF SHARENTING: BALANCING BETWEEN
PARENTAL FREEDOM OF EXPRESSION AND MINORS' RIGHT TO
DIGITAL PRIVACY IN KENYA**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

By

MOGENI EILEEN NYARINDA

122155

Prepared under the supervision of

Mr. Allan Mukuki

December 2024

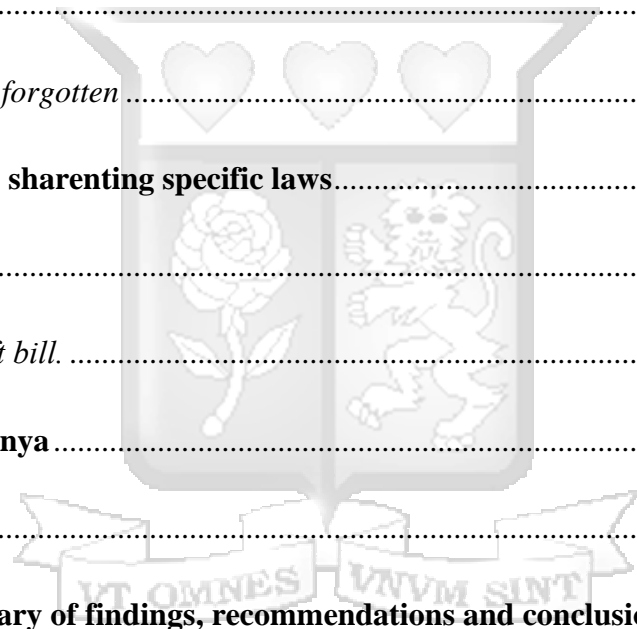
Word count (15,201)

Table of Contents

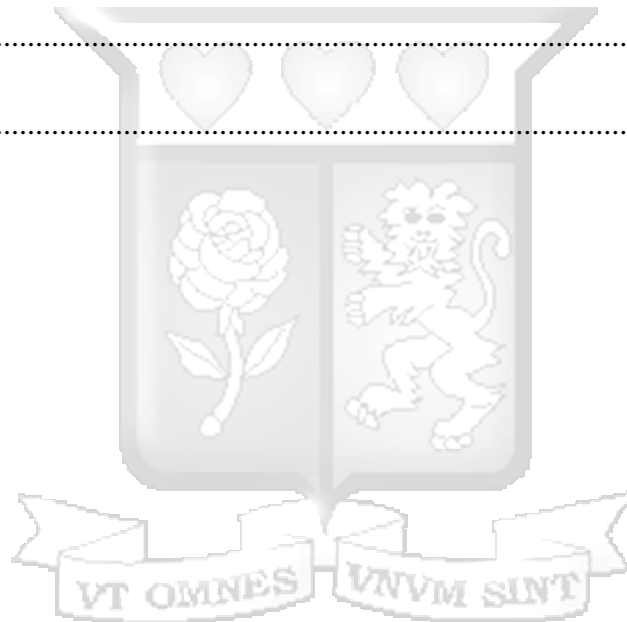
Dedication	vi
Acknowledgements	vii
Declaration	viii
Abstract	ix
List of abbreviations	x
List of cases	xi
List of legal instruments	xii
Chapter one: Introduction	1
1.1 Introduction	1
1.2 Background	1
1.3 Statement of the problem	3
1.4 Research objectives	3
1.5 Hypothesis	4
1.6 Research questions	4
1.7 Significance of the study	4
1.8 Theoretical framework	4
<i>1.8.1 Interest theory of rights</i>	4
1.9 Literature review	7
<i>1.9.1 Right to privacy of children</i>	7
<i>1.9.2 Parental freedom of expression vis-à-vis parental responsibility</i>	10

1.9.3 Comparability of EU laws in the Kenyan context.....	12
1.10 Methodology	13
1.10.1 Primary sources	13
1.10.2 Secondary sources	13
1.11 Limitations of the study.....	13
1.12 Chapter breakdown.....	14
Chapter two: What constitutes minors’ right to privacy on social media platforms	15
2.1 Introduction.....	15
2.2 What is privacy, and why is it important?	16
2.3 Manifestation of the right to digital privacy of children	18
2.4 Parental role in the right to digital privacy of minors.....	19
2.5 Age-appropriate inclusion.....	21
2.6 The right to digital privacy of minors.....	22
2.7 Conclusion	23
Chapter three: Balancing parental freedom of expression and parental responsibility .24	
3.1 Introduction.....	24
3.2 Freedom of expression and sharenting	24
3.2.1 Self-presentation theory.....	26
3.2.2 Sharenting and a minor’s future	27
3.3 Parental responsibility.....	28
3.3.1 Mindful sharenting.....	29

3.4 Conclusion	30
Chapter four: Comparative study on sharenting in the EU versus in Kenya.....	31
4.1 Introduction.....	31
4.2 Parallels between Kenya’s Data Protection Act and the GDPR as regards minors’ digital privacy.....	32
<i>4.2.1 Parental role in a minor’s digital privacy</i>	<i>32</i>
<i>4.2.2 Evolving capacities of the child</i>	<i>33</i>
<i>4.2.3 Sharenting</i>	<i>33</i>
<i>4.2.4 Right to be forgotten</i>	<i>34</i>
4.3 Countries with sharenting specific laws.....	35
<i>4.3.1 France</i>	<i>35</i>
<i>4.3.2 Italy’s draft bill.</i>	<i>36</i>
4.4 Lessons for Kenya.....	37
4.5 Conclusion	40
Chapter five: Summary of findings, recommendations and conclusion.....	41
5.1 Introduction.....	41
5.2 Summary of findings.....	41
5.3 Recommendations	43
<i>5.3.1 Interpretation of the laws to incorporate the regulation of sharenting</i>	<i>43</i>
<i>5.3.2 Requirement for social media platforms to moderate content involving minors....</i>	<i>43</i>
<i>5.3.3 Sensitisation on sharenting</i>	<i>44</i>
5.4 Conclusion	44



Bibliography	46
Books	46
Book chapters	46
Dictionaries	47
Journal articles	47
Internet resources	50
Reports	51
UN documents	51
Working papers	52



Dedication

I dedicate this work to all the children who want to chart their own path in life; may they have the opportunity to be children without the prying eyes of the digital world




Acknowledgements

I would like to thank God for the never-ending flow of knowledge and understanding throughout the dissertation writing process. Special thanks to my supervisor Mr Allan Mukuki whose guidance and patience made the completion of this work possible. I am also truly grateful for the support and encouragement from my family and my friends. To my mother who was my biggest cheerleader and who was always eager to listen to me brainstorming ideas, I am truly grateful. I acknowledge my father's constantly pushing me to always give the best that I can give in my research and writing. I am indebted to my generous friends, Jess Wanjiru and Hope Imaline who held my hand, encouraged me and supported me as I worked on my research. And finally, a great thank you to myself for my hard work, consistency and resilience.



Declaration

I, MOGENI EILEEN NYARINDA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

Date: 19/12/2024

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: 

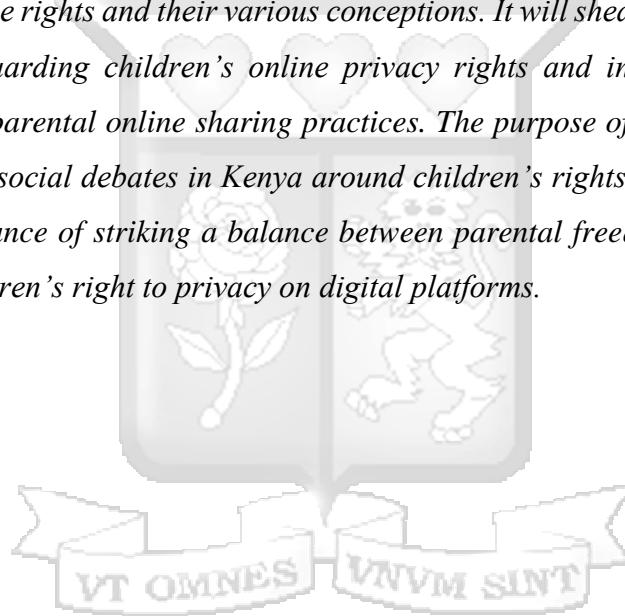
Mr Alfian Mukuki

Date: 19/12/2024



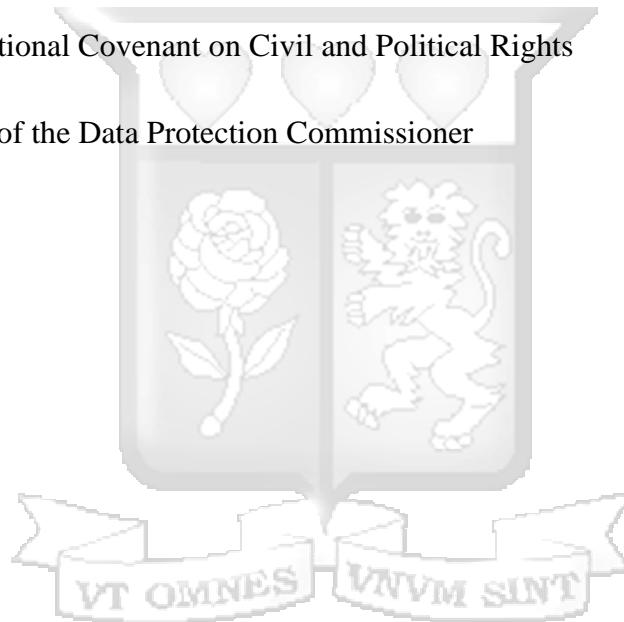
Abstract

Some parents and/or guardians are actively sharing photographs, videos, and even personal details of their children across various social media platforms in Kenya to share their parental experiences. This is the concept has been dubbed sharenting. This research will employ the interest theory of rights to examine the possible contradiction between children's ever-evolving right to privacy and parents' and/or guardians' freedom of expression on social media platforms. The study promotes a reasonable approach that prioritises the child's best interests while still acknowledging parental freedom of self-expression. The developing nature of children's rights and the possible drawbacks of unrestricted online exposure are emphasised. This work will employ doctrinal legal research to examine statutes, case laws, books, journals, and reports about these rights and their various conceptions. It will shed light on Kenya's legal framework for safeguarding children's online privacy rights and investigate the possible violations caused by parental online sharing practices. The purpose of this study is to add to the current legal and social debates in Kenya around children's rights to privacy online, and it stresses the importance of striking a balance between parental freedom of expression and the protection of children's right to privacy on digital platforms.



List of abbreviations

COK	Constitution of Kenya
CRC	United Nations Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GDPR	General Data Protection Regulation
ICCPR	International Covenant on Civil and Political Rights
ODPC	Office of the Data Protection Commissioner



List of cases

Coalition for reform and democracy (CORD) & 2 others v Republic of Kenya & 10 others (2015) eKLR.

Craft Silicon Limited v Republic; Namai & 5 others (Criminal Revision E30 of 2021) (2022) KEHC 424 (KLR).

Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González, ECtHR Judgement 13 May 2014.

Jessica Clarice Wanjiru v Darina Aesthetics & reconstructions centre & others (2017) eKLR.

Kenya human rights commission v communication authority of Kenya & 4 others (2018) eKLR.

King'ori V Royal Media Services (2024) 5994 KLR.

MAK v RMAA & 4 others (Petition 2 of 2022) eKLR.

PKM v ANM (Civil appeal 115 of 2019), eKLR.

Reynolds v Times Newspapers Ltd (2001), The United Kingdom House of Lords.



List of legal instruments

Bill on the Amendments to Law No. 977 of 17 October 1967 on the employment of minors in digital platforms for sharing multimedia content, as well as provisions on the dissemination of the image and multimedia content of minors.

Children's act (No. 29 of 2022).

Civil code of France (21 March 1804).

Constitution of Kenya (2010).

Data protection act (No. 24 of 2019).

Employment Act (Act no 11 of 2007).

General Data Protection Regulation, 27 April 2016

International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

Law number 2024-120 of 19 February 2024.

Law relating to information technology, files and freedoms.

Office of the Data Protection Commissioner Complaints Management Manual.

Penal code of France (1810).

The Charter of Treviso (1990).

United nations convention on the rights of the child, 20 November 1989, 1577 UNTS.

Chapter one: Introduction

1.1 Introduction

Children are guaranteed the right to parental care and protection in Article 53(1)(e) of COK in their best interests.¹ This includes upholding their rights and creating environments for these rights to thrive. Children are further guaranteed the right to privacy in Article 31 of the COK.² However, several parents and guardians in Kenya have been actively sharing data on their children across social media platforms in Kenya in a bid to share their parenting experiences. This has been dubbed 'sharenting'. They are exercising their freedom of expression, as espoused in Article 33 of the COK.³ This may pose a challenge to the privacy rights of children online as their information is being made readily available by persons who are supposed to protect said information.⁴

This study attempts to explain what constitutes a child's right to privacy, with an emphasis on digital privacy. It then looks at how a parent's freedom of expression should be balanced with parental responsibility regarding their children's digital footprint. The study will do a comparative study with the EU to find the best practice that can be applied in the Kenyan context.

1.2 Background

Article 31 of the Constitution of Kenya dictates that every person has the right to privacy⁵, this includes children as well. This right to privacy extends into the digital realm making consent to sharing one's images on online platforms vital as to ensure there is no violation of their right to privacy.⁶ In the case of minors however, consent adopts a nuanced form. A minor's assent to data use pales in comparison to the decisive role of the parent or guardian who acts as the gatekeeper of their child's digital footprint.⁷ All Kenyans are further constitutionally

¹ Article 53(1)(e), *Constitution of Kenya* (2010).

² Article 31, *Constitution of Kenya* (2010).

³ Article 33, *Constitution of Kenya* (2010).

⁴ Pietro F, Ignazio C, Giovanni C, Giardino I, Vural M, Lucian T, Pettoello-Mantovani C, Indrio F & Pettoello-Mantovani M, 'Online "Sharenting": The dangers of posting sensitive information about children on social media' *The Journal of Paediatrics*, 2023, 2 -< <https://doi.org/10.1016/j.jpeds.2023.01.002> > on 21 July 2024.

⁵ Article 31, *Constitution of Kenya* (2010).

⁶ Section 2, *Data Protection Act* (No. 24 of 2019).

⁷ Section 33, *Data Protection Act* (No. 24 of 2019).

guaranteed freedom of expression, and this includes parental self-expression on their parenting experience as they seek and offer information on the matter.⁸ A parent's experience will inadvertently include the experiences of their children and thus it becomes a challenge to draw the line between the right of freedom of expression and that of privacy of children on social media platforms.

The increased digital age has witnessed an explosion of the content of children online, with parents and guardians readily sharing photographs and videos of their children across various social media platforms like YouTube, Facebook, X (previously Twitter), and TikTok in a bid to share their parenting experiences.⁹ Questions have been raised on violating the right to privacy of children occasioned by such posting. Parents are obligated not just by the constitution¹⁰ but also the children's act¹¹ to exercise parental responsibility in a manner that promotes the best interests of the child in all situations.¹² Therefore, this paramountcy principle (best interests of the child) dictates that although their parents exercise consent for children, they have a right to actively participate in decisions concerning their online privacy in an age-appropriate manner.¹³

The right to privacy bears importance in giving individuals an area of autonomous development without interaction with others.¹⁴ One should be able to live one's own life, shaping and charting one's paths and the image of who one is without the prying eyes of others. Intrusions on an individual's privacy demean their dignity, impinging on their autonomous development.¹⁵ Freedom of expression is essential in freely exchanging ideas, thoughts,

⁸ Article 33, *Constitution of Kenya* (2010).

⁹ Wangari N, 'The dangers of posting your child's photos online' *The Standard*, 2016 <<https://www.standardmedia.co.ke/sunday-magazine/article/2000187114/dangers-of-posting-your-childs-photos-online>> on 10 December 2023; 'Sharenting: Should I post photos of my kids online?' *The Standard*, 30 October 2022 <<https://www.standardmedia.co.ke/business/sunday-magazine/article/2001459341/sharenting-should-i-post-photos-of-my-kids-online>> on 10 December 2023; Yoo J, Gehlen B, Lopez P and Weintraub A, 'Social media posts by parents bring concerns for children's privacy, safety' *ABC News*, 6 July 2023 <<https://abcnews.go.com/US/social-media-posts-parents-bring-concerns-childrens-privacy/story?id=100706825>> on 10 December 2023.

¹⁰ Article 53(2), *Constitution of Kenya* (2010).

¹¹ Section 8, *Children's Act* (No. 29 of 2022).

¹² *MAK V RMAA & 4 others* (Petition 2 of 2022) eKLR.

¹³ Dimopolous G, 'A theory of children's decisional privacy' *Legal Studies*, 2021, 11-15 <<https://doi.org/10.1017/lst.2021.16>> on 15 December 2023.

¹⁴ *Kenya Human rights Commission v Communications Authority of Kenya & 4 others* (2018) eKLR.

¹⁵ Rossler B, *The value of privacy*, Polity, Cambridge, 2005, 72.

opinions and experiences. It is vital to encouraging communication and thus the building of human connections.¹⁶

This research aims to investigate how minors' right to privacy can be upheld in light of their parents and/or guardians posting their photographs and videos on various social media platforms as a manifestation of their freedom of expression. An exploration of a child's right to participate in decisions affecting their lives is thus necessary. It is also essential to highlight the need to study how parents can exercise their parental responsibility in a manner that promotes the best interest of their children while still being able to exercise their freedom of expression.

1.3 Statement of the problem

The COK guarantees all persons the right to privacy and expression. However, there have been deviations from the right to privacy, especially for children whose digital footprint is decided upon by their parents or guardians who claim they are exercising their freedom of expression regarding their parental experiences. This exposure poses risks such as identity theft, cyberbullying, and lack of decisional autonomy online. Considering these risks, this study will thus comprehensively assess whether a balance can be struck between these two constitutionally guaranteed rights to ensure that the right to privacy of children is respected as parents and guardians exercise their freedom of expression relating to their parenting experiences.

1.4 Research objectives

The overall research objective of this study is to assess the balancing of a parent's freedom of expression and a child's right to privacy on social media platforms in Kenya. This objective shall be realised through the following minor objectives;

- i. Assess what constitutes minors' right to privacy on social media platforms based on what interests they want to advance.
- ii. Investigate how parental motivations regarding online expression may be balanced with parental responsibility regarding their children's right to privacy.

¹⁶ Traber M, 'Communication is Inscribed in Human Nature: A Philosophical Enquiry into the Right to Communicate' 30(1) *idoc internazionale* 1991, 249.

- iii. Conduct a comparative analysis of legal frameworks and case law in the EU to identify the best practices for balancing these rights.

1.5 Hypothesis

A balance can be struck between parental rights to self-expression and children's right to privacy on social media platforms.

1.6 Research questions

The following research study shall answer the following research question: Can there be a balance between a parent's freedom of expression and a child's right to privacy on social media platforms in Kenya? This shall be answered by responding to the following minor research questions;

- i. What would constitute minors' right to privacy on social media platforms based on what interest children want to advance?
- ii. How should a parent's freedom of expression be balanced with parental responsibility as regards the digital footprint of their children?
- iii. How effectively do EU legal frameworks and case law balance these competing rights?

1.7 Significance of the study

There exists a gap in protecting children's right to privacy when their parents post their photographs and videos on social media platforms as a form of parental self-expression. Therefore, this study will show how to best uphold this right while still allowing parents to exercise their freedom of expression.

1.8 Theoretical framework

1.8.1 Interest theory of rights

The exact origin of the interest theory of rights is difficult to pinpoint. Different scholars and theorists have given different versions of this theory and this research will rely on the interest theory of rights from Matthew H Kramer's perspective. I use his perspective because it brings out the critical tenets of the theory and builds upon other theories like Hohfeldian conception

of rights. According to Matthew, the underlying idea of the interest theory of rights is that every right protects an aspect of a person's welfare¹⁷; rights exist to protect fundamental interests.¹⁸

Several critics have criticised this theory. One of the greatest critics of Matthew Kramer is Mark McBride, in his work 'The unavoidability of evaluation for interest theories of rights,' who highlights the weaknesses of Kramer's conception of the interest theory of rights and brings out his own conception of the theory. McBride gives four criticisms: problematic promise, bare descriptions, vacuous truths, and fortuitous detriment.

1.8.1.1 Problematic promise/Granny attack

McBride argues that the interest theory of rights fails to account for third-party beneficiary scenarios where a third party will benefit from a promise. He builds it up from Gopal Sreenivasan, who also brings it up when he tries to find a hybrid claim-right theory.¹⁹ For example, when X promises Y's grandmother that they will give Y some money, Y's grandmother will be interested in ensuring Y gets the money as this is her grandchild. This interest would thus assign her a right.²⁰ However, Kramer suggests that third parties' rights may not be as problematic as it appears. Both Y and his grandmother would have a right based on their interest, but it does not have much of an impact on the theory itself or its grounding.²¹

1.8.1.2 Bare descriptions

This criticism highlights the Interest Theory's reliance on subjective judgments about the importance of interests based on Bentham's, which determines rights correlated to existing duties. Merely describing events without considering their broader context and moral implications may not fully capture the significance of a situation. To accurately identify rights, the interest theory must delve deeper into descriptions of duties.²²

1.8.1.3 Vacuous truths

This theory has the potential to lead to 'false positives' and assign rights where they do not exist. It fails to distinguish between rights and mere claims or desires, and failure to apply it

¹⁷ Kramer H.M, *A debate over rights*, Oxford University Press, New York, 1998, 61

¹⁸ Kramer H.M, 'Refining the interest of rights' 55(1) *The American Journal of Jurisprudence*, 2010, 32.

¹⁹ Sreenivasan G, 'A hybrid theory of claim-rights' 25(2) *Oxford Journal of Legal Studies*, 2005, 264.

²⁰ McBride M, 'The Unavoidability of Evaluation for Interest Theories of Rights', 2.

²¹ Kramer H.M, *Rights, wrongs and responsibilities*, Palgrave Publishers, 2001, 65-73.

²² McBride M, 'The Unavoidability of Evaluation for Interest Theories of Rights', 18.

carefully would lead to such an assignment of non-existent rights since an interest exists.²³ This has, however, been countered through assigning duties appropriately to mitigate this risk.

1.8.1.4 Fortuitous detriment

McBride also highlights the fact that the theory does not consider the matter of causation in determining whether a detriment/harm is sufficient to ground a right since violations of rights and others cause some detriments/harms due to mere chance.²⁴ However, this criticism is refuted using Bentham's test of rights. Fortuitous detriments do not constitute grounds for rights, as they do not meet the criteria established by Bentham's test (a person has a right if and only if there is a significant negative consequence for them if the corresponding duty is not fulfilled²⁵). Furthermore, the harm must directly impact the individual claiming the right to be considered a legitimate basis for such a claim.²⁶

Parents sharing photographs and videos of their children online in Kenya raises complex questions. The interest theory of rights offers a valuable framework for navigating this clash between parental freedom of expression and the child's right to privacy. The interest theory of rights emphasises that rights exist to protect fundamental interests. Under this theory, children are to be respected as persons in their own right, with their interests, concerns and points of view.²⁷ In extrapolating the paramountcy principle, a child's interest in digital privacy is controlling their image, protecting their well-being, self-determination, and appropriate autonomy online.²⁸ All these boil down to the importance of autonomous development²⁹ where children guide their development by protecting their image and what image they portray to the public. Sharing of these images and videos may potentially infringe upon these interests.

Man is a social being who seeks connections with those around him so that he can garner support, and companionship and have a sense of belonging.³⁰ Communication (sharing and

²³ McBride M, 'Preserving the interest theory of rights' National University of Singapore, NUS Law Working Paper Number 016, 2018,25 -<<http://dx.doi.org/10.2139/ssrn.3215715>> on 30 August 2024.

²⁴ McBride M, 'The Unavoidability of Evaluation for Interest Theories of Rights', 14.

²⁵ Hohfeld W, 'Some fundamental legal conceptions as applied in judicial reasoning' 23 *The Yale Law Journal*, 1913, 16-59.

²⁶ Kurki V, 'The interest theory of rights: Still standing' 27(4) *Legal Theory*, 2021, 364.

²⁷ *UN Committee on the Rights of the Child General Comment No 7, Implementing Child Rights in Early Childhood*, 20 September 2006.

²⁸ Dimopolous G, 'A theory of children's decisional privacy', 11-15.

²⁹ *Kenya Human rights Commission v Communications Authority of Kenya & 4 others* (2018) eKLR.

³⁰ Lieberman D.M, *Social: Why our brains are wired to connect*, Oxford University Press, United Kingdom, 2013, ix.

exchanging of information or ideas) is vital in the formation of social connections with other human beings.³¹ It can, therefore, be deemed that parental interests in sharenting are the desire to express themselves and connect with others in their parental experiences. These connections are meaningful to parents as they enable them to navigate their parenting journey, which is often quite complex and challenging. Through these connections, they can enhance their parenting skills through learning from others and building a supportive community that will guide them through their parenting journey.

This research contends that the interest theory of rights can help find a viable way of balancing these interests in a way that is beneficial to both the parent and that upholds the child's best interests.

1.9 Literature review

There is limited authorship in Kenya and Africa in general on the matter of children's privacy in light of parental decisions on social media platforms. However, there are a great many authors who have dealt with the matter on an international level, although with a highly Western view, it can be extrapolated and related to the Kenyan context as the matter is similar in different countries around the world.

This dissertation will explore specific thematic areas in response to the research questions outlined above. These themes will be the focus of the subsequent literature review. The themes will address; the right to privacy of children, parental freedom of expression *vis-à-vis* parental responsibility and finally comparability of EU laws in the Kenyan context.

1.9.1 Right to privacy of children

The right to privacy for children is unique, and it will be considered from the point of view of the interests they want to protect under this right, especially in terms of self-determination, autonomy, and self-interest.

In a report by the Atlantic Council titled 'Respecting children as rights holders' there is a great focus on the recognition of children as rights holders and thus an advocacy for their participation in decision-making that affects their rights on digital platforms.³² It brings out the

³¹ Rymanowicz K, 'The importance of communicating' Michigan State University, 22 April 2016 -< https://www.canr.msu.edu/news/the_importance_of_communicating > on 2 September 2024.

³² Atlantic Council, *Respecting children as rights holders*, 2023.

current situation regarding children and decisions made regarding their social media presence. The report looks to the CRC on a child's right to participation (in accordance with age and maturity) in matters affecting them³³ and a child's right to privacy³⁴. It highlights that a child's active participation in decisions that affect them in the digital sphere will better uphold their best interests. Although the report points to the CRC, this right to participation can be traced in the Children's Act of Kenya as part of the considerations of the best interests of the child, where a child's preference, if meaningful, should be considered in matters regarding that child.³⁵ This report brings to light the internationally guaranteed children's rights in the digital sphere. The report, however, also falls short of getting into focus on parents as it is one-sided with the right to privacy of children being the focal point.

The report's focal point is children's perspectives on their rights in the digital space, which is also a focal point of this research work. This study will demonstrate the importance of involving children in safeguarding their right to privacy, which is essential for their autonomous development.

Chapter 10 of the book 'Childhood Vulnerabilities in South Africa: Some Ethical Perspectives' by Fourie addresses the protection of children in the digital society.³⁶ It mainly puts forth the risks involved in children in the digital world and how a multistakeholder approach is needed to ensure adequate protection of children in the digital sphere. This chapter highlights the classification of risks involving ICT, especially towards children with children being recipients of online information or being participants online or even children being perpetrators of activities like online bullying or the creators of risky content online.³⁷

This chapter fails to consider circumstances where the child's parent or guardian introduces these risks to children by making them participants in online platforms by sharing their images and videos. If this was examined, the risks and methods of mitigating risks might have had a slightly different perspective, with a possible focus on how parents can exercise their freedom of self-expression.

³³ Article 12, *United Nations Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS.

³⁴ Article 16, *United Nations Convention on the Rights of the Child*.

³⁵ First Schedule, *Children's Act* (2022).

³⁶ Fourie L, 'Protecting children in the digital society' in Grobbelaar J and Jones C *Childhood vulnerabilities in South Africa: Some ethical perspectives*, African Sun Media, SUN Press, Stellenbosch, 2020, 233.

³⁷ EU Kids Online, *EU kids online: Final report 2009*, 2009, 10.

This, however, does not diminish its relevance to this research work. The risks it highlights serve as a justification for parents or guardians' apprehension of exposing children to the internet. These risks explain why children must be actively protected in the digital space and the need to exercise parental responsibility in the child's best interest when considering sharing images and videos of children online. It shows why there is an urgent need to protect the image of children on social media platforms actively.

Shannon Sorensen delves into the nature of children's privacy rights in her article, 'Protecting Children's Right to Privacy in the Digital Age: Parents as Trustees of Children's Rights.'³⁸ She brings out the prevalent misconception of children as incapable of autonomous decision-making due to developmental factors necessitating intervention from their parents.³⁹ Furthermore, Sorensen challenges the notion of children as parental property, which diminishes their role in life-affecting decisions.⁴⁰ In contrast, she views children as rights-holders with evolving capacities for self-determination. Rather than viewing children as property, Sorensen proposes parents assume the role of trustees, safeguarding their children's rights until they reach a point where they can exercise them independently.⁴¹ This entails a more profound responsibility for protecting children's privacy on social media platforms. By framing children's privacy as akin to adults', Sorensen advocates for a parental duty to act consistently in the child's best interests.

Her work brings out the critical matter of looking at children as wanting to advance a particular interest and the role of parents in the advancement of said interest in terms of their right to privacy. Fourie's chapter will support her work in ensuring children's participation in decisions involving their privacy. Children can express their desires regarding their privacy rights when provided with appropriate guidance and consideration of their maturity and level of comprehension of that right. This paper will explore this as it reveals what constitutes children's right to privacy.

³⁸ Sorensen S, 'Protecting children's right to privacy in the digital age: parents as trustees of children's rights' 36(3) *Children's Legal Rights Journal*, 2016, 156.

³⁹ Sorensen S, 'Protecting children's right to privacy in the digital age', 165.

⁴⁰ Woodhouse B.B, 'Hatching the egg: A child-centered perspective on parents' rights' 14 *Cardozo Law Review*, 1993, 1043.

⁴¹ Sorensen S, 'Protecting children's right to privacy in the digital age', 172.

1.9.2 Parental freedom of expression vis-à-vis parental responsibility

Blum-Ross and Livingstone, in their article ‘Sharenting: parent blogging and the boundaries of the digital self’ offer insights into parents’ motivation for blogging about their parenting experiences.⁴² Their findings reveal that parent bloggers share content for various reasons, including self-expression, community building for seeking and offering advice, emotional release for venting frustrations and finding empathy from others who understand the challenges of parenting as well as monetisation for some of these bloggers.⁴³ This article prioritises parental perspectives on sharenting, presenting a valuable shift from children’s rights and risks. Understanding parental perspectives offers valuable insight into why parents readily share snippets of their children’s lives online as they enjoy their freedom of expression.

The article, however, overlooks the perspective of children whose digital footprints are shaped by their parents’ online activities. Notably, it merely mentions the aspects of children’s right to privacy, particularly as the child ages. It might not consent to past online exposure, and the element of parental responsibility to protect their children from potential online harms associated with sharenting. It also fails to recognise the obligation of parents to take care of their children. Section 23 of the Children’s Act defines parental responsibility as the duty, power, responsibility, and authority of a parent with respect to their child in a manner consistent with the evolving capacities of the child.⁴⁴ One needs to look at what parents need to do for their child and to what extent.⁴⁵ Blum-Ross and Livingstone’s work lays the groundwork for further research exploring both sides. Further studies should integrate children’s perspectives and legal considerations to find a balanced approach that respects parental expression while prioritising child protection online. This would ensure that adult and child interests are recognised and addressed relatively in the digital age.

This article is important in showing why parents need to share in line with their interests under their right to freedom of expression. This research will explore these parental motivations, even highlighting the importance of sharing as it seeks to find a middle ground between the two competing rights.

⁴² Blum-Ross A and Livingstone S, ‘Sharenting: parent blogging and the boundaries of the digital self’ Taylor & Francis, 2017- <https://web.archive.org/web/20190427173437id_/http://eprints.lse.ac.uk/67380/1/Blum-Ross_Sharenting_revised_2nd%20version_2017.pdf> on 15 December 2023.

⁴³ Blum-Ross A and Livingstone S, ‘Sharenting’, 2-13.

⁴⁴ Section 23(1), *Children’s Act* (No. 29 of 2022).

⁴⁵ *PKM v ANM* (Civil appeal 115 of 2019), eKLR.

A quantitative study conducted in 2023 brought out a novel approach by millennial parents to safeguard their children's online privacy. The article, 'Mindful Sharenting: How Millennial Parents Balance Between Sharing and Protecting,' underscores an equilibrium between parental sharing and child protection.⁴⁶ This concept offers a potential solution to the issue of excessive online sharing of children's information. The researchers identified the motivations behind sharenting, associated risks, and parental strategies for mitigation. One of the greatest motivators of sharenting is found in Goffman's self-presentation theory, where parents use their children as a proxy to convey a particular image or to express a side of themselves that they want people to see.⁴⁷

This research indicates that it is indeed possible for parents and/or guardians to find a way to share their parenting experiences as they involve their children without compromising their children's right to privacy. Some of the strategies that these parents adopt include blurring their children's faces, focusing on a body part like the child's hand which would not be easily identifiable, putting emojis on the child's face, taking pictures or videos from a distance, shielding recognisable body parts and referring to the child without a photograph of the child.⁴⁸ However good these strategies are, it is essential to note that they represent mere suggestions, as a significant portion of parents, despite acknowledging the associated risks, continue to engage in sharenting without implementing protective measures. These strategies primarily reflect the practices of millennial parents. To gain a comprehensive understanding, it is essential to consider the perspectives of other generations, particularly Gen Z, who have been deeply immersed in social media environments.

This article Provides a foundational framework for exploring long-lasting solutions to the challenges posed by sharenting. A primary focus of this research will be determining the feasibility of legally mandating or incentivising the identified strategies. Key considerations include the suitability of these strategies within the Kenyan context, the potential for alternative approaches, and the legal mechanisms for implementation and enforcement. Furthermore, the

⁴⁶ Walrave M, Robbe S, States L & Hallam L, 'Mindful sharenting: how millennial parents balance between sharing and protecting' *Frontiers in Psychology*, 2023, 1 -<10.3389/fpsyg.2023.1171611> on 18 July 2024.

⁴⁷ Walrave M, Verswijvel K, Ouvrein G, Staes L, Hallam L, & Hardies K, 'The limits of sharenting: exploring parents' and adolescents' sharenting boundaries through the lens of communication privacy management theory' *Frontiers in Education*, 2022, 7-<10.3389/educ.2022.803393> on 18 July 2024; Goffman E, 'The arts of impression management' in Goffman E *The presentation of self in everyday life*, University of Edinburgh, George Square Edinburgh, 1956, 132-151.

⁴⁸ Walrave M, Robbe S, States L & Hallam L, 'Mindful sharenting', 9.

study will investigate the appropriate party responsible for compliance—social media data controllers or parents—and the corresponding enforcement strategies.

1.9.3 Comparability of EU laws in the Kenyan context

Ingrida Milkaite and Eva Lievens, in their work, ‘Children’s rights to privacy and data protection around the world: Challenges in the digital realm,’ provide a comprehensive overview of global child privacy regulations. Through a comparative analysis, they assess the consistency of implementing the Convention on the Rights of the Child (CRC) worldwide and examine the impact of these laws on children's digital experiences.⁴⁹ While the study offers a broad perspective, its focus on EU regulations is particularly relevant to this research.⁵⁰

The authors provide a valuable foundation for comparative analysis by highlighting key areas of child privacy protection. This article works as an analysed report of relevant EU laws on privacy and their current application in different parts of the EU. The comparative measures used in this article offer guidelines for a comparative analysis to be undertaken in this research work.

Sheila Donovan (in a further study on regulations within the EU), in her paper, ‘Sharenting: the forgotten child of the GDPR’, addresses a critical gap in privacy law by examining the tension between parental free speech and children's privacy rights under the GDPR. Donovan highlights the limitations of the GDPR in addressing parental awareness and the implications of sharenting on children’s identities.⁵¹ Her work underscores the need for further discussion and development of legal frameworks to protect children's privacy while respecting parental rights in the EU. This paper will use her work to highlight the weaknesses in EU law and how to rectify them if they are to suit the Kenyan context.

Federica Persano further studied the GDPR and children’s rights in EU data protection laws, specifically referring to the processing of children’s data by data controllers. The author examines the scope of Article 8 of the GDPR, which relates to conditions applicable to a child’s consent about information society services.⁵² She brings out the issue of consent as an effective

⁴⁹ Milkaite I & Lievens E, ‘Children’s rights to privacy and data protection around the world: Challenges in the digital realm’ 10(1) *European Journal of law and technology*, 2019, 2.

⁵⁰ Milkaite I & Lievens E, ‘Children’s rights to privacy and data protection around the world’, 3-8.

⁵¹ Donovan S, ‘Sharenting: The forgotten children of the GDPR’ 4(1) *Peace Human Rights Governance*, 2020, 36.

⁵² Article 8, *GDPR*, 2016.

tool to protect the best interests of a child, especially where a holder of parental responsibility for the child gives consent. She highlights something similar to Sheila Donovan in showing how data controllers are put in charge of verifying whether indeed there was consent before they can process data related to children. Her work highlights the gap in the GDPR, which shifts the burden of ensuring children's data has consented to be processed by a data controller who may be unable to verify if a holder of parental responsibility gave consent in the best interest of a child.⁵³

This author goes on to state that according to the GDPR, data processing regarding a minor should be understood as data minimisation with informed consent, which would burden holders of parental responsibility to ensure that consent given to data controllers regarding minor's data is told. This is an idea not explicitly seen in Kenyan laws and thus will be a great point of study to see how to incorporate it into Kenya's legal system best or if it is already incorporated in what ways.

1.10 Methodology

This study used a doctrinal research methodology. It is a qualitative study, with information obtained from primary and secondary sources.

1.10.1 Primary sources

Statutes (Kenyan and international), treaties, and case law (Kenyan and international)

1.10.2 Secondary sources

Books, reputable newspaper publishers, reports, legal commentaries, dissertations, and journals.

1.11 Limitations of the study

The main limitation of this study will be time constraints as this research is to be completed within the fourth year of study. This might not be enough time to collect information and do a thorough analysis of it adequately. Another limitation lies in the research methodology.

⁵³ Persano F, 'GDPR and children's rights in EU data protection laws' *European Journal of Privacy law and technologies*, 2020, 32 -<
https://heinonline.org/HOL/Page?handle=hein.journals/ejplt2020&div=8&g_sent=1&casa_token=&collection=journals > on 20 July 2024.

Considering this is desktop research, the views of the main subjects, parents and/or guardians and the children being posted will not be adeptly captured by the research.

1.12 Chapter breakdown

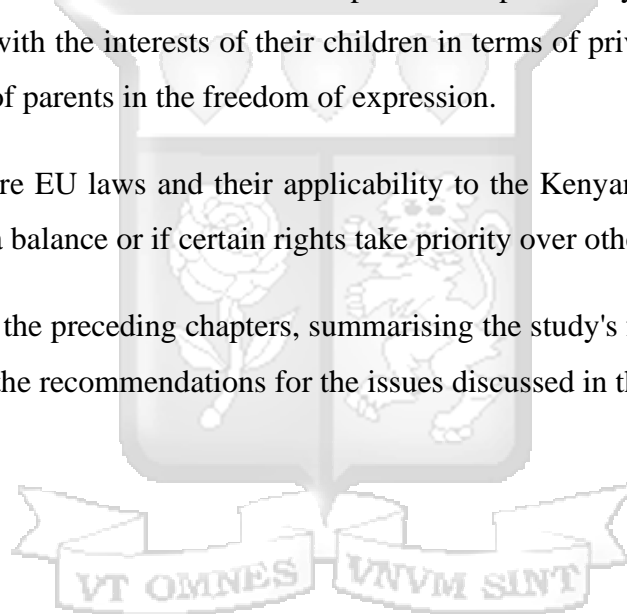
Chapter 1 will introduce the research topic, presenting a background to the study, the problem statement, hypothesis, the research question, the methodology, the theoretical framework, and the significance of the study.

Chapter 2 will attempt to define what interests children want to advance under their right to privacy.

Chapter 3 will attempt to find a balance between parental responsibility and parental freedom of expression in line with the interests of their children in terms of privacy. This section will highlight the interest of parents in the freedom of expression.

Chapter 4 will compare EU laws and their applicability to the Kenyan context to determine whether there can be a balance or if certain rights take priority over others.

Chapter 5 will review the preceding chapters, summarising the study's findings and providing a succinct account of the recommendations for the issues discussed in the study.



Chapter two: What constitutes minors’ right to privacy on social media platforms

2.1 Introduction

The right to privacy for all Kenyans is assured under Article 31 of the COK. Of relevance is Article 31 sub-article (c), which relates to information related to a person’s family or private affairs.⁵⁴ Children have the same human rights that adults do. They are inalienable to the person, and everyone is born with them. They are their person with the same human rights even if they apply slightly differently to them.⁵⁵ This right to privacy is given to every person in Kenya, including children, from conception⁵⁶ as that is when their lives begin in Kenya. The *Data Protection Act* further buttresses Article 31 of the COK in protecting individuals' data. It was passed to give effect to Article 31(c) and (d).⁵⁷ It bears particular importance on the aspect of consent to the processing of personal data by an individual. Personal data is any information that relates to an identified or identifiable natural person. A person may be identified by reference to their name, identification number, location, or factors specific to their physical, physiological, genetic, mental, economic, cultural or social identity.⁵⁸ Posting images and videos of children online will give factors by which a person may identify them. They are thus identifiable natural persons and are subject to the protections accorded in this act. The CRC, which is specific to children, in Article 16 also assures minors of the right to privacy, and that said right may not be unlawfully interfered with.⁵⁹ Kenya ratified this convention in 1990, thus its applicability to Kenyan minors.⁶⁰

Scholars, legislation and even case law have defined the right to privacy differently. It is particularly challenging to apply these definitions to children because a vital aspect of privacy – consent – is not directly exercised by all children, much younger ones. The need for privacy

⁵⁴ Article 31(c), *Constitution of Kenya* (2010).

⁵⁵ Ife J, *Human rights and social work: Towards rights-based practice*, Cambridge University Press, Cambridge, 2008, 11; ‘Children rights and why they matter’ UNICEF,- < <https://www.unicef.org/child-rights-convention/child-rights-why-they-matter#:~:text=Children%20and%20young%20people%20have.subject%20of%20their%20own%20rights>> on 1 October 2024.

⁵⁶ Article 26(2), *Constitution of Kenya* (2010).

⁵⁷ Preamble, *Data Protection Act* (Act no. 24 of 2019).

⁵⁸ Section 2, *Data protection Act* (Act no. 24 of 2019).

⁵⁹ Article 16, *United Nations Convention on the Rights of the Child*.

⁶⁰ Zamzam M & Chatterjee S, ‘Child rights in Kenya – 30 years on’ UNICEF, 22 November 2019-< <https://www.unicef.org/kenya/stories/Child-rights-in-kenya-30-years-on>> on 30 September 2024.

tends to come up in these definitions. A need that is advanced by this paper in line with the interest theory of rights is self-determination. The exercise of children's right to privacy is unique due to their age and maturity. But this does not entirely remove their enjoyment of this right.

This chapter will attempt to give a general definition of privacy that encompasses these various definitions. We will find the need for privacy and what interest is being advanced from the definition. It will also highlight the unique nature of children's right to privacy on social media platforms, especially regarding the role of parents and/or guardians. Finally, it will give what constitutes minors' right to privacy on social media platforms in Kenya.

2.2 What is privacy, and why is it important?

In the case of *Jessica Clarice Wanjiru v Darina Aesthetics & Reconstructions Centre & others*, privacy was defined as the right of individuals to control access to their personal lives, including protection from physical intrusions and the publication of private information and any form of unwanted exposure would constitute a breach of privacy.⁶¹ In *Kenya Human Rights Commission v Communication Authority of Kenya & 4 others*, privacy was seen as a right that protects individuals' right to autonomous development by ensuring that they have a private sphere where they can make their own choices and pursue their own interests.⁶² The Cambridge Dictionary defines privacy as 'someone's right to keep their personal matters and relationships secret'.⁶³ The Merriam-Webster dictionary defines privacy as freedom from unauthorised intrusion. Different scholars also have different conceptions of this right.⁶⁴

Several scholars have attempted to define privacy using a single concept. These include right to be left alone⁶⁵, control over personal information⁶⁶, intimacy, secrecy, and a sense of personhood. More modern conceptions of privacy tend to incorporate most of these aspects rather than focusing on one aspect.

⁶¹ *Jessica Clarice Wanjiru v Darina Aesthetics & reconstructions centre & others* (2017) eKLR.

⁶² *Kenya Human rights Commission v Communications Authority of Kenya & 4 others* (2018) eKLR.

⁶³ Cambridge Dictionary, 4th ed.

⁶⁴ Merriam Webster Dictionary 11th ed.

⁶⁵ Warren S & Brandeis L, 'The Right to Privacy' 4 *Harvard Law Review*, 1890, 193-220 -< https://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warr2.html > on 21 September 2024.

⁶⁶ Westin AF, *Privacy and freedom*, Atheneum, New York, 1967, 7. This author's major concern was surveillance and thus why he focuses on privacy as control over one's information. He also viewed privacy as an individual's right to pull away from the general society and maintain a state of anonymity.

All these definitions can be combined into one that encompasses all the aspects brought out. Privacy is the individual's right to control the access, collection, use and disclosure of personal information and experiences, both physical and digital, to maintain a sense of agency, autonomy and dignity. This definition encompasses the spatial realm of privacy, informational privacy, agency and independence and dignity as concerns one's boundaries.⁶⁷ Using the interest theory of rights, this dissertation focuses on maintaining autonomy as an interest of the right to privacy for children is self-determination.

Privacy is thus a tool for individuals to achieve goals as part of their self-determination. It is a right that gives individuals the space to advance specific interests. A significant theme that has emerged from these various definitions of privacy is the concept of autonomy. A primary goal of the right to privacy is the maintenance of autonomy. There has been a significant focus on individuals deciding what they want to reveal about themselves and to whom. It can thus be seen that a child's interests regarding digital privacy are controlling their image, protecting their well-being, self-determination, and appropriate autonomy online.⁶⁸ All these boil down to the importance of autonomous development⁶⁹ where children guide their development by protecting their image and what image they portray to the public. They want the choice to decide what aspects of themselves they want to reveal to the world, to conceal that which they wish to hide from the public on social media platforms. Children also want to make their own choices and decisions regarding intimate areas of their lives or areas they would consider secret. They would like to develop autonomously without an intrusion into their lives from people on online platforms.

This idea of autonomy was brought out in the case of *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others*, where the court stated that privacy is a necessary condition for an individual to lead an autonomous, independent life, among other things. This importance of privacy is why this right must be protected, and intrusion into a person's private life demeans not only the spirit and dignity of an individual but also the integrity of the society to which the individual belongs.⁷⁰ Intrusions into children's private lives through consistent posting of their identifiable data impinge upon their autonomous development. Their choices will be forced to align with the image crafted through sharenting,

⁶⁷ Rossler B, *The value of privacy*, Polity, Cambridge, 2005, 6-7.

⁶⁸ Dimopolous G, 'A theory of children's decisional privacy', 11-15.

⁶⁹ *Kenya Human rights Commission v Communications Authority of Kenya & 4 others* (2018) eKLR.

⁷⁰ *Coalition for reform and democracy (CORD) & 2 others v Republic of Kenya & 10 others* (2015) eKLR.

which may not be in line with this child's desires. Minors may be constrained to behave according to the persona their parents have created for them without their (minors) involvement. The choice of what to reveal and to whom is taken away and they are expected to behave as they have been presented their whole lives on social media.⁷¹

2.3 Manifestation of the right to digital privacy of children

The right to privacy is accorded to children with all its protections. Children have every right to decide on private matters of their own volition. However, their young age predisposes them to cognitive limitations.⁷² Children between the ages of four to about twelve have a more challenging time applying their mental skills to a more extensive problem-solving process; they cannot apply reason to hypothetical situations.⁷³ They do not know the value of probabilities in situations⁷⁴, and thus, they cannot indeed weigh the risks and benefits of different situations.⁷⁵ The difference between decision-making by adults and that of adolescents is evident in the ability of adults to act and think more responsibly, resist impulses and consider a much broader context of their choices.⁷⁶ Adults have the advantage of a much more developed brain and life experiences to learn from when making decisions.⁷⁷ Due to these factors, minors will need some guidance in decision-making or having someone else decide how their information will be disseminated to persons on social media. Their parents and guardians are the default in determining what is best for their children while they are online, as they are the bearers of parental responsibility.⁷⁸

⁷¹ Rutledge P, 'How holiday sharenting can put your kids at risk' Fielding Graduate University, 21 December 2023-<[⁷² Cognitive skills are the mental processes that our brains use to acquire, process, and apply information from the outside world. These skills are essential for thinking, learning, reading, remembering, reasoning, and attention, and they underlie our ability to complete everyday tasks. Cognitive limitations are constraints to these mental processes and may be brought about by things like age and biases.](https://www.fielding.edu/how-holiday-sharenting-can-put-your-kids-at-risk/#:~:text=Excessively%20sharented%20kids%20can%20have,images%20are%20permanent%20and%20searchable.> on 1 October 2024.</p></div><div data-bbox=)

⁷³ Hein I, Troost P, Broersma A, Vries M, Daams J & Lindauer R, 'Why is it hard to make progress in assessing children's decision-making competence?' 16(1) *BMC Medical Ethics*, 2015, 3.

⁷⁴ Lang A & Betsch T, 'Children's neglect of probabilities in decision making with and without feedback' 19 *Frontiers in Psychology*, 2018-< <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5835113/> > on 2 October 2024.

⁷⁵ Broome M, 'Consent (Assent) for research with paediatric patients' 15(2) *Seminars in Oncology Nursing*, 1999, 102.

⁷⁶ Piker A, 'Balancing liberation and protection: a moderate approach to adolescent health care decision-making' 25(4) *Bioethics*, 2011, 204-205.

⁷⁷ Hein I *et al*, 'Why is it hard to make progress in assessing children's decision-making competence?', 3.

⁷⁸ Section 31, *Children's Act* (Act no. 29 of 2022).

Various risks are posed to children on social media platforms. These risks manifest themselves differently based on how the minor got onto the internet as a participant or a recipient of information on the social media platform. They include content risks, contact risks and conduct risks.⁷⁹ Contact risks are associated with children actively participating in online interactions, particularly those initiated by adults. They include cyberbullying, sexual exploitation by adults and engaging with adults who may have harmful intentions.⁸⁰ Content risks are associated with children as passive recipients of dangerous or inappropriate content. They include exposure to websites that promote unhealthy behaviours, encountering hate speech or extremist content and viewing violent or gruesome images.⁸¹ Conduct risks address the risks where children engage in harmful behaviours towards others. These include cyberbullying of peers, sharing inappropriate content and engaging in hostile peer activities.⁸²

Parents and guardians are better placed to understand these risks than children are. However, this does not mean they are perfect at internalising the risks since they still actively share. A significant risk posed is commercial harvesting and misuse of data of these children due to the current algorithm systems that exist.⁸³ The data obtained from this child will create a particular image of this child as they continue to grow and develop. This removes the freedom to craft their own image and life paths. Specific algorithms will learn who this child is based on how the parent and/or guardian has decided to show them. Therefore, any interests pushed towards them will be based on a created persona, not a genuine version of this person, even as they head into adulthood. Even marketing will be crafted for this persona that has been made.

2.4 Parental role in the right to digital privacy of minors

There is a need to understand the role of parents regarding the privacy of their children in a different manner that ensures they consider their child's best interests. Shannon Sorensen's work 'Protecting Children's Right to Privacy in the Digital Age: Parents as Trustees of Children's Rights' offers an interesting perspective of a parent's role regarding their child's rights. She highlights the prevalent misconception of children as incapable of autonomous

⁷⁹ Graafland HJ, 'New technologies and 21st century children: Recent trends and outcomes' Organisation for Economic Co-operation and Development, OECD Education Working Paper Number 179, 2018, 13 -14- <[https://one.oecd.org/document/EDU/WKP\(2018\)15/en/pdf](https://one.oecd.org/document/EDU/WKP(2018)15/en/pdf) > on 22 September 2024.

⁸⁰ Fourie L, 'Protecting children in the digital society' in Grobbelaar J and Jones C *Childhood vulnerabilities in South Africa: Some ethical perspectives*, African Sun Media, SUN Press, Stellenbosch, 2020, 240.

⁸¹ UNICEF, *The State of the World's Children 2017: Children in a digital world*, December 2017, 72.

⁸² Fourie L, 'Protecting children in the digital society', 243 – 245.

⁸³ UNICEF, *The State of the World's Children 2017*,

decision-making due to developmental factors necessitating intervention from their parents. She also challenges the notion of children as parental property, which diminishes their role in life-affecting decisions.⁸⁴ This view of children as property would mean that one could claim absolute control over them and may do whatever they so wish with these children without any kind of accountability.⁸⁵ Sharenting under this context would thus be allowable as a parent has full control over this child without needing to consider the interests or opinions of this child. This is a dehumanisation of the child as they are equated to things like land, vehicles or even livestock.⁸⁶

To address the issue of parents' excessive control over children's lives, Sorensen proposes a shift from a property-based view to a fiduciary one. Under a fiduciary relationship, parents would be obligated to act as trustees, safeguarding their children's rights until they can exercise them independently. This entails a more profound responsibility to protect children's privacy on social media platforms. By framing children's privacy as akin to adults', Sorensen advocates for a parental duty to act consistently in the child's best interests. She frames children as rights-holders with evolving capacities for self-determination.⁸⁷

A fiduciary relationship is primarily associated with commercial law; however, it can be applied in parent-child relationships, as the law surrounding these relationships does not adequately offer explicit guidance on how a parent is to consider the child's best interests. Fiduciaries are obligated to serve their principals' interests and place them above their own interests. This does not mean, however, that the interest of parents would not be taken into consideration, just that those of the child should ideally take precedence over their own.⁸⁸

This is a relationship of great trust and confidence with minimal supervision of the principal on the fiduciary.⁸⁹ In parent-child relationships involving sharenting, children are often unaware of the potential consequences of their parents' online activities. They trust their parents to make responsible decisions and protect their privacy. It is expected that an agent will act in the best interests of the principal due to the duty of loyalty under a fiduciary

⁸⁴ Sorensen S, 'Protecting children's right to privacy in the digital age', 156, 165.

⁸⁵ Vissing Y, 'Are children parental property?' in Vissing Y (ed) *Children's Human Rights in the USA*, Springer Cham, Switzerland, 2023, 246-248.

⁸⁶ Montgomery J, 'Children as property?' 51(3) *The Modern Law Review*, 1988, 342.

⁸⁷ Sorensen S, 'Protecting children's right to privacy in the digital age', 171-173.

⁸⁸ Smith L, 'Parenthood is a fiduciary relationship' 70(4) *University of Toronto Law Journal*, 2020, 400-401.

⁸⁹ Scott E & Scott R, 'Parents as Fiduciaries' 81(8) *Virginia Law Review*, 1995, 2427.

relationship.⁹⁰ This duty of loyalty depends on good faith. It is breached when an agent has a conscious disregard of responsibility.⁹¹ Regarding digital privacy; parents are expected to protect their children's data and consciously sharenting may constitute a breach of this responsibility.

A higher duty of care on the parents would mean that they are to act in line with the interests of their children. A focus on the interests of the child would require a certain level of participation of the child in decisions that will ultimately alter their future. A minor's involvement is crucial because it allows the parent and/or guardian involved to know the expectations of this child as regards their social media presence, and it also helps legitimise the decision that is finally made regarding the matter.⁹²

2.5 Age-appropriate inclusion

This participation, however, must follow the age and maturity of the child. As per the *Children's Act*, children who are capable of forming their views on the matter should be allowed to express these views freely.⁹³ This has also been described in Article 12 of the CRC.⁹⁴ Furthermore, *the Children's Act* states that the exercise of parental responsibility must take into account the evolving capacities of the child.⁹⁵

Studies have shown that a child develops rational thought at seven. This is called the 'age of reason' where a child is now capable of common sense and maturity in their thought processes.⁹⁶ This term was first described in 'Latency Revisited: The Age of 7, Plus or Minus 1' in 1976 by child psychiatrists Theodore Shapiro and Richard Perry.⁹⁷ At this age, children

⁹⁰ Scott E & Scott R, 'Parents as Fiduciaries', 2420.

⁹¹ Harrod C, 'No child left online: Influencer "Sharenting" as a breach of fiduciary duty' 45(4) *Cardozo Law Review*, 2023, 1236-1237.

⁹² Correia D, Eduardo JF, Marques J and Teixeira L, 'Participatory methodology guidelines to promote citizens participation in decision-making: Evidence based on a Portuguese case study' *Elsevier*, 2023, 1 - <<https://doi.org/10.1016/j.cities.2023.104213>> on 20 September 2024.

⁹³ Section 8(3), *Children's Act* (Act no. 29 of 2022).

⁹⁴ Article 12, *United Nations Convention on the Rights of the Child*.

⁹⁵ Section 31(1), *Children's Act* (Act no. 29 of 2022).

⁹⁶ Piaget J, *Judgement and reasoning in the child*, Routledge, Britain, 2002; Zander M, 'A milestone developmental stage: The age of reason' *Scholastic*, 12 April 2019-< <https://www.scholastic.com/parents/family-life/social-emotional-learning/development-milestones/age-reason.html>> on 1 October 2024.

⁹⁷ Shapiro T & Perry R, 'Latency revisited: The age of 7 plus or minus 1' 31(1) *The Psychoanalytic Study of the Child*, 1976, 81.

exhibit a certain level of common sense, awareness, sensibility or intelligence⁹⁸ and can thus reasonably understand their data being shared with people online. From around age seven, children have the mental capacity to be brought into conversations surrounding their right to digital privacy as they are capable of reasoning and giving a relatively rational opinion as compared to before they developed reasoning.⁹⁹

It is advisable that once children show maturity in comprehending digital footprints, they should play an active role in such decisions. For children aged between seven and twelve, parents must give all the necessary information to have a basic understanding of sharing so that this child can provide a more informed opinion on what they want. Teenagers have a much better grasp of sharenting and digital privacy; thus, obtaining their opinions and views would be much easier. They can even state how they want to be portrayed on social media if they want their information to be shared. For much younger children, a parent must consider their best interests since this child may not be able to express their interests rationally due to lower maturity levels. A parent must look at this child not just as a person under their control but as a trustee of the right of this right and, therefore, must ensure that they cause no harm in how they choose to exercise this right.

2.6 The right to digital privacy of minors

The right to digital privacy of children is, therefore, the freedom of children to decide what they want to share on social media platforms in line with age-appropriate maturity while being guided by their parents and/or guardians who have internalised the risks involved and who have given due respect to the wishes and interests of their children as agents of these children. This definition brings out the aspects of autonomy of children, internalisation of risks, involvement of children in decisions affecting their digital privacy, and a reconceptualisation of the role of parents and/or guardians.

⁹⁸ Rogoff B, Sellers MJ, Pirrotta S, Fox N & White SH, 'Age of assignment of roles and responsibilities to children: A cross-cultural survey' 18(5) *Human Development*, 1975, 359.

⁹⁹ Tooley U.A, Park A, Leonard J, Boroshok A, McDermott C, Tisdall M, Basset D & Mackey A, 'The age of reason: Functional brain network development during childhood' 42(44) *The Journal of Neuroscience*, 2022, 8247; Wendelken C, Ferrer E, Whitaker KJ & Bunge SA, 'Fronto-parietal network reconfiguration supports the development of reasoning ability' 26(5) *Cerebral Cortex*, 2016.

2.7 Conclusion

This chapter has given what constitutes the digital privacy of minors on social media platforms. It began by providing the various definitions of privacy given in case law dictionaries and by scholars traversing multiple years. Using the interest theory of rights, the need for privacy emerged from a single definition encompassing these multiple definitions. This need emerged in autonomous self-determination, where one can decide what will be shared and retained. It highlighted the challenges minors face in terms of cognitive limitations due to their tender age and, thus, the need for parents and/or guardians to help them control what is to be shared and what is not to be shared. Parents and/or guardians have better-internalised risks associated with sharing content online due to their better-developed cognitive skills and life experiences. Thus, they are in a better position to help these children.

It then went on to show the current conception of the role of parents in the digital privacy of children. The current view of seeing children as property would mean that parents can do whatever they want as regards these children without accountability or even considering the interest of these children. Therefore, A reconceptualisation of this role to impose a higher duty of care was necessary, and a fiduciary relationship offered a solution. A fiduciary relationship requires the agent to always consider the interests of the principal; in this situation, the consideration of minors' interests would come in the form of participation of the minors in decisions affecting their digital privacy. This participation is, however, supposed to be based on the evolving capacities and maturity of the child. Seven was deemed an appropriate age to start actively involving children in decisions affecting their digital privacy. This is what psychologists have considered the 'age of reason' – when a child begins to develop reasoning capabilities.

The right to digital privacy of minors is a constitution of all these factors. Children are free to decide what they want to share on social media platforms, in line with age-appropriate maturity, while being guided by their parents and/or guardians who have internalised the risks involved and who have given due respect to the wishes and interests of their children as agents of these children.

Chapter three: Balancing parental freedom of expression and parental responsibility

3.1 Introduction

The freedom of expression is guaranteed in Article 33 of the COK.¹⁰⁰ It is a limited right with particular reference to Article 33(3) of the COK, which states that the exercise of this freedom must be done with due regard to the rights and reputation of other people.¹⁰¹ The right is also guaranteed in Article 19(2) of the ICCPR¹⁰² and is further limited by Article 19(3)(a)¹⁰³ of the same statute; all expressions should take into consideration the rights of other people. Children are also guaranteed parental responsibility in Article 53(1)(e)¹⁰⁴ of the COK, which must be exercised in line with the best interests of the child.¹⁰⁵ Parents who wish to express themselves on social media must weigh between their freedom of expression and their parental responsibility to their children. Parents must, therefore, pay due regard to the rights and reputation of their children as they share their data on social media platforms.

This chapter will discuss how parents are expected to balance out parental responsibility and the freedom of expression guaranteed in the COK. It will highlight freedom of expression and how parents manifest it through sharenting, bringing out an excellent motivator for parents to sharent. It will also use Goffman's presentation theory to explain why parents are sharenting. Furthermore, it will also look into parental responsibility, considering the higher duty of care imposed in the preceding chapter and, thus, what should take precedence in balancing these rights.

3.2 Freedom of expression and sharenting

Freedom of expression includes the freedom to seek, receive or impart information or ideas¹⁰⁶ which is essentially the freedom to communicate with people.¹⁰⁷ Communication is rooted in

¹⁰⁰ Article 33, *Constitution of Kenya* (2010).

¹⁰¹ Article 33(3), *Constitution of Kenya* (2010).

¹⁰² Article 19(2), *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.

¹⁰³ Article 19(3)(a), *International Covenant on Civil and Political Rights*.

¹⁰⁴ Article 53(1)(e), *Constitution of Kenya* (2010); Section 31(1), *Children's Act* (Act No. 29 of 2022).

¹⁰⁵ Article 53(2), *Constitution of Kenya* (2010); Section 8, *Children's Act* (Act No. 29 of 2022).

¹⁰⁶ Article 33(1), *Constitution of Kenya* (2010).

¹⁰⁷ The definition of communication according to the Oxford dictionary is the imparting or the exchange of information by speaking, writing, or using some other medium. This is similar to what has been expressed in the COK as to what constitutes the freedom of expression.

man's social nature, which seeks connections with others; these connections are formed through various means of communication.¹⁰⁸ Communication happens through different media, one of them being social media, with an upwards of 13.05 million people using social media platforms by January 2024.¹⁰⁹ This is about 41.9% of Kenya's population.¹¹⁰

Some parents have opted to express themselves through social media platforms. They share their parenting experiences with other people for various reasons. Some want to have a community to help them in their parenting journey, others want to show off how great their families are and how great they are at parenting, and others want to build up a potential future career for their children as influencers or models.¹¹¹ Therefore, parents' interest in sharenting is the desire to express themselves and connect with others in their parental experiences. Through these connections, they can enhance their parenting skills by learning from others and building a supportive community to guide them through their parenting journey.

Sharenting comes with several risks and benefits. The primary benefit to parents is forming connections and building up a future career for their children. The risks involved (discussed in the preceding chapter), however, outweigh these benefits. A risk that has a particular impact on children's autonomous development, especially on their image, is the risk of creating a picture of the child that may not represent them as they are.¹¹² Parents may craft an image that is more acceptable to audiences to ensure maximum engagement on social media platforms. This maximised engagement, in some instances, leads to financial gain.

When parents share data on social media, they may present themselves in a certain way to make themselves more acceptable in the online parenting community and even the general society outside of social media. Social interactions can be viewed as a performance where individuals present themselves in specific ways to create desired impressions.¹¹³ Parents want to create an

¹⁰⁸ Lieberman D.M, *Social: Why our brains are wired to connect*, Oxford University Press, United Kingdom, 2013, xv; Rymanowicz K, 'The importance of communicating' Michigan State University, 22 April 2016 -<https://www.canr.msu.edu/news/the_importance_of_communicating > on 2 September 2024.

¹⁰⁹ -<<https://www.statista.com/statistics/1304674/number-of-social-media-users-in-kenya/> > on 28 November 2024.

¹¹⁰ Kemp S, 'Digital 2024: Kenya' Datareportal, 23 February 2024-<<https://datareportal.com/reports/digital-2024-kenya#:~:text=Meanwhile%2C%20data%20published%20in%20the.and%20above%20at%20that%20time.> > on 28 November 2024.

¹¹¹ Blum-Ross A and Livingstone S, 'Sharenting: parent blogging and the boundaries of the digital self'.

¹¹² Rutledge P, 'How holiday sharenting can put your kids at risk' Fielding Graduate University, 21 December 2023-<<https://www.fielding.edu/how-holiday-sharenting-can-put-your-kids-at-risk/#:~:text=Excessively%20sharented%20kids%20can%20have.images%20are%20permanent%20and%20searachable.> > on 1 October 2024.

¹¹³ Blum-Ross A and Livingstone S, 'Sharenting: parent blogging and the boundaries of the digital self', 4.

image of themselves through their children and their parenting experiences and will thus share particular images and videos of their children that best generate this image. This can be further explained through Goffman Erving's self-presentation theory.

3.2.1 Self-presentation theory

This is a theory advanced by Goffman Erving. He uses a dramaturgical perspective or analysis, which is the idea that people's everyday lives can be understood as a performance that actors on a stage portray.¹¹⁴ Parents who sharent can be seen as using their children as proxies to convey a particular image of themselves or to express a side of themselves that they want people to see.¹¹⁵ The 'actors', these parents, play a part through their children and convince the audience to take seriously this character that they have crafted. They have to portray this character well enough for the audience to accept it and enjoy it.¹¹⁶ This character presented is all the person is, nothing more, nothing less. This also creates a relationship with the audience that they have a unique relationship with this character that has been crafted.¹¹⁷ Intimate content is used as a strategy for the establishment of trust and closer relationships with their followers.¹¹⁸ This intimacy makes this person more connected with audiences.¹¹⁹ An image of an intimate parent-child relationship is more appreciated. If it creates more engagement, the parent will feel obliged to push more intimate content in that line to satisfy their audience or their viewers online.

Once this image has been created, it must be managed. This is called 'Impression Management'. What the audience is shown must be controlled; there is no room for *faux pas*, unmeant gestures or inappropriate intrusions.¹²⁰ This would require all teammates to actively participate in ensuring this image that has been crafted is carefully maintained. They must be loyal to the performance as they have a moral obligation to act appropriately. They must also

¹¹⁴ Blum-Ross A and Livingstone S, 'Sharenting: parent blogging and the boundaries of the digital self' Taylor & Francis, 2017-<https://web.archive.org/web/20190427173437id/http://eprints.lse.ac.uk/67380/1/Blum-Ross_Sharenting_revised_2nd%20version_2017.pdf> on 15 December 2023.

¹¹⁵ Walrave M, Verswijvel K, Ouvrein G, Staes L, Hallam L, & Hardies K, 'The limits of sharenting: exploring parents' and adolescents' sharenting boundaries through the lens of communication privacy management theory' *Frontiers in Education*, 2022, 7-<10.3389/feduc.2022.803393> on 18 July 2024; Goffman E, 'The arts of impression management' in Goffman E *The presentation of self in everyday life*, University of Edinburgh, George Square Edinburgh, 1956, 132-151.

¹¹⁶ Goffman, 'The arts of impression management', 10.

¹¹⁷ Goffman, 'The arts of impression management', 31.

¹¹⁸ Vizcaíno-Verdú A, De-Casas-Moreno P & Jaramillo-Dent D, 'Thanks for joining our life: Intimacy as performativity on YouTube parenting vlogs' 31(4) *Profesional de la información*, 2022, 3.

¹¹⁹ Melonçon L, and Arduser L, 'A theory of collective intimacy' in Melonçon L and Molloy C (ed) *Strategic interventions in mental health rhetoric*, 1st ed, Milton: Taylor & Francis, New York, 2022, 21.

¹²⁰ Goffman, 'The arts of impression management', 133.

be disciplined enough to play the part they have been assigned in this performance.¹²¹ Unfortunately, it is not all the time the children involved are willingly managing this impression that has been created. Some are being forced to play a part and are only loyal because the parent has insisted they do it. The discipline needed may be forced as now the parent has created an image that their community has accepted. They feel they cannot deviate from this image, and thus, their children must be actively involved in upholding this image. This further creates issues, such as children working extremely long hours to produce content in line with the image the parent wants to convey.¹²²

3.2.2 *Sharenting and a minor's future*

Most of the time, children whose data is shared do not have much of a say in what they will record and post. The parent decides based on the most engaging content and what will make the most money. This manifestation of freedom of expression actively infringes upon the right to privacy of these children. They are forced to portray themselves as their parents wish and must share deeply intimate parts of themselves to encourage more engagement with audiences and thus more money for the parents.

Furthermore, there is a risk to the future reputation of the child. The reputation of a person is a vital part of their dignity as a person. Reputation is defined as the 'respect or admiration someone or something receives, based on past behaviour or character' according to the Cambridge Dictionary.¹²³ Once a child becomes an adult and decides how they want to live their life, they may have a different level of respect due to the massive exposure they got when they were younger. Reputation is the public's estimation of the worth or value of a person.¹²⁴ This public worth forms the basis of several decisions in society, from whom to employ or work for, whom to promote and even whom to do business with.¹²⁵ This minor loses the opportunity to shape their reputation as their parents actively shaped it.

¹²¹ Goffman, 'The arts of impression management', 138.

¹²² Nottingham E, 'Dad! Cut that part out!'. Children's rights to privacy in the age of 'generation tagged': Sharenting, digital kidnapping and the child micro-celebrity' in Murray J, Swadener B & Smith K (eds) *The Routledge international handbook of young children's rights*, Routledge, New York, 2019, 183-190.

¹²³ Cambridge Dictionary, 4th ed.

¹²⁴ *King'ori v Royal Media Services* (2024) 5994 KLR.

¹²⁵ *Reynolds v Times Newspapers Ltd* (2001), The United Kingdom House of Lords.

3.3 Parental responsibility

As mentioned, this expression is limited, and for parents sharing their parental experiences on social media, a particular limitation comes in the form of parental responsibility. Parental responsibility constitutes the duties, rights, powers, obligations, and authority that a parent has by law about their child.¹²⁶ The COK deems children as vulnerable members of society and thus in need of special protections.¹²⁷ Parental responsibility is a part of special protections that children need. The role of a parent regarding the right to digital privacy of a child is elaborated on in chapter 2 of this dissertation. A parent has a high duty of care when it comes to protecting their children's data online; thus, they are expected to place their parental responsibility above their freedom of expression. They must consider what their children want. A parent must assess the risk they run regarding their child's future image and personality. They are responsible for protecting their children from harm¹²⁸; and since they have a better understanding of risks posed to the child in the digital realm, they should actively find ways to keep their child safe. They must weigh between the expression of their experience and the right to privacy of their children.

The Data Protection act gives parents the authority to consent to the processing of their children's data.¹²⁹ It is a part of their responsibility to their children. This authority must be exercised in line with the best interest of the child which has been constitutionally guaranteed for all children in Kenya.¹³⁰ The best interest of the child comprises principles that are vital for a child's right to survival, protection, participation and development. Parental rights and freedoms are thus balanced against this paramountcy principle.¹³¹ Considering the best interests of the child would require active participation of the child in line with their capacities and minimising the data shared as the child is not yet old enough to fully grasp what such publication of the data actually means.

A popular Kenyan family YouTube channel 'The Green Calabash' that had amassed over fourteen million views was taken down in consideration of the right to privacy of the children involved. Speaking in an interview back in 2022, the father popularly known as Ramzzy

¹²⁶ Section 31(1), *Children's Act* (Act No. 29 of 2022).

¹²⁷ Article 21(3), *Constitution of Kenya* (2010).

¹²⁸ Marcus P, 'Parental responsibilities: Reformulating the paradigm for parent-child relationships Part 2: Who has responsibilities to children and what are these responsibilities?' 14(2-3) *Journal of Child Custody*, 2017, 118.

¹²⁹ Section 33(1)(a), *Data protection act* (No. 24 of 2019).

¹³⁰ Article 53(2), *Constitution of Kenya* (2010); Section 8, *Children's Act* (Act No. 29 of 2022).

¹³¹ *MAK V RMAA & 4 others* (Petition 2 of 2022) eKLR.

(Ramadhani Oluoch), stated that he and the mother of his children (Shiko Nguru) decided to take down the channel to respect their children's right to privacy and to allow them to live their lives without his name attached to them.¹³² He further sent a cease and desist to Shiko Nguru's new boyfriend when he posted his children on social media platforms to stop the boyfriend's actions. He believed that this was a breach of his children's right to privacy and must be immediately stopped.¹³³ This is an example of a parent who ensured that they protected their children's right to privacy on social media platforms. This is however not the case in general as there are still several YouTube channels dedicated to people's family life with their children constantly appearing. A very popular channel is the WaJesus Family that has amassed eight hundred and fourteen thousand subscribers and happens to be one of the top 100 YouTube channels in Kenya.¹³⁴

Parental responsibility should involve finding the best ways to express their parenting journey including their children without infringing on their rights to privacy. There are various ways to do this and several factors to be considered. Mindful sharenting is one way to do this.

3.3.1 Mindful sharenting

There are several less invasive ways for parents to post their children. A quantitative study on a group of millennial parents showed that parents can share content with their children without necessarily overexposing them to their children. It brings about a potential way to share as a parent while protecting your child.¹³⁵ Some of the strategies that these parents adopt include blurring their children's faces, focusing on a body part like the child's hand which would not be easily identifiable, putting emojis on the child's face, taking pictures or videos from a distance, shielding recognisable body parts and referring to the child without a photograph of the child.¹³⁶ This would allow parents to include their children in their videos and photos while maintaining some form of anonymity so that the future reputation of the child is protected and to ensure that they do not infringe upon the child's right to privacy.

¹³² Jerotich S, 'Ramzzy: Why we deleted 'The Green Calabash' from youtube' Citizen Digital, 1 March 2022 - <<https://www.citizen.digital/entertainment/rama-says-he-was-protecting-his-kids-amid-deleting-green-calabashyoutube-page-n293516> > on 20 November 2024.

¹³³ -<<https://x.com/RaMbuzZy/status/1745101760417464376> > on 25 November 2024.

¹³⁴ -<<https://www.youtube.com/@THEWAJESUSFAMILY> > on 25 November 2024.

¹³⁵ Walrave M, Robbe S, States L & Hallam L, 'Mindful sharenting: how millennial parents balance between sharing and protecting' *Frontiers in Psychology*, 2023, 1 -<10.3389/fpsyg.2023.1171611> on 18 July 2024.

¹³⁶ Walrave M, Robbe S, States L & Hallam L, 'Mindful sharenting', 9.

Mindful sharenting also includes actively involving children in sharenting to ensure that their views are expressed and respected. The Children's Act states that one of the considerations of the best interests of the child is age, maturity and stage of development of a child.¹³⁷ These are vital when a child expresses their opinion on matters affecting them, especially when the child is at an age where they can comprehend risks and benefits of sharenting. Withholding important identifiable information about children is also an important consideration in mindful sharenting. This is provided for by the Data Protection Act under 'pseudonymisation'. A parent can choose to use a nickname to refer to their child.

3.4 Conclusion

This chapter has highlighted parents' need for freedom of expression and how they choose to manifest that right through sharing. It has also brought out the risk that such parents run when they decide to share information about their children with people on social media platforms, especially when they force these children to portray a particular image that will ensure maximised engagement on their social media platforms. Parental responsibility has been considered a limitation of this right as parents are responsible for protecting their children even though they are free to express themselves. They can do so by mindfully sharing their children's images online and actively removing as many identifiable features of their children as possible. Parents are therefore encouraged to limit their freedom of expression and allow the right to privacy of their children to take precedence as they exercise their parental responsibility.

¹³⁷ First schedule para 1, *Children's Act* (Act No. 29 of 2022).

Chapter four: Comparative study on sharenting in the EU versus in Kenya

4.1 Introduction

Sharenting is a worldwide phenomenon that has raised issues of the privacy rights of the children involved. In Australia, about 7% of parents who engage in sharenting have reported having been requested to share child abuse material of their children by people who view their content.¹³⁸ A 2021 study conducted in the United States of America showed that out of 1,000 parents surveyed, about 75% of them shared their children's data on social media platforms, and more than 80% of them used their children's real names online.¹³⁹ Countries like France and Italy have seen the need to come up with laws against the phenomenon due to the gross violations of children's right to privacy.¹⁴⁰ Kenya is also one of the countries deeply affected by the phenomenon. Parents readily share their children's data on social media platforms like YouTube, Facebook, X (previously Twitter), and TikTok.¹⁴¹

Different countries are choosing other ways to address the matter. This study will use the EU as a case study to try and find solutions to the infringement of children's right to privacy. The choice of the EU is because it is the only region where laws around sharenting have been explicitly developed in France and Italy. France's law aims to guarantee respect for the image rights of children.¹⁴² Italy's draft bill, which is still being deliberated upon, seeks to specifically address the matter of sharing and even its economic aspect when money is made out of sharing activities.¹⁴³

This chapter will draw parallels between the data protection act of the EU, the GDPR and that of Kenya to determine the place of sharenting within these laws. It will then look into France's

¹³⁸ Butler J, 'Parents who share photos of children online more likely to be approached for sexual images of them' The Guardian, 2 May 2024 -< <https://www.theguardian.com/media/2024/may/02/parents-share-photo-kids-online-identity-aic-report-sharenting> > on 5 December 2024.

¹³⁹ Security.org, *Parents' Social Media Habits: 2021*, 2021, -< <https://www.security.org/digital-safety/parenting-social-media-report/> > on 5 December 2024.

¹⁴⁰ Castro C, 'Italy considers law against sharenting to protect children's privacy' Techradar, 5 April 2024-< <https://www.techradar.com/computing/cyber-security/italy-considers-law-against-sharenting-to-protect-childrens-privacy> > on 5 December 2024.

¹⁴¹ Wangari N, 'The dangers of posting your child's photos online' The Standard; 'Sharenting: Should I post photos of my kids online?' The Standard.

¹⁴² *Law number 2024-120 of 19 February 2024.*

¹⁴³ *Bill on the Amendments to Law No. 977 of 17 October 1967 on the employment of minors in digital platforms for sharing multimedia content, as well as provisions on the dissemination of the image and multimedia content of minors.*

law against sharenting and Italy's draft bill against the same. From this analysis, the study will highlight the best practices that Kenya can adopt or practises that Kenya already has.

4.2 Parallels between Kenya's Data Protection Act and the GDPR as regards minors' digital privacy

The GDPR was passed in 2016 to protect people's privacy rights. It has been seen as a law that would raise the bar for data protection worldwide. It has great flexibility to allow for necessary changes based on prevailing circumstances and greater opportunities for global cooperation due to the global nature of data flows. Trust that data controllers will treat personal information responsibly and that rules will be effectively enforced are the cornerstones of the GDPR.¹⁴⁴ It has also introduced protective measures specific to minors, thus increasing protections to their right to privacy.¹⁴⁵

4.2.1 Parental role in a minor's digital privacy

The GDPR affords children special protections, making it such that holders of parental responsibility over the child are the ones to exercise consent to process the child's data.¹⁴⁶ This provision assumes that parents are responsible enough to know how best to exercise consent to processing their children's data. This is similar to Kenya's *Data Protection Act* (hereinafter 'Act'), which also allows for the processing of minor's data by consent given through their parents. The use of parents and guardians as the determinant of consent for minors forgets the fact that different parents deem their role as parents in various ways. Most of the time, what a child needs or requires is based on the parent's perception of their best interests.¹⁴⁷ Chapter 2 highlighted the different ways parenting can be viewed, emphasising the need to move past looking at children as property and rather understanding parental responsibility as a fiduciary role with a higher duty of care from parents to their children. A parent may choose to overshare personal information regarding their child because they see the child as property that they own so they can do whatever they wish. However, a more responsible parent would see their role

¹⁴⁴ Buttarelli G, 'The EU GDPR as a clarion call for a new global digital standard' 6(2) *International Data Privacy Law*, 2016, 77-78.

¹⁴⁵ Donovan S, 'Sharenting: The forgotten children of the GDPR', 52.

¹⁴⁶ Article 8, *GDPR*, 2016.

¹⁴⁷ Institute of Law and Internet, *The law behind sharenting: Children's rights when guardians publish pictures or other information about their child on the internet*, 2021, 12.

as one of protecting their child's privacy and thus would avoid sharenting or may limit how much of their children's data that they share.

4.2.2 *Evolving capacities of the child*

A unique difference in consent between the two legislations is that the GDPR recommends that minors above the age of 16 can consent to processing their data. This age of 16 can go as low as 13 years of age such that minors aged 13 and above can give consent to the processing of their data.¹⁴⁸ This directly takes into consideration the evolving capacities of children. Kenya's Act does not make this distinction.¹⁴⁹ However, this does not mean that the child's evolving capacities are not recognised. The Act states that processing of the minor's data must be in the best interests of the child¹⁵⁰ which will also be inclusive of the capacity of the child as per the *Children's Act*.¹⁵¹

The GDPR further explicitly recognises children's unique vulnerabilities regarding their personal data in Recital 38. It acknowledges the fact that children are less aware of risks, consequences and safeguards that are related to the processing of their personal data.¹⁵² Adults have the benefit of greater cognitive maturity and life experiences to learn from when making decisions regarding such processing of data, unlike children.¹⁵³ Furthermore, Recital 58, on the principle of transparency, requires that any information and communication on data processing addressed to a child be in clear and plain language that the child can easily understand. The Act does not do this explicitly but still recognises the need to protect children through their parents when exercising consent.

4.2.3 *Sharenting*

Recital 18 would seem to be incompatible with Recital 38 as it removes household and personal online activities (which tend to be content that parents share with their children) from its purview.¹⁵⁴ This would then mean that sharing would not be regulated under the GDPR, allowing parents to post as much personal data on social media as they want.¹⁵⁵ No provision

¹⁴⁸ Article 8(1), *GDPR*, 2016.

¹⁴⁹ Section 33(1)(a), *Data Protection Act* (No. 24 of 2019), a child becomes an adult once they obtain the age of 18 in Kenya, thus parents have this right to exercise their children's consent until the child is 18 years of age.

¹⁵⁰ Section 33(1)(b), *Data Protection Act* (No. 24 of 2019).

¹⁵¹ First Schedule, *Children's Act* (2022).

¹⁵² Recital 38, *GDPR*, 2016.

¹⁵³ Hein I *et al*, 'Why is it hard to make progress in assessing children's decision-making competence?', 3.

¹⁵⁴ Recital 18, *GDPR*, 2016.

¹⁵⁵ Donovan S, 'Sharenting: The forgotten children of the GDPR', 39.

under the Act explicitly removes sharenting from its purview; neither is there a provision that explicitly includes sharenting as something regulated by law. It would be open to interpretation of the Act itself to determine its applicability to sharenting.

Posting pictures and videos on social media platforms can be considered data processing under the Act. This is because uploading such content includes collecting and disseminating personal data to audiences on these social media platforms. Collection and dissemination of data are actions that fall under the definition of processing as per Section 2 of the Act.¹⁵⁶ The Act (in the same section) further defines a data processor as one who undertakes the processing of personal data. It includes natural persons. A natural person, as defined by the Mozley & Whitelely's Law Dictionary, means a person in the ordinary sense of the word; a human being.¹⁵⁷ A parent is a natural person and can thus be deemed data processors when sharing their children's data on social media platforms. As a data processor, a parent needs to follow the principles of data processing espoused in Section 25 of the Act, one of which is the respect of a data subject's right to privacy.¹⁵⁸ Minors are data subjects since they are identifiable natural persons¹⁵⁹ and thus must have their privacy rights respected in the face of sharenting by their parents. Sharenting can thus be regulated under the Act even though it is not directly stated as such.

4.2.4 Right to be forgotten

The right to be forgotten is the right to have one's data deleted by a data controller or a data processor.¹⁶⁰ It emanates from the right to privacy. The ECtHR decision in *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González*¹⁶¹, set a precedent for this right which is now found in right in Article 17 of the GDPR¹⁶², and it is further bolstered by Recital 65(3) for children. The legislation states that this right is particularly important for minors who gave consent at a point in their lives when they were not fully aware of the risks involved in processing the data. They can choose to have this data

¹⁵⁶ Section 2, *Data Protection Act* (No. 24 of 2019).

¹⁵⁷ Mozley & Whitelely's Law Dictionary, 12th ed; *Craft Silicon Limited v Republic; Namai & 5 others* (Criminal Revision E30 of 2021) (2022) KEHC 424 (KLR).

¹⁵⁸ Section 25(a), *Data Protection Act* (No. 24 of 2019).

¹⁵⁹ Section 2, *Data Protection Act* (No. 24 of 2019).

¹⁶⁰ Wolford B, 'Everything you need to know about the "Right to be forgotten"' GDPR, -< <https://gdpr.eu/right-to-be-forgotten/> > on 3 December 2024.

¹⁶¹ *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, ECtHR Judgement 13 May 2014.

¹⁶² Article 17, *GDPR*, 2016.

erased and no longer processed for reasons such as withdrawal of consent, or if the processing of the data is in contravention with the GDPR, or if the processing of the personal data is no longer necessary in relation to the reason why it was first collected or processed.¹⁶³ The Act does not distinguish between adults and minors in this right. It simply highlights the right and the fact that a data processor or controller is expected to erase or destroy personal data of a data subject without undue delay.¹⁶⁴ Public opinion about a person can be greatly informed by content on social media platforms¹⁶⁵ about that person and thus the need to take down information that may not represent them. Decisions about a person may be based on their reputation and available information online.

4.3 Countries with sharenting specific laws

4.3.1 France

France recently enacted a law that targets sharenting; *Law number 2024-120 of 19 February 2024 aimed to ensure respect for children's image rights*. It amends specific parts of its *Civil Code*, the *Penal Code* and *Law Number 78-17 of January 1978 relating to information technology, files and freedoms* to be more respectful of children's image rights.¹⁶⁶

Law number 2024-120 has amended Article 371-1 of the *Civil Code* on parental authority to include the private life of a child as something that parents have authority over.¹⁶⁷ However, the law also amends the *Civil Code* to ensure that if they misuse this authority and share images of their children that are detrimental to their children's dignity or moral integrity, then they will be given to somebody else.¹⁶⁸ Parental authority as per the Article 372-1 of the *Civil Code* has been amended to include the joint responsibility of parents in ensuring they safeguard children's private life. There is also a requirement to involve children in decisions of digital privacy following the maturity and age of the child.¹⁶⁹ If consent from a child is not in line with the requirements of the *Civil Code*, then whoever has processed a minor's data is liable to pay a fine of 45,000 Euros.¹⁷⁰ This includes parents who fail to obtain consent to share their

¹⁶³ Recital 65(3), *GDPR*, 2016.

¹⁶⁴ Section 40(1)(a), *Data Protection Act* (No. 24 of 2019).

¹⁶⁵ *King'ori v Royal Media Services* (2024) 5994 KLR; *Reynolds v Times Newspapers Ltd* (2001), The United Kingdom House of Lords.

¹⁶⁶ <<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000049163317>> on 2 December 2024.

¹⁶⁷ Article 1, *Law number 2024-120 of 19 February 2024*.

¹⁶⁸ Article 377, *Civil Code*.

¹⁶⁹ Article 372-1, *Civil Code*.

¹⁷⁰ Article 226-1, *Penal Code*.

children's images in line with the provisions of the law. The law also allows for a family court judge to prohibit the dissemination of a child's images by one parent when there is a disagreement between the parents on the child's image rights.¹⁷¹ This is in line with the parents' joint responsibility to protect their children's image rights. The law further creates more protections for minors by amending the *Law relating to information technology, files and freedoms* to ensure that when a minor's data is not being processed or deleted in line with the data protection laws then the regulatory authority can take immediate legal action to safeguard the child's rights.¹⁷²

4.3.2 Italy's draft bill.

A draft bill to regulate 'baby influencers' and sharenting was recently proposed in Italy. Baby influencers are children who generate revenue through fame acquired from their online presence. It distinguishes sharenting as more of a social issue than a matter of commercialising children's images. However, it is worth noting that such lines may sometimes blur when sharing becomes a more commercialised issue with a parent using the child to generate revenue.¹⁷³

Article 2(1) of this Bill restricts the dissemination of a child's news or multimedia content if it does not directly benefit the child.¹⁷⁴ The main objective of such dissemination must be the child's interests, which is in line with the Treviso Charter that gives guidelines to journalists and media professionals when reporting on minors. They must do so in the best interest of the child.¹⁷⁵ This bill bears great similarity to the French law in the aspect of joint parental responsibility over the child's image rights and the need for a child's participation in matters of consent as regards their digital privacy. Consent as regards a minor would, therefore, be obtained from holders of parental responsibility who have taken into account the minor's best interest as well as giving due weight to the minor's opinion.¹⁷⁶ Without obtaining consent in

¹⁷¹ Article 373-2-6, *Civil Code*.

¹⁷² Article 21, *Law relating to information technology, files and freedoms*.

¹⁷³ *Bill on the Amendments to Law No. 977 of 17 October 1967 on the employment of minors in digital platforms for sharing multimedia content, as well as provisions on the dissemination of the image and multimedia content of minors*.

¹⁷⁴ Article 2(1), *Bill on the Amendments to Law No. 977 of 17 October 1967 on the employment of minors in digital platforms for sharing multimedia content, as well as provisions on the dissemination of the image and multimedia content of minors*

¹⁷⁵ The Charter of Treviso (1990).

¹⁷⁶ Article 2(2), *Bill on the Amendments to Law No. 977 of 17 October 1967 on the employment of minors in digital platforms for sharing multimedia content, as well as provisions on the dissemination of the image and multimedia content of minors*

such a manner, a minor's image cannot be processed.¹⁷⁷ This is a direct limitation to sharenting as parents must ensure that they follow the guidelines on the consent set forth lest they lose the freedom to share their children's data.

Furthermore, if the Bill is adopted into law, then digital platforms will be required to encourage reporting of content that amounts to a violation of a minor's dignity or moral or physical integrity by users of the platform to protect minors' right to privacy further.¹⁷⁸ It also ensures to address the sensitisation of the public on the risks involved in sharing images and personal information of minors online. Such sensitisation will also empower minors on their rights and how to safeguard these rights.¹⁷⁹

The Italian Bill goes into greater depth in addressing the issue of sharenting and how to deal with it in a manner that promotes the child's rights while still allowing parents to express themselves freely. It offers a lot more insights into the prevalence of sharenting, even addressing the commercial aspect of it as some of these minors end up becoming influencers who make money and must thus be protected through employment laws. It is a more deliberate way of dealing with sharenting considering the GDPR does not consider it something it will regulate. Both the Italian bill and the French law are a step in the right direction when protecting minor's digital privacy in the face of their parents.

4.4 Lessons for Kenya

France's law provides special protections for minors in the realm of digital privacy. This is very similar to Kenyan law, as such provisions are found within the laws of Kenya, albeit not explicitly.

France's law gives parents authority over the private life of their children. They are meant to safeguard it. Parents in Kenya have a responsibility over their children's lives without any specifications for a minor's private life. Specifying that parents have a responsibility to safeguard their children's private lives would potentially increase protections to the right to

¹⁷⁷ Article 2(3), *Bill on the Amendments to Law No. 977 of 17 October 1967 on the employment of minors in digital platforms for sharing multimedia content, as well as provisions on the dissemination of the image and multimedia content of minors.*

¹⁷⁸ Article 3(2)(c), *Bill on the Amendments to Law No. 977 of 17 October 1967 on the employment of minors in digital platforms for sharing multimedia content, as well as provisions on the dissemination of the image and multimedia content of minors.*

¹⁷⁹ Article 3(3), *Bill on the Amendments to Law No. 977 of 17 October 1967 on the employment of minors in digital platforms for sharing multimedia content, as well as provisions on the dissemination of the image and multimedia content of minors.*

privacy of their children. Such responsibility is, however, implied in Kenyan law as Section 31 of the *Children's Act* gives some of the duties of the parent to the child and clearly states that the duties are not limited to only those which are in the act.¹⁸⁰ More duties may be assigned to the parent depending on circumstances. The France law also creates joint responsibility for parents in safeguarding their children's right to privacy. Kenya requires equal protection from both parents when it comes to the rights of the child as dictated by the COK in Article 53(1)(e).¹⁸¹

France's law further requires a minor's participation, in line with maturity levels, in decisions about consenting to the processing of their data. Section 8(3) of the *Children's Act* requires that a child's opinion be given due weight (also in consideration with the level of maturity) in matters affecting the child¹⁸², including any data processing decisions. For additional protections to a minor's digital privacy, France's law allows for a regulatory body to directly take legal action against whoever infringes upon this right. Complaints of infringement of rights under the Data Protection Act are taken to the ODPC who will then investigate and determine the matter.¹⁸³ However, the ODPC complaints management manual allows for *Suo Motu* complaints by the office itself where there is an infringement of data rights.¹⁸⁴ The difference comes in on the specification of minors in the French law, while the Kenyan regulation fails to specify minors but this does not exclude them.

Italy's draft bill considers the commercialisation of a minor's image and thus earns money through these digital platforms. It considers the labour implications of such actions and thus seeks to protect a minor doing such labour. Kenya's *Employment Act* states that minors can only do labour that does not harm their health or development and does not affect their attendance at school or other educational programs that they are involved in.¹⁸⁵ The labour is not specified as in the draft bill. This means that sharenting, which makes money for the minor or the parent could also be a form of labour that is recognised under the *Employment Act*. This limitation on labour applies to minors aged at least 13 years old. Younger children are not

¹⁸⁰ Section 31(2), *Data Protection Act* (No. 24 of 2019).

¹⁸¹ Article 53(1)(e), *Constitution of Kenya* (2010).

¹⁸² Section 8(3), *Data Protection Act* (No. 24 of 2019).

¹⁸³ Section 8(1)(f), *Data Protection Act* (No. 24 of 2019).

¹⁸⁴ Office of the Data Protection Commissioner Complaints Management Manual.

¹⁸⁵ Section 56(2), *Employment Act* (Act no 11 of 2007).

spoken about under protections in the act other than the fact that they may not work.¹⁸⁶ However, sharenting involves minors of all ages from as young as newborns; therefore a clear gap in their protection, especially under Kenya's labour laws exists. Kenyan laws should thus fill in this gap either through legislation or interpretation of the law to further protect minors in the digital space.

It also stipulates that sharing a minor's image must be of direct benefit to the minor rather than the parent sharing it. Chapter 3 of this work highlighted the interests of a parent involved in sharenting. Sharenting tends to benefit the parent rather than the minor directly. Kenya's laws stipulate that everything done should be in the best interest of the minor, which would also be inclusive of sharenting that directly benefits a minor. This would then mean that the child's best interest will be a direct limitation to sharenting.

Under Italy's draft bill, social media platforms would be expected to encourage people to report content that contravenes a minor's right to privacy. This is not a legal requirement in Kenya; however, social media applications still have ways for one to report content that may infringe on a minor's rights.¹⁸⁷ Something of great importance that Kenya should consider adopting, which has been highlighted in Italy's draft bill, is sensitisation of the public on sharenting, its risks, benefits and how minors should safeguard their rights to privacy in case they feel aggrieved when their parents share their data online.

The differences between Kenya's Act and the GDPR are quite small and can be resolved by interpreting the laws. Kenya's law is currently open enough in interpretation to include sharenting and thus would not necessarily need a sharenting-specific law. The current legal framework in Kenya around sharenting is, therefore, adequate to protect the digital privacy of minors in light of their parents' sharing practices. However, the passing of law shows the gravity of the situation around sharenting and the potential infringement of children's right to privacy.

¹⁸⁶ The African Network for the Prevention and Protection Against Child Abuse and Neglect, *Strengthening the worldwide movement for the protection of children from violence at work: a review of laws, policies and programmes for the elimination of child labour and violence against children in Kenya*, 2018, 13.

¹⁸⁷ <<https://support.tiktok.com/en/safety-hc/report-a-problem/report-a-video>> on 10 December 2024; <<https://help.instagram.com/2922067214679225>> on 12 December 2024; <<https://help.x.com/en/rules-and-policies/x-report-violation>> on 12 December 2024.

4.5 Conclusion

This chapter has drawn attention to the global nature of sharenting, highlighting parallels between Kenya's Data Protection Act and the GDPR. It has further pointed out that although sharenting may not fall directly under the purview of the GDPR, it can be accommodated within Kenya's legal framework. France and Italy have taken proactive steps to regulate sharenting through legislation. A valuable practice that Kenya should consider adopting from Italy's draft bill is public sensitisation on the digital privacy of minors. This comparative study has demonstrated Kenya's great potential to effectively regulate sharenting and protect minors' right to privacy on social media platforms.



Chapter five: Summary of findings, recommendations and conclusion.

5.1 Introduction

This chapter will conclude this dissertation. It will cover a summary of the findings of this study reflecting on the research objectives made and how they have been addressed. It will also give recommendations on the possible ways of solving the legal problem identified. These recommendations are: interpretation of Kenyan laws in a manner that regulates sharenting similar to the law of France and the draft bill of Italy, a requirement for social media platforms to regulate content involving minors and finally, sensitisation of the public on sharenting with specific focus on parents and the minors themselves.

5.2 Summary of findings

This study's main objective was to assess the balancing of a parent's freedom of expression and a child's right to privacy on social media platforms in Kenya. It sought to achieve this through three minor objectives. First, it assessed what constituted a minor's right to privacy on social media platforms in Kenya while specifying what interest they want to advance through this right. Second, it investigated how parental motivations regarding their freedom of expression online may be balanced with parental responsibility regarding their children's right to privacy. Finally, it compared the EU's legal frameworks and case law to identify the best practices for balancing these rights.

Chapter 2 of this dissertation discussed what the digital privacy of a minor constitutes. It highlighted various definitions of the right to privacy, and using the interest theory of rights the need for the right emerged. It was determined that the right to privacy allows for autonomous self-determination, where one can decide what will be shared and retained. This is important to minors, especially since they are still developing and can determine who they want to be. The fact that minors have cognitive limitations was a justification for the need for parents and/or guardians to help them decide what should be shared and what should not be shared on social media platforms. These holders of parental responsibility are required to reconceptualise their role as one with a more significant duty of care (a fiduciary relationship with their children) to their children so that they will ensure that they consider the interests of their children when making decisions affecting their digital privacy. This participation must be

done in line with the evolving capacities of these minors. The definition of the right to privacy for minors was derived from all these factors to read as; the freedom of minors to decide what is shared on social media platforms, guided by age-appropriate maturity and the support of their parents and/guardians, who have a deeper understanding of the associated risks and respect for their children's autonomy.

Chapter 3 focused on the freedoms and responsibilities of the parents. Using the interest theory of rights, it determined that the interest of parents who engage in sharenting as a manifestation of their freedom of expression is to communicate and thus form connections with other parents on social media platforms. The need for man to communicate is a part of his nature that cannot be separated from him. It highlighted the self-presentation theory to show how parents may sometimes choose to portray their children in a manner that is not representative of the children just so that they can maximise the connections they get. Through a different understanding of parental responsibility, parents would be required to use methods like mindful sharenting, which encourage data minimisation in line with the principles of personal data protection. This chapter in conjunction with Chapter 2 brought out the fact that parental responsibility is above the freedom of expression of parents, thus the need to uphold and protect minors' right to privacy over and above their freedom of expression.

Chapter 4 studies EU laws on sharenting and determines that the laws bear similarities to the law in Kenya. The difference came in the fact that EU laws are more explicit about what protections are offered under sharenting while Kenyan laws need to be interpreted to accommodate sharenting. The GDPR removed sharenting from its purview but countries like France and Italy have found ways to regulate it. France passed a law to regulate sharenting and Italy has a bill that will regulate it if passed into law. There were similarities in the law and the bill to Kenya's law. The differences occurred when Kenya's laws were compared with the Italian draft bill. The draft bill considered the protection of all minors no matter the age when it came to making money through sharenting while Kenya's law only considers employment for minors aged 13 years and up. France's law also states that if consent was not properly obtained from a minor in processing their data, whoever improperly processed the data will be liable to pay a fine of 45,000 Euros. This has not been addressed in Kenyan law; it is unclear what would happen if a minor's consent is not adequately obtained when processing their data.

5.3 Recommendations

5.3.1 Interpretation of the laws to incorporate the regulation of sharenting

A comparative study between Kenyan laws and laws in the EU has shown that Kenyan laws are designed to handle sharenting and even have the potential to regulate it. The law should thus be interpreted as such to allow for greater protections for minors as regards their digital privacy. The GDPR does not restrict sharenting thus EU nations will need to have laws specific to sharenting to regulate it legally. Kenyan law highlights the need for a parent to consent to process a minor's personal data in the Data Protection Act. This is in line with constitutionally guaranteed parental responsibility that minors are owed. The COK requires that the best interest of the child must be paramount in all decisions involving a minor as parental responsibility is exercised. The Children's Act considers the child's best interests, with the minor's participation in line with their maturity. Thus, their evolving capacities are one of the considerations. Sharenting is not excluded from all these requirements. Parents, as data controllers, must process the minor's data with the requirements for consent of the minor. They are the default in consent, but they must still follow the law and involve their children depending on their different maturity levels.

5.3.2 Requirement for social media platforms to moderate content involving minors

Social media platforms should be required to encourage users to report content that violates a minor's data rights actively. Some apps already have in-app prompts that encourage such reporting. Once such reports are received, the content should be immediately assessed, and if it infringes on the minor's rights, it must be promptly taken down from the platform. Such platforms should also be required to moderate content on the platform, especially if minors are involved proactively. Content involving minors should have stricter standards on what can be shared about these minors. Content such as bathtime photos or videos, which have been proven to be of great benefit to people seeking child sexual material, should not be allowed. Age progression content should also be regulated to help avoid issues like digital theft. Age restrictions should be put in place with requirements such as blurring minors' identifiable data, especially when they are of tender age and cannot participate in decisions affecting their digital privacy.

5.3.3 Sensitisation on sharenting

Considering the Italian draft bill, public awareness campaigns should be launched to educate the general public about sharenting, while highlighting its risks and benefits. As many social media platform users as possible should know that they can report content that may violate minors' right to privacy and should be aware of the process of such reporting. Parents and guardians should receive specific guidance on minors' right to privacy as espoused in law. They must also be guided appropriately on their role in protecting this right and how to exercise consent to data processing of their children by ensuring that due weight has been given to their children's views. They must actively weigh between their freedom of expression and the right to privacy of their children as a part of their parental responsibility. Mindful sharenting should also be encouraged at this point to ensure that parents practise data minimisation in line with Section 25(d) of the Data Protection Act.

Minors must also be educated on this right and its protections. They should be able to recognise when their parents and guardians infringe on their privacy and know to whom to report the infringement. Such campaigns for minors can be incorporated into school curricula to allow them to apply them in their daily lives seamlessly.

For these recommendations to be effective, regular evaluation and feedback from the parties involved are essential. These recommendations call for creating safer online environments for minors with proper guidance from parents and guardians.

5.4 Conclusion

This dissertation has proven its hypothesis that a balance can be struck between minors' right to privacy and parents' freedom of expression on social media platforms in Kenya, albeit one right may need to take precedence over the other. In this case, minors' right to privacy will take precedence over the freedom of expression of parents and/or guardians. Parents and guardians must bear the burden of limiting their freedom of expression to protect their children's right to privacy. The law recognises that minors are vulnerable members of the society, thus the need to have extra protections for them. This research work advocates for additional protections for these minors in Kenya, allowing them to autonomously develop, form their own personalities and shape how people perceive them without it being predetermined through their parents' sharenting practices. This study, however, does not advocate for the prohibition of sharenting; rather, a more limited version of sharenting. Parents are free to express themselves as benefits

such as early childhood careers for their children and even a deeper understanding of digital literacy exists. Mindful sharenting should take the fore as parents ensure that they protect as much of their children’s digital privacy as possible. This provides the balance between these rights exists, and both parents and minors benefit from the arrangement.

This dissertation aims to inspire future research on sharenting and how best to ensure that the right to privacy of minors is upheld while also allowing for parents and/or guardians to express themselves and share their parenting experiences with other people.



Bibliography

Books

Bok S, *Secrecy: On the Ethics of Concealment and Revelation*, Pantheon, New York, 1983.

Goffman E, *The presentation of self in everyday life*, University of Edinburgh Social Sciences Research Centre, Edinburgh, 1959.

Ife J, *Human rights and social work: Towards rights-based practice*, Cambridge University Press, Cambridge, 2008, 'Children rights and why they matter' UNICEF, <<https://www.unicef.org/child-rights-convention/child-rights-why-they-matter#:~:text=Children%20and%20young%20people%20have,subject%20of%20their%20own%20rights>> 21 September 2024.

Inness JC, *Privacy, intimacy and isolation*, Oxford University Press, New York, 1992.

Kramer H.M, *A debate over rights*, Oxford University Press, New York, 1998.

Kramer H.M, *Rights, wrongs and responsibilities*, Palgrave Publishers, 2001.

Lieberman D.M, *Social: Why our brains are wired to connect*, Oxford University Press, United Kingdom, 2013.

Piaget J, *Judgement and reasoning in the child*, Routledge, Britain, 2002.

Rossler B, *The value of privacy*, Polity, Cambridge, 2005.

Westin AF, *Privacy and freedom*, Atheneum, New York, 1967.

Book chapters

Fourie L, 'Protecting children in the digital society' in Grobbelaar J and Jones C *Childhood vulnerabilities in South Africa: Some ethical perspectives*, African Sun Media, SUN Press, Stellenbosch, 2020.

Melonçon L, and Arduser L, 'A theory of collective intimacy' in Melonçon L and Molloy C (ed) *Strategic interventions in mental health rhetoric*, 1st ed, Milton: Taylor & Francis, New York, 2022.

Nottingham E, ‘Dad! Cut that part out!’. Children’s rights to privacy in the age of ‘generation tagged’: Sharenting, digital kidnapping and the child micro-celebrity’ in Murray J, Swadener B & Smith K (eds) *The Routledge international handbook of young children’s rights*, Routledge, New York, 2019.

Vissing Y, ‘Are children parental property?’ in Vissing Y (ed) *Children's Human Rights in the USA*, Springer Cham, Switzerland, 2023.

Dictionaries

Cambridge dictionary 4th ed

Merriam Webster Dictionary 11th ed

Journal articles

Blum-Ross A and Livingstone S, ‘Sharenting: parent blogging and the boundaries of the digital self’ Taylor & Francis, 2017-
<https://web.archive.org/web/20190427173437id/http://eprints.lse.ac.uk/67380/1/Blum-Ross_Sharenting_revised_2nd%20version_2017.pdf> on 15 December 2023.

Broome M, ‘Consent (Assent) for research with paediatric patients’ 15(2) *Seminars in Oncology Nursing*, 1999.

Buttarelli G, ‘The EU GDPR as a clarion call for a new global digital standard’ 6(2) *International Data Privacy Law*, 2016, 77-78.

Correia D, Eduardo JF, Marques J and Teixeira L, ‘Participatory methodology guidelines to promote citizens participation in decision-making: Evidence based on a Portuguese case study’ *Elsevier*, 2023, 1 -<<https://doi.org/10.1016/j.cities.2023.104213>> on 20 September 2024.

Dimopolous G, ‘A theory of children’s decisional privacy’ *Legal Studies*, 2021<
<https://doi.org/10.1017/lst.2021.16>> on 15 December 2023.

Donovan S, ‘Sharenting: The forgotten children of the GDPR’ 4(1) *Peace Human Rights Governance*, 2020.

Harrod C, ‘No child left online: Influencer “Sharenting” as a breach of fiduciary duty’ 45(4) *Cardozo Law Review*, 2023.

Hein I, Troost P, Broersma A, Vries M, Daams J & Lindauer R, 'Why is it hard to make progress in assessing children's decision-making competence?' 16(1) *BMC Medical Ethics*, 2015.

Hohfeld W, 'Some fundamental legal conceptions as applied in judicial reasoning' 23 *The Yale Law Journal*, 1913.

Institute of Law and Internet, *The law behind sharenting: Children's rights when guardians publish pictures or other information about their child on the internet*, 2021, 12.

Kramer H, 'Refining the interest of rights' 55(1) *The American Journal of Jurisprudence*, 2010.

Kurki V, 'The interest theory of rights: Still standing' 27(4) *Legal Theory*, 2021.

Lang A & Betsch T, 'Children's neglect of probabilities in decision making with and without feedback' 19 *Frontiers in Psychology*, 2018 -<
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5835113/> > on 2 October 2024.

Marcus P, 'Parental responsibilities: Reformulating the paradigm for parent-child relationships Part 2: Who has responsibilities to children and what are these responsibilities?' 14(2-3) *Journal of Child Custody*, 2017.

Milkaite I & Lievens E, 'Children's rights to privacy and data protection around the world: Challenges in the digital realm' 10(1) *European Journal of law and technology*, 2019.

Montgomery J, 'Children as property?' 51(3) *The Modern Law Review*, 1988.

Persano F, 'GDPR and children's rights in EU data protection laws' *European Journal of Privacy law and technologies*, 2020, -<
https://heinonline.org/HOL/Page?handle=hein.journals/ejplt2020&div=8&g_sent=1&casa_token=&collection=journals > on 20 July 2024.

Pietro F, Ignazio C, Giovanni C, Giardino I, Vural M, Lucian T, Pettoello-Mantovani C, Indrio F & Pettoello-Mantovani M, 'Online "Sharenting": The dangers of posting sensitive information about children on social media' *The Journal of Paediatrics*, 2023, 2 -<
<https://doi.org/10.1016/j.jpeds.2023.01.002> > on 21 July 2024.

Piker A, 'Balancing liberation and protection: a moderate approach to adolescent health care decision-making' 25(4) *Bioethics*, 2011.

Reiman J, 'Privacy, intimacy and personhood' 6(1) *Philosophy and Public Affairs*, 1976.

Shapiro T & Perry R, 'Latency revisited: The age of 7 plus or minus 1' 31(1) *The Psychoanalytic Study of the Child*, 1976.

Sreenivasan G, 'A hybrid theory of claim-rights' 25(2) *Oxford Journal of Legal Studies*, 2005.

Sorensen S, 'Protecting children's right to privacy in the digital age: parents as trustees of children's rights' 36(3) *Children's Legal Rights Journal*, 2016.

Tooley U.A, Park A, Leonard J, Boroshok A, McDermott C, Tisdall M, Basset D & Mackey A, 'The age of reason: Functional brain network development during childhood' 42(44) *The Journal of Neuroscience*, 2022.

Traber M, 'Communication is Inscribed in Human Nature: A Philosophical Enquiry into the Right to Communicate' 30(1) *idoc internazionale* 1991.

Vizcaino-Verdú A, De-Casas-Moreno P & Jaramillo-Dent D, 'Thanks for joining our life: Intimacy as performativity on YouTube parenting vlogs' 31(4) *Profesional de la información*, 2022.

Warren S & Brandeis L, 'The Right to Privacy' 4 *Harvard Law Review*, 1890, 193-220 -< https://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warr2.html > 1 October 2024.

Wendelken C, Ferrer E, Whitaker KJ & Bunge SA, 'Fronto-parietal network reconfiguration supports the development of reasoning ability' 26(5) *Cerebral Cortex*, 2016.

Wolford B, 'Everything you need to know about the "Right to be forgotten" GDPR, -< <https://gdpr.eu/right-to-be-forgotten/> > on 3 December 2024.

Woodhouse B.B, 'Hatching the egg: A child-centered perspective on parents' rights' 14 *Cardozo Law Review*, 1993.

Internet resources

Butler J, 'Parents who share photos of children online more likely to be approached for sexual images of them' The Guardian, 2 May 2024 -< <https://www.theguardian.com/media/2024/may/02/parents-share-photo-kids-online-identity-aic-report-sharenting> > on 5 December 2024.

Castro C, 'Italy considers law against sharenting to protect children's privacy' Techradar, 5 April 2024-< <https://www.techradar.com/computing/cyber-security/italy-considers-law-against-sharenting-to-protect-childrens-privacy> > on 5 December 2024.

Jerotich S, 'Ramzzy: Why we deleted 'The Green Calabash' from youtube' Citizen Digital, 1 March 2022 -<<https://www.citizen.digital/entertainment/rama-says-he-was-protecting-his-kids-amid-deleting-green-calabashyoutube-page-n293516> > on 20 November 2024.

Rutledge P, 'How holiday sharenting can put your kids at risk' Fielding Graduate University, 21 December 2023-<<https://www.fielding.edu/how-holiday-sharenting-can-put-your-kids-at-risk/#:~:text=Excessively%20sharented%20kids%20can%20have,images%20are%20permanent%20and%20searchable.> > 1 October 2024.

Rymanowicz K, 'The importance of communicating' Michigan State University, 22 April 2016 -< https://www.canr.msu.edu/news/the_importance_of_communicating > on 2 September 2024.

'Sharenting: Should I post photos of my kids online?' The Standard, 30 October 2022 -< <https://www.standardmedia.co.ke/business/sunday-magazine/article/2001459341/sharenting-should-i-post-photos-of-my-kids-online>> on 10 December 2023.

Wangari N, 'The dangers of posting your child's photos online' The Standard, 2016 -< <https://www.standardmedia.co.ke/sunday-magazine/article/2000187114/dangers-of-posting-your-childs-photos-online>> on 10 December 2023.

Yoo J, Gehlen B, Lopez P and Weintraub A, 'Social media posts by parents bring concerns for children's privacy, safety' ABC News, 6 July 2023 -< <https://abcnews.go.com/US/social-media-posts-parents-bring-concerns-childrens-privacy/story?id=100706825>> on 10 December 2023.

Zamzam M & Chatterjee S, 'Child rights in Kenya – 30 years on' UNICEF, 22 November 2019-< <https://www.unicef.org/kenya/stories/Child-rights-in-kenya-30-years-on>> on 30 September 2024.

Zander M, 'A milestone developmental stage: The age of reason' Scholastic, 12 April 2019-< <https://www.scholastic.com/parents/family-life/social-emotional-learning/development-milestones/age-reason.html> > on 1 October 2024.

-<<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000049163317> >on 2 December 2024.

-<<https://support.tiktok.com/en/safety-hc/report-a-problem/report-a-video> > on 10 December 2024

-<<https://help.instagram.com/2922067214679225> > on 12 December 2024.

-<<https://help.x.com/en/rules-and-policies/x-report-violation> > on 12 December 2024.

Reports

Atlantic Council, *Respecting children as rights holders*, 2023.

EU Kids Online, *EU kids online: Final report 2009*, 2009.

Security.org, *Parents' Social Media Habits: 2021*, 2021, -< <https://www.security.org/digital-safety/parenting-social-media-report/> > on 5 December 2024.

The African Network for the Prevention and Protection Against Child Abuse and Neglect, *Strengthening the worldwide movement for the protection of children from violence at work: a review of laws, policies and programmes for the elimination of child labour and violence against children in Kenya*, 2018.

UNICEF, *The State of the World's Children 2017: Children in a digital world*, December 2017.

UN documents

UN Committee on the Rights of the Child General Comment No 7, *Implementing Child Rights in Early Childhood*, 20 September 2006.

Working papers

Graafland HJ, 'New technologies and 21st century children: Recent trends and outcomes' Organisation for Economic Co-operation and Development, OECD Education Working Paper Number 179, 2018, 13 -14-< [https://one.oecd.org/document/EDU/WKP\(2018\)15/en/pdf](https://one.oecd.org/document/EDU/WKP(2018)15/en/pdf) > on 22 September 2024.

McBride M, 'Preserving the interest theory of rights' National University of Singapore, NUS Law Working Paper Number 016, 2018, -<<http://dx.doi.org/10.2139/ssrn.3215715>> on 30 August 2024.

