

Children's digital human rights: Another glitch in the code

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

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101267

Prepared under the supervision of

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21st July 2021

11, 316 Words

Table of contents

Table of contents.....	i
Acknowledgements.....	iii
Declaration.....	iv
Abstract.....	v
List of Abbreviations.....	vi
List of Cases and Legal Instruments.....	vii
Chapter One.....	1
1.1. Introduction	1
1.1.1. <i>Human rights and the digital world</i>	1
1.1.2. <i>Children and digital rights</i>	3
1.2. Statement of the problem.....	6
1.3. Methodology.....	7
1.4. Justification of the study.....	7
1.5. Significance of the study.....	7
1.6. Aim and objectives.....	8
1.7. Research questions.....	8
1.8. Hypothesis.....	8
1.9. Delimitations of the study.....	8
1.10. Chapter summary.....	9
Chapter Two.....	10
2.1. Introduction to the theoretical framework.....	10
2.2. Theories central to children’s rights.....	11
2.2.1. <i>The choice theory on children’s rights</i>	11
2.2.2. <i>The needs-based approach or the relationship-based theory?</i>	12
2.2.3. <i>The patriarchal theory of children as property</i>	14
2.2.4. <i>The parental trusteeship theory</i>	15
2.3. Approach to adopt towards children’s digital human rights.....	16
Chapter Three.....	18
3.1. The dilemma concerning children’s digital rights.....	18

3.2. The definition and development of digital human rights.....	19
3.3. Liberties recognised as digital rights.....	21
3.4. Evaluating the contention regarding children’s rights.....	23
Chapter Four.....	27
Conclusion: The way forward.....	27
Bibliography.....	29

Acknowledgements

Thank you, Prof. Juan Carlos Riofrio, for your patience and insightful guidance during the dissertation writing process. This final product would not have been possible without your advice and assistance.

To the key pillars of my support system, my mother, Maimuna Mohamed Musa, and my dear friends, Gerald Otieno, Chilala Chicha, and Maya Shah, thank you for the never-ending displays of love and encouragement. Your inspiring words and reassuring presence motivated me to stay focused and keep pushing on towards the finish line – we made it.

Declaration

I, WINFRED NAKKAZI KIBERU, 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.

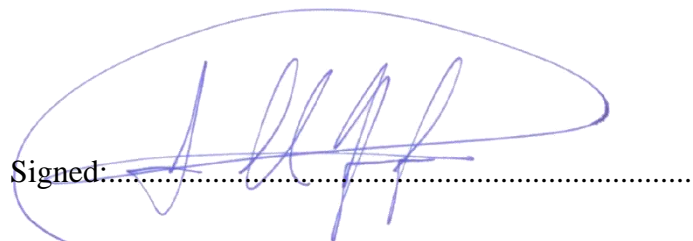


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Abstract

This research study, guided by scholarly articles, institutional reports, and relevant legal instruments, sought to understand what constitute digital human rights and uncover whether children possess these rights. An analysis of doctrinal research and legislation on children's engagement and interactions with the digital world, revealed that children do possess digital human rights, though some rights require the guidance of their parents or guardians. Based on the findings and recommendations of prominent scholars, institutions and leaders on children's rights and internet governance, this dissertation proposes that children's existing offline rights must be applied and enforced to the internet, not just theoretically. Additionally, digital literacy education is required for both children and adults, to enhance their knowledge the rights, duties, and consequences children have on the internet, thus creating more responsible digital citizens.

List of Abbreviations

APC	Association for Progressive Communications
CIPESA	Collaboration on International ICT Policy for East and Southern Africa
CRC	Convention on the Rights of the Child
COVID-19	Coronavirus
EU	European Union
GDPR	General Data Protection Regulation
ICCPR	International Covenant on Civil and Political Rights
ICT	Information and Communication Technology
IRPC	Internet Rights & Principles Coalition
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNICEF	United Nations Children's Fund
USA	United States of America
v	Versus

List of Cases and Legal Instruments

Cases

Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González (2014), Grand Chamber, Court of Justice of the European Union.

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Laws

Children Act, No. 8 of 2001 of the Laws of Kenya.

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European Union General Data Protection Regulation, 2016/679.

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

International Convention on Economic, Social and Cultural Right, 993 UNTS 3, 16 December 1966.

Penal Code, CAP. 63 of the Laws of Kenya.

Universal Declaration of Human Rights, 217 A (III), 10 December 1948.

UN Documents

Committee on the Rights of the Child, *Report of the 2014 day of general discussion: “Digital media and children’s rights”*, 12 September 2014.

UNGA Human Rights Council, *The promotion, protection and enjoyment of human rights on the internet*, UN A/HRC/Res/20/8, 16 July 2012.

UNGA, *Promotion and protection of the right to freedom of opinion and expression: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN A/69/335, 21 August 2014.

UNGA, *Right to education – Impact of the COVID-19 crisis on the right to education; concerns, challenges and opportunities: Report of the Special Rapporteur on the right to education*, UN A/HRC/44/39 (15 July 2020).

UNGA Human Rights Council, *The promotion, protection and enjoyment of human rights on the internet*, A/HRC/32/L.20, 27 June 2016.

Chapter One

1.1. Introduction

1.1.1. Human rights and the digital world

Human rights are ever present and significant in our daily lives. Therefore, it makes sense that they would feature prominently in public policy issues and debates on internet governance.¹ With the ways in which the internet and digital technologies are transforming how people around the globe live and interact, it is prudent to ascertain what rights people have online and in relation to digital spaces; what is generally referred to as digital rights, specifically digital human rights.²

Currently, there is no universally established definition of digital human rights. However, The UN Human Rights Council has on several occasions asserted ‘that the same rights that people have offline must also be protected online.’³ This was further reaffirmed in the *10 Internet Rights & Principles* developed by the Internet Rights & Principles Dynamic Coalition, and in the *Internet Rights Charter* created by the Association for Progressive Communications.⁴ Nevertheless, certain rights feature more frequently and prominently in discussions concerning online rights; these include: freedom of expression, right to privacy, data protection, freedom of association, access to information, right to education, freedom from discrimination, and the right to development.⁵ This conveys the importance that human rights, specifically privacy and

¹ World Summit on the Information Society, *Declaration of principles building the information society: A global challenge in the new millennium*, 12 December 2003, Document WSIS-03/GENEVA/DOC/4-E – <<http://www.itu.int/net/wsis/docs/geneva/official/dop.html>> on 26 July 2020; see also UNGA Human Rights Council, *The promotion, protection and enjoyment of human rights on the internet*, A/HRC/32/L.20 (27 June 2016).

² Nitsche L and Hairesine K, ‘What are digital rights?’ DW Akademie, 9 December 2016 – <<https://www.dw.com/en/what-are-digital-rights/a-36703292>> on 21 July 2020; see also Kreutz C, ‘Introduction to digital human rights’ Crisscrossed, 8 November 2018 – <<https://www.crisscrossed.net/2018/11/08/Introduction-human-digital-rights/>>.

³ UNGA Human Rights Council, *The promotion, protection and enjoyment of human rights on the internet*, UN A/HRC/Res/20/8 (16 July 2012); see also Nitsche L and Hairesine K, ‘What are digital rights?’ DW Akademie, 9 December 2016 – <<https://www.dw.com/en/what-are-digital-rights/a-36703292>> on 21 July 2020.

⁴ Internet Rights and Principles Dynamic Coalition and UN Internet Governance Forum, *The charter of human rights and principles for the internet*, 7 ed, 2019, 7; see also Association for Progressive Communications, *APC internet rights charter*, 2006.

⁵ Benedek W, ‘Internet governance and human rights’ in Benedek W, Bauer V and Kettemann M (eds) *Internet governance and the information society: Global perspectives and European dimensions*, 1 ed, Eleven International Publishing, The Netherlands, 2008, 36.

participation rights, have in the digital world. However, for one to enjoy these rights online, they must first have access to the internet, which indicates that these digital privacy and participation rights are pegged on the existence of internet-facilitating infrastructure and technologies.⁶ Thus, one can argue that the fundamental right, upon which all other digital rights are founded, is the right to have access to the internet.⁷

In addition to identifying the common rights recurring in the conversation on digital human rights and internet governance, it is important to recognise who is entitled to enjoy these rights and protections. The UDHR and the ICCPR both acknowledge that all humans are born free and equal in dignity and rights, so therefore are all entitled to human rights, freedoms and protections.⁸ The significance of the principle of equality in human rights is emphasised in the wording of these instruments. In their respective Articles, the UDHR and ICCPR expressly state that ‘Everyone has the right to’ freedom of expression,⁹ freedom of association,¹⁰ and the right to education.¹¹ The broad, inclusive terms used in these international instruments are reflected in our domestic laws, like in the Constitution of Kenya 2010, which states that, ‘Every person has the right to’ freedom of expression,¹² freedom of association,¹³ and the right to education.¹⁴ This demonstrates that every person is entitled to these rights regardless of race, sex, age, nationality, religion, and so on, at both the international and domestic levels.¹⁵

Similar to the rights previously mentioned, the right to privacy is a traditional all-inclusive civil liberty recognised worldwide, which ensures that no one has the privacy of their person, home, family, property, or communications *arbitrarily* interfered with or infringed upon.¹⁶ With the

⁶ Association for Progressive Communications, *APC internet rights charter*, 2006, Theme 1.

⁷ Third A, Bellerose D, Dawkins U, Keltie E and Pihl K, *Children’s rights in the digital age: A download from children around the world*, 2 ed, Young and Well Cooperative Research Centre and UNICEF, Melbourne, 2014, 8, 32-33; see also, Association for Progressive Communications, *APC internet rights charter*, 2006, Theme 1.

⁸ Article 1 and 2 UNGA, *Universal declaration of human rights*, 217 A (III) 10 December 1948; see also Preamble, *International covenant on civil and political rights*, 16 December 1966, 999 UNTS 171.

⁹ Article 19 UNGA, *Universal declaration of human rights*; see also Article 19 (2), *International covenant on civil and political rights*.

¹⁰ Article 20 (1) UNGA, *Universal declaration of human rights*; see also Article 22 (1), *International covenant on civil and political rights*.

¹¹ Article 26 (1) UNGA, *Universal declaration of human rights*.

¹² Article 33 (1), *Constitution of Kenya* (2010).

¹³ Article 36 (1), *Constitution of Kenya* (2010).

¹⁴ Article 43 (1) (f), *Constitution of Kenya* (2010).

¹⁵ Article 27, *Constitution of Kenya* (2010) expressly provides for the right to equality and freedom from discrimination based on several grounds, including some mentioned here.

¹⁶ Article 31, *Constitution of Kenya* (2010); see also Article 12 UNGA, *Universal declaration of human rights*; see also Article 17 (1), *International covenant on civil and political rights*.

development of ICT the right to privacy has expanded to include a new branch, data protection, which is solely concerned with the collection, processing, use and storage of our information online.¹⁷ The unique nature of data protection has merited the development of its own specialised regulation, which is presently epitomised by the EU GDPR.¹⁸ Though data protection legislation varies from country to country, more states, like Kenya, are developing their own data protection regulations inspired by the GDPR template.¹⁹

Unlike the other rights mentioned, data protection regulations go a step further in their recognition of rights holders, also known as data subjects. For example, Article 8 of the GDPR requires parental consent before the personal data of minors, aged below sixteen, can be processed.²⁰ Additionally, Section 27 of Kenya's Data Protection Act, recognises special circumstances where a data subject's rights can be exercised on their behalf by another authorised party; namely in the cases of minors, persons with mental or physical disability, or power of attorney.²¹

The recognition of protected groups in society regarding data protection portrays that some digital rights cannot be exercised by everyone, due to their insufficient capacity and to safeguard their well-being. Children are one of these protected groups. But does this mean they are not entitled to possess any digital human rights?

1.1.2. Children and digital rights

Article 1 of the CRC and Section 2 of the Children Act of Kenya, define a child as any person under the age of eighteen years.²² Children are regarded as a vulnerable group in society, who require extra protection under the law.²³ Efforts taken to safeguard the liberties of minors are

¹⁷ Determann L, 'Healthy data protection' 26 (2) *Michigan Technology Law Review*, 2020, 238-239.

¹⁸ *General Data Protection Regulation (GDPR)* (European Union); see also Queralt J, 'Let's talk data-centric digital rights' The IO Foundation, 2020, 3 – https://docs.google.com/document/d/1YIKgxID7nEtGQrU6X2EOMi75I1WjJ8_EAPv_X1KXe-E/edit on 27 January 2021.

¹⁹ *The Data Protection Act, 2019* (Act No. 24 of 2019); see also Queralt J, 'Let's talk data-centric digital rights' The IO Foundation, 2020, 3 – https://docs.google.com/document/d/1YIKgxID7nEtGQrU6X2EOMi75I1WjJ8_EAPv_X1KXe-E/edit on 27 January 2021.

²⁰ Article 8 (1) *GDPR* (European Union).

²¹ Section 27, *The Data Protection Act, 2019* (Act No. 24 of 2019).

²² Article 1, *Convention on the rights of the child*, 20 November 1989, 1577 UNTS 3; see also Section 2, *Children Act* (Act No. 8 of 2001).

²³ Article 21 (3) *Constitution of Kenya* (2010); see also Krivokapić D and Adamović J, 'Impact of general data protection regulation on children's rights in digital environment' 11 (1) *Annals of the Faculty of Law in Belgrade*,

evidenced at both the national and international level, in legal instruments such as: the CRC; the GDPR; the Bill of Rights enshrined in many constitutions, like the Constitution of Kenya 2010; and child-specific domestic legislation, like Kenya's Children Act.²⁴ The existence of such legal provisions convey that legislators and policy makers are cognizant that children exist within the human rights regime, and thus, also acknowledge that despite the protected status they hold in law, children are entitled to possess and enjoy human rights regardless of any grounds of discrimination, like age, race, or gender.

However, despite the loud clamour to protect minors and respect their rights in normative human rights systems and in our everyday lives, we suddenly become mute at the thought of children in the digital environment. We grow silent at the faintest whisper of children being deemed internet users, as though the subject is taboo. This sentiment is reflected in the fact that research and policy on children's rights often takes a very confined approach to addressing the relationship between minors and the internet, and similarly, children rarely feature in pertinent discussions on internet governance.²⁵ It seems that the only time children's rights and internet governance intersect is with regard to risks online from which they must be protected, primarily concerning sexual abuse and exploitation,²⁶ and more recently, relating to cyberbullying and protection of their privacy online.²⁷

Considering the fundamental milestone the CRC achieved in recognising children as independent holders of rights, and the empirical data conveying that every one in three internet users worldwide is a child, it would be reasonable to assume that children's needs would be considered and incorporated into internet governance frameworks. However, this key demographic group largely remains invisible when it comes to internet policies and digital

2016, 205 (abstract), 206; see also From the Editors, 2 (1) *The Clarion, The IHRC Journal of Human Rights*, 2016, 1.

²⁴ *Convention on the rights of the child*; Article 8, *GDPR* (European Union); Chapter 4, *Constitution of Kenya* (2010); *Children Act* (Act No. 8 of 2001).

²⁵ Livingstone S and Third A, 'Children and young people's rights in the digital age: An emerging agenda' LSE Research Online, 2017, 2 – http://eprints.lse.ac.uk/68759/7/Livingstone_Children%20and%20young%20peoples%20rights_2017_author%20LSERO.pdf on 25 March 2020.

²⁶ UNICEF, *The state of the world's children 2017: Children in a digital world*, December 2017, 72-73, 76-77, 79-81.

²⁷ UNICEF, *The state of the world's children 2017: Children in a digital world*, December 2017, 72-75, 82; see also Sorensen S, 'Protecting children's rights to privacy in the digital age: Parents as trustees of children's rights' 36 (3) *Children's Legal Rights Journal*, 2016, 158-159; see also Article 8, *GDPR* (European Union).

human rights that cater specifically to them.²⁸ A significant impediment, greatly contributing to the lacuna between children's rights and internet governance, is the tension between adults' rights and children's rights on digital media, which essentially boils down to the right to protect versus the right to participate.²⁹ Endeavours taken by both parents and policy makers to ensure the wellbeing of their offspring and to shield them from exposure to harmful content, violence, trauma and exploitation online, has often led to the detrimental limitation of children's rights to education, access to information, right to privacy, right to access the internet, freedom of expression and association, to name a few.³⁰ Scholars and human right advocates have posited that this protectionist approach towards the relationship between minors and the internet risks gravely restricting the opportunities for empowerment and development the internet has to offer children.³¹

With more minors having access to the internet and engaging online,³² scholars, human rights activists and policy makers acknowledge the pressing need to achieve a balance between protecting children and empowering them to exercise and advance their rights on the internet.³³ Former UN Special Rapporteur on the Right to Freedom of Opinion and Expression, Frank LaRue, stated that striking a balance between protecting minors from harm and empowering them online is the only way in which to ensure that their voices are heard and that they fully participate in society.³⁴ Our discussions around digital human rights need to be more holistic,

²⁸ Livingstone S, 'Realizing children's rights in relation to the digital environment' LSE Research Online, 2020, 3 – <http://eprints.lse.ac.uk/103563/1/Children_s_rights_for_The_European_Review_LSERO_2.pdf> on 25 March 2020; see also Committee on the Rights of the Child, *Report of the 2014 day of general discussion: "Digital media and children's rights"*, 12 September 2014, 3.

²⁹ Livingstone S and Third A, 'Children and young people's rights in the digital age: An emerging agenda', 2; see also Geary P, 'Children's rights in a digital world' 2 (1) *The Clarion, The IHRC Journal of Human Rights*, 2016, 12.

³⁰ Livingstone S and Third A, 'Children and young people's rights in the digital age: An emerging agenda', 3-4, 8.

³¹ Kurbalija J, *An introduction to internet governance*, 7 ed, Diplo Foundation, Geneva, 2016, 216; see also UNGA, *Promotion and protection of the right to freedom of opinion and expression: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN A/69/335 (21 August 2014).

³² Smahel D, Machackova H, Mascheroni G, Dedkova L, Staksrud E, Ólafsson K, Livingstone S and Hasebrink U, 'EU kids online 2020: Survey results from 19 countries' EU Kids Online, 2020, 6 – <http://eprints.lse.ac.uk/103294/1/EU_Kids_Online_2020_March2020.pdf> on 25 March 2020.

³³ Livingstone S and Third A, 'Children and young people's rights in the digital age: An emerging agenda', 10, 12; see also UNGA, *Promotion and protection of the right to freedom of opinion and expression: Report of the Special Rapporteur*.

³⁴ Committee on the Rights of the Child, *Report of the 2014 day of general discussion: "Digital media and children's rights"*, 12 September 2014, 4.

cognizant to the reality that children engage with the internet more so than adults.³⁵ Therefore, to establish a safe online environment and promote the agency and abilities of children, it is important that we examine the rights that children possess in the digital world.

1.2. Statement of the problem

In an ideal world, the internet would be a free, open, and safe space in which children could interact and participate without fears of online risks.³⁶ Minors would be acknowledged as rights-holders possessing sufficient agency to exercise their rights and participate in society, instead of being viewed merely as vulnerable, incapable victims.³⁷ In an ideal world, children and adults would mutually be responsible digital citizens.³⁸ Unfortunately, we are yet to achieve this dream. Though more efforts are being taken to integrate children's rights and internet governance, parents and policy makers continue to adopt a protectionist approach towards minors in digital spaces, which tend to neglect the opportunities the internet has to offer them, while simultaneously infringing on their participation rights.³⁹

To resolve the tension between the right to protect and the rights to participate online, we must embrace a robust, multifaceted debate on the relationship between children and the internet.⁴⁰ This can be achieved by using a human rights-based approach to children's internet activities, founded on the principles established in documents like the APC *Internets Rights Charter*, the *10 Internet Rights & Principles*, and more precisely, those established in the CRC; specifically: non-discrimination, guaranteeing the best interests of children, encouraging them to develop their full potential, and ensuring that they are heard.⁴¹

³⁵ Livingstone S and Third A, 'Children and young people's rights in the digital age: An emerging agenda', 7.

³⁶ Livingstone S, Carr J and Byrne J, 'One in three: Internet governance and children's rights' Centre for International Governance Innovation, Global Commission on Internet Governance Paper Series: No. 22, November 2015, 5 – <https://www.cigionline.org/sites/default/files/no22_2.pdf> 25 March 2020.

³⁷ Livingstone S, Carr J and Byrne J, 'One in three: Internet governance and children's rights', 5, 9.

³⁸ Geary P, 'Children's rights in a digital world', 12.

³⁹ UNGA, *Report of the special rapporteur on the promotion and protections of the right to freedom of opinion and expression*, UN A/69/335 (21 August 2014), 12-13, 16.

⁴⁰ Sorensen S, 'Protecting children's rights to privacy in the digital age: Parents as trustees of children's rights', 167; see also Livingstone S and Third A, 'Children and young people's rights in the digital age: An emerging agenda', 2-3.

⁴¹ Kurbalija J, *An introduction to internet governance*, 216; see also Livingstone S and Third A, 'Children and young people's rights in the digital age: An emerging agenda', 10.

1.3. Methodology

The methodology used in this study is doctrinal research. This research study relied on a range of written primary and secondary sources. The written primary sources used were domestic legislation, such as Kenya's Children's Act and the Data Protection Act, 2019; international legal instruments, like the CRC; and international case law from the USA and Europe. The secondary sources used include scholarly journal articles; documented research studies by organisations like EU Kids Online; and reports from policy makers and international organisations concerned with digital rights, internet governance, and children's digital human rights, such as the APC and UNICEF.

1.4. Justification of the study

Despite the global discussion around digital human rights, and the steps countries are taking to protect individuals' rights online, most notably captured in the GDPR, this is all happening on a level that assumes that adults over the age of eighteen are the only users of the internet.⁴² This assumption is deeply false and has consequently led to the development of a faulty legal framework that seeks to establish and protect digital human rights but ignores a large population of its user base – minors. Therefore, the relevance of this study is that it draws attention to this legal gap and calls for clarity on the matter, to enhance the area of children's rights online.

1.5. Significance of the study

An investigation into whether children have digital human rights stands to benefit a broad segment of the global population, namely: children, parents, educational institutions and professionals, and policy makers, such as governments and international organisations. With a more definitive stance on whether children have online rights, parents, children, and teachers will be able to better understand and learn more about the rights, duties and remedies minors hold in digital spaces, which will hopefully work towards developing more mindful and responsible internet users from a young age.⁴³ A clear position on what digital human rights children hold and are entitled to enjoy, will enable governments and key stakeholders, like

⁴² Livingstone S, 'How can children be protected online when the internet has been designed for adults?' in UNICEF *Children's rights and the internet: From guidelines to practice*, 1 ed, UNICEF and Guardian Sustainable Business, 2016, 12-13.

⁴³ Geary P, 'Children's rights in a digital world', 12-13.

parents, teachers, and NGOs, to: explore and develop innovative ways of making the internet a safe and inclusive space for minors; generate more inclusive and holistic policies towards establishing and developing children's rights in digital spaces; and to maximise the benefits the digital world has to offer minors, while minimising the risks.⁴⁴

1.6. Aim and objectives

With the aid of scholarly articles and relevant legal instruments, this study seeks to identify and understand what are considered digital human rights, then uncover whether children possess these rights. An analysis of studies on children's engagement and interactions with digital media, and of existing national and international legal frameworks concerning children in digital spaces, will enable the identification of the digital human rights minors directly possess, and the digital human rights they may enjoy at the discretion of their parents or guardians.

1.7. Research questions

This study intends to identify 'what are digital human rights,' and determine which of these rights children are considered to directly hold or are entitled to enjoy under the trusteeship of their parents or guardians.

1.8. Hypothesis

This research study hypothesises that children are holders of digital human rights, like adults. However, due to their vulnerable status recognised in law, parents may be deemed to be custodians of their children's rights online, for example in cases pertaining to legal capacity, like entering binding contracts, and protection from dangers and exploitation online. Therefore, it theorises that the digital human rights children possess are limited, for their protection, and subject to parental supervision and guardianship.

1.9. Delimitations of the study

⁴⁴ Berger G, 'Collaborating to make the digital world a safer one for children' in UNICEF *Children's rights and the internet: From guidelines to practice*, 1 ed, UNICEF and Guardian Sustainable Business, 2016, 44.

This study will focus on the child as defined in Article 1 of the CRC and Section 2 of the Children Act.⁴⁵ Additionally, this study will concentrate on the provision of online rights for children, and less so on the measures and policies implemented for their protection.

1.10. Chapter summary

Chapter One has briefly defined and identified some digital human rights and has given a general background on their relation to children's rights. Additionally, this chapter has laid down the foundation of this research study, by outlining the hypothesis, aims and questions it seeks to address. Chapter Two introduces the theoretical framework of this study, through a discourse on the key elements and theories that characterise the discussion on children's rights and concludes with a proposal on the best approach to adopt with respect to children's online rights. Chapter Three discusses the development of digital human rights, identifies specific rights central to digital human rights, and analyses the doctrinal research on the challenges facing children's digital rights. The final chapter of this study presents the conclusion and suggests a way forward, based on recommendations from institutions and scholars dedicated to the inclusion of children and their needs in this evolving, yet underdeveloped area of law.

⁴⁵ Article 1, *Convention on the rights of the child*; see also Section 2, *Children Act* (Act No. 8 of 2001).

Chapter Two

2.1. Introduction to the theoretical framework

There have been great challenges in developing internet governance regulatory frameworks that balance the prohibition of illicit content and activities online, while maintaining the internet as an open and free space.⁴⁶ This endeavour has been greatly exacerbated by efforts to ensure that the internet is also a *safe* space for children, in addition to its being open and free. When it comes to internet regulations and laws, the general practice applied is, ‘what is illegal or inappropriate offline is the same online.’⁴⁷ This resembles the general approach used in determining what constitute online rights: that is, what is guaranteed offline is guaranteed online.⁴⁸

Often, the question of whether children have rights is rarely contested, as there are specific legislations conferring them with privileges and protections, at both the national and international levels.⁴⁹ The problem arises when it comes to the practical realisation of these rights. In *Planned Parenthood of Central Missouri v Danforth*, the US Supreme Court unequivocally stated that, ‘Constitutional rights do not mature and come into being magically only when one attains state-defined age of majority. Minors as well as adults are protected by the Constitution and possess constitutional rights.’⁵⁰ This sentiment of universal enjoyment of rights, regardless of age, is reaffirmed in the wording of several key rights in Kenya’s Constitutional Bill of Rights, most of which begin with ‘every person...’.⁵¹ Their universality is further emphasised by the inclusion of these rights in Kenya’s Children Act, 2001.⁵²

With respect to children and digital human rights, there have been several debates on whether children even have digital rights, in the first place. Consequently, several theories on children’s rights are present and central to this emerging area of law. Key issues in the discussion on

⁴⁶ Tilovska-Kechedji E and Rakitovan D, ‘The digital world affecting children rights and the affects of internet governance’ 5 (1) *Journal of Eastern-European Criminal Law*, 2018, 144-145.

⁴⁷ Tilovska-Kechedji E and Rakitovan D, ‘The digital world affecting children rights and the affects of internet governance’, 145.

⁴⁸ UNGA Human Rights Council, *The promotion, protection and enjoyment of human rights on the internet*, UN A/HRC/Res/20/8 (16 July 2012).

⁴⁹ See *Convention on the rights of the child*, 20 November 1989, 1577 UNTS 3; *Children Act* (Act No. 8 of 2001); *Children’s Online Privacy Protection Act* (United States of America).

⁵⁰ *Planned Parenthood of Central Missouri v Danforth* (1976), The Supreme Court of the United States.

⁵¹ See generally, Chapter 4, *Constitution of Kenya* (2010).

⁵² See generally Part II, *Children Act* (Act No. 8 of 2001).

children's rights, whether online or offline, revolve around the protection, enforcement, and exercise, or enjoyment, of these liberties.⁵³ The arguments presented are often anchored on the concepts of protection and fulfilment of needs, autonomy and decision-making capabilities of minors, and fundamentally, the best interests of the child.⁵⁴ Nevertheless, research on regulations for the protection of children online, specifically the right to privacy, have illustrated how internet policies relating to minors tend to have patriarchal and proprietary undertones where their online engagement and rights are concerned.⁵⁵

Chapter Two will explore key theories that characterise the discussion around children's rights, evaluating their similarities and differences, and ultimately propose the best approach to adopt to achieve a balance between the right to protect and the right to participate in the discussion on children's digital human rights.

2.2. Theories Central to children's rights

2.2.1. The choice theory on children's rights

In spite of the clear existence of children's rights, the decision-making capabilities of minors is a valid caveat to the extent to which they can enjoy and participate in certain rights.⁵⁶ This view, propagated under the choice theory of children's rights, states that the ability to logically reason depends on the minor's level of development, hence the existence of and need for parental rights.⁵⁷

However, scholars, like Anne Dailey, criticise the choice theory for being too narrow and simplistic in its analysis of minors' abilities to think logically, which ultimately leads to their exclusion from rights due to them.⁵⁸ Dailey states that the choice theory fails to sufficiently account for unique rights bestowed upon children based on their special and vulnerable status under the law.⁵⁹ These unique rights intend to protect children from the consequences of their

⁵³ Sorensen S, 'Protecting children's rights to privacy in the digital age: Parents as trustees of children's rights' 36 (3) *Children's Legal Rights Journal*, 2016, 165.

⁵⁴ Shmueli B and Blecher-Prigat A, 'Privacy for children' 42 (3) *Columbia Human Rights Law Review*, 2011, 769-771.

⁵⁵ Sorensen S, 'Protecting children's rights to privacy in the digital age', 157, 167, 172.

⁵⁶ Dailey A, 'Children's Constitutional Rights' 95 (6) *Minnesota Law Review*, 2011, 2106.

⁵⁷ Dailey A, 'Children's Constitutional Rights', 2113-2114.

⁵⁸ Dailey A, 'Children's Constitutional Rights', 2113, 2123, 2137-2138.

⁵⁹ Dailey A, 'Children's Constitutional Rights', 2138.

underdeveloped decision making abilities.⁶⁰ For example, a unique right bestowed upon children for their protection, is the right not to be executed for a criminal offense committed as a minor. In Kenya, this protection is enshrined in Section 190 (2) of the Children Act, and in Section 27 of the Penal Code, further supplemented by Section 14.⁶¹ By virtue of the US Supreme Court decision in *Roper v Simmons*, this unique right is guaranteed under the Eighth Amendment.⁶²

Despite its notable contribution to the discussion on children's rights, the choice theory fails to consider that although the cognitive developmental progression of young children and teenagers varies, minors are still alive to human rights issues and social justice from as young as the age of eleven, and some – aged fourteen and above – can go as far as to understand these complex matters from different perspectives and raise equally challenging questions in response.⁶³ This illustrates how in its limitation, the choice theory does not sufficiently provide for children's social interests and development.⁶⁴

2.2.2. *The needs-based approach or the relationship-based theory?*

Another frequently raised and equally fundamental concern regarding children's rights, is the matter of their protection and the fulfilment of their needs. This problem is anchored in the needs-based approach to children's rights, which states that minors have essential requirements from birth – such as the need to be fed, clothed, educated, and kept safe – that arise from their dependency and vulnerability, which necessitates that they receive more nurturing and protection.⁶⁵ The needs-based approach is captured in Article 3 of the CRC, which states that “the best interests of the child” must be primary and central to all efforts taken by parents, States, and other actors, in fulfilling the needs of children and ensuring their wellbeing.⁶⁶

Therefore, it is logical to assume that parents would be best placed and suited to preserve the all-round wellbeing of their children and ensure that their needs are fully met.⁶⁷ In this

⁶⁰ Dailey A, ‘Children’s Constitutional Rights’, 2138.

⁶¹ Section 190 (2), *Children Act* (Act No. 8 of 2001); see also Section 27, *Penal Code*, (CAP. 63); see further Section 14, *Penal Code*, (CAP. 63).

⁶² *Roper v Simmons* (2005), The Supreme Court of the United States.

⁶³ Daly A, ‘Demonstrating positive obligations: Children’s rights and peaceful protest in international law’ 45 (4) *The George Washington International Law Review*, 2013, 770.

⁶⁴ Dailey A, ‘Children’s Constitutional Rights’, 2135.

⁶⁵ Shmueli B and Blecher-Prigat A, ‘Privacy for children’ 769-770.

⁶⁶ Article 3, *Convention on the rights of the child*.

⁶⁷ Shmueli B and Blecher-Prigat A, ‘Privacy for children’ 772; see also, Laufer-Ukeles P, ‘The relational rights of children’ 48 (3) *Connecticut Law Review*, 2016, 745.

endeavour, the CRC acknowledges that States should respect the responsibilities, rights, and duties of parents and legal guardians in caring for their wards.⁶⁸ However, at times parental rights and decisions may be contrary to, or even risk, the wellbeing of the child, like in custody battles.⁶⁹

To avoid the constant clashes between children's rights, parental rights and state responsibility, scholars have posited the relationship-based theory, which states that children's rights and interests should be analysed through the interdependent relationships they have with their caregivers, and the supportive role the state plays in protecting and assisting these relationships, where necessary.⁷⁰ Pamela Laufer-Ukeles adopts Jennifer Nedelsky's "relational rights" approach when examining the interplay between children's rights, parents' rights and the State's obligations regarding such matters.⁷¹ Building on Nedelsky, Laufer-Ukeles states that instead of viewing the interests of children, parents and the State as competing, we should recognise that all of these varying interests and relationships are equally important as they all mould who children become: from their identities, their aspirations, to their overall development.⁷²

Therefore, the relationship-based theory acknowledges the importance of the diverse relationships that affect children's rights and seeks to ensure that laws support instrumental relations that cultivate and preserve core values, like dignity, respect, autonomy, and security, that result from them.⁷³ The relationship-based theory is in line with Article 9 of the CRC in their mutual recognition of the importance of the parent-child relationship as a right that should be preserved, but also in acknowledging that the State has a duty to intervene when this primary relationship is abusive or unhealthy for the child.⁷⁴ Consequently, under this theory, the State can step in and extinguish a "bad relationship" to safeguard the wellbeing and rights of a compromised child.⁷⁵ The values espoused by the relationship-based theory, specifically the importance of strong familial bonds, respect, autonomy, and security, should be extended to the discourse on children's digital rights, and be given serious consideration as it could provide

⁶⁸ Article 5, *Convention on the rights of the child*.

⁶⁹ Laufer-Ukeles P, 'The relational rights of children', 747.

⁷⁰ Laufer-Ukeles P, 'The relational rights of children', 749-750.

⁷¹ Laufer-Ukeles P, 'The relational rights of children', 780-782, 784.

⁷² Laufer-Ukeles P, 'The relational rights of children', 782.

⁷³ Laufer-Ukeles P, 'The relational rights of children', 782-783.

⁷⁴ Article 9, *Convention on the rights of the child*; see also Laufer-Ukeles P, 'The relational rights of children', 784.

⁷⁵ Laufer-Ukeles P, 'The relational rights of children', 784.

useful insights for the development of more comprehensive legal and regulatory frameworks catering to children online.

2.2.3. *The patriarchal theory of children as property*

The conflict at the heart of this study, parents' right to protect versus children's right to participate, finds its origins in the patriarchal theory that regards children as the property of their parents.⁷⁶ Barbara Bennett Woodhouse unpacks the historical development of this theory, conveying the two forms it took: the absolute approach and the specific parental duties approach.⁷⁷ The absolute view of children as property stated that fathers, as the head of the household, had absolute power over their families, and deemed children as the assets of their fathers because children were their seed who depended on them for life and maintenance.⁷⁸ Therefore, fathers had total control over the person, liberties and freedoms of their offspring, who had to submit to this authority.⁷⁹ The specific parental duties approach was a development of the patriarchal property model that sought to move away from the absolute view by claiming that parental rights over their children stemmed from the fulfilment of their duties to provide for, maintain, educate and protect their offspring.⁸⁰ Nevertheless, children remained under the dominance of their parents.

The parental theory of children as property and the needs-based approach to children's rights are similar in the way they both place a heavy focus on the parents' care-giving role and mandate, and the child's dependency on its parent for survival. From this, the sentiment of the supremacy of parental rights over children's rights emerges, and further, the notion that what the parent says is what is best for the child. Though it is often the case that what a parent decides is usually in the best interest of their child, parental rights cannot override, be a substitute for, or be synonymous with children's rights.⁸¹ As scholars of the relationship-based theory have posited, the rights and wellbeing of a child need to be evaluated through the lens of the relationships they participate in and that affect them, and not from the position of parental rights

⁷⁶ Sorensen S, 'Protecting children's rights to privacy in the digital age', 167.

⁷⁷ Woodhouse B, 'Who owns the child: Meyer and Pierce and the child as property' 33 (4) *William and Mary Law Review*, 1992, 1037.

⁷⁸ Grossberg M, *Governing the hearth: Law and the family in nineteenth-century America*, 1 ed, The University of North Carolina Press, Chapel Hill, 1985, 235, as cited in Woodhouse B, 'Who owns the child: Meyer and Pierce and the child as property', 1037.

⁷⁹ Woodhouse B, 'Who owns the child: Meyer and Pierce and the child as property', see generally Part IV, B.

⁸⁰ Woodhouse B, 'Who owns the child: Meyer and Pierce and the child as property', 1037-1038.

⁸¹ Brighouse H and Swift A, 'Parents' rights and responsibilities' University of Warwick Institute for Advanced Teaching and Learning, 2017, 1 – https://warwick.ac.uk/fac/cross_fac/iatl/study/ugmodules/ethicalbeings/wbiee727.pdf on 9 February 2021.

versus children's rights.⁸² Thus, when contentious cases arise causing the State to intervene, the relationship-based approach can be used to justify this external interference by showing that the State's intervention was a means of ensuring the child's protection, by assisting the family where the parent was unable to fulfil their duties and enforce their rights.

Consequently, instead of adopting a rigid "parent-knows-best" approach to children's digital rights, as proposed under the patriarchal theory, the relationship-based theory can be applied to evaluate whether a parental figure denying their ward access to the internet curtails the child's right to education, right to access information, and so on. If so, the State should use its relational capacity in a way that balances the parent's right to protect with the child's right to participate online.

2.2.4. *The parental trusteeship theory*

In examining the patriarchal theory of children as property, Woodhouse illustrates how the development of children's rights saw scholars gradually move away from this restrictive theory, towards the more progressive theory that viewed parents as trustees of their children's rights and best interests.⁸³ This theory stops viewing minors as property of their parents, but rather, tasks parents to act as trustees of their children's future rights, while acting in their children's best interests, where necessary, in the present.⁸⁴ Interestingly, the parental trusteeship theory is codified in the CRC by virtue of Article 18, which states that, 'both parents share responsibility for bringing up their children and should always consider what is best for each child,' and that governments should support parents to fulfil this duty by providing services and assistance where necessary.⁸⁵ This responsibility is further reiterated in Article 3 that directs all organisations concerned with children to work towards achieving what is best for them.⁸⁶ The application of Articles 3 and 18 of the CRC can be used to highlight the correlations between the parental trusteeship theory and the relationship-based theory.

The parental trusteeship theory, like the choice theory, sees the importance of parental rights to ensure the best interests of the child. However, you could argue that the parental trusteeship theory is more robust than the choice theory, in that it is alive to the various stages of child development, and leaves room for their autonomy – guided by parental oversight – which

⁸² Laufer-Ukeles P, 'The relational rights of children', 780-781.

⁸³ Woodhouse B, 'Who owns the child: Meyer and Pierce and the child as property', 1039.

⁸⁴ Sorensen S, 'Protecting children's rights to privacy in the digital age', 170.

⁸⁵ Article 18, *Convention on the rights of the child*.

⁸⁶ Article 3, *Convention on the rights of the child*.

enables minors to develop not just physically and mentally, but socially too: what Dailey calls ‘children’s socialisation’.⁸⁷ As previously intimated, the parental trusteeship theory relates with the relationship-based theory, in that the former allows for the development of a more symbiotic and dynamic relationship between parents and children – a relationship fundamental for the success and development of children’s rights online – which is the foundation upon which the latter theory is premised.

By viewing parents as trustees rather than owners of children, and by recognising the instrumental supportive role the state plays in preserving family dynamics, the parental trusteeship theory adopts elements of the relationship-based theory. The parental trusteeship theory is alive to the importance of these different relationships, and acknowledges that these relations need to work together, not override each other, to achieve and promote the best interests of the child.

2.3. Approach to adopt towards children’s digital human rights

Parents and governments often take a protectionist approach when it comes to children’s digital rights and online presence, which favours protection of children over their rights to participate online.⁸⁸ This is understandable given the burden imposed on them to ensure the wellbeing of their wards by law, cultural norms, societal standards, and even religious teachings.⁸⁹ For example, from the patriarchal theory, parents can argue that since they birthed their kids, they have the right to know and control what they do online; or parents and governments can state that since they provide children with the means (technology) to access the internet, they are entitled to monitor their activities online to protect them from harm. Additionally, legal guardians and States could use the choice theory to argue that due to the underdeveloped decision-making abilities of minors, adults are better positioned and have a moral obligation to govern children’s activities and privileges online. From the parental trusteeship theory, parents and governments can argue that the duty placed on them, under Articles 3 and 18 of the CRC, requires them to take all necessary measures to ensure that children grow up in a safe and

⁸⁷ Dailey A, ‘Children’s Constitutional Rights’, 2103, see generally, Part II, B, 2.

⁸⁸ Livingstone S and Third A, ‘Children and young people’s rights in the digital age: An emerging agenda’, 6

⁸⁹ Articles 3 and 18, *Convention on the rights of the child*; Sections 3, 4 and 23, *Children Act* (Act No. 8 of 2001); 1 Timothy 3:4 and 1 Timothy 5:8, *The Holy Bible*, New International Version.

healthy environment, thus allowing them to be custodians of minors' rights online, and limit them if necessary.

Nevertheless, a rights-based approach to children's digital human rights, propounded by scholars like Professor Sonia Livingstone, Frank LaRue and Jovan Kurbalija, embraces the parental trusteeship theory.⁹⁰ This approach acknowledges the need and duty parents and States have to ensure that children are safe and healthy, but simultaneously appreciates that the internet can benefit several aspects of children's lives, such as their education, access to information, ability to play, communication, and their general social development.⁹¹

Ultimately, no theory, alone, can sufficiently address the importance and needs of children's digital rights. The solution is an approach that amalgamates the strengths of the theories discussed in this chapter. A rights-based approach, founded on the parental trusteeship theory, acknowledges the centrality of the relationship between minors and their custodians, in their individual and joint respects as a fundamental unit of society. Furthermore, it is cognizant to the important role parental rights play in guaranteeing the best interests of the child yet leaves room for child development and autonomy. Therefore, a hybrid approach, based on the parental trusteeship theory, offers the most holistic and accommodating solution towards balancing parents' right to protect and children's right to participate, in the development of a safer internet and the recognition of children's digital human rights.

⁹⁰ UNGA, *Report of the special rapporteur on the promotion and protections of the right to freedom of opinion and expression*, 3-5, 18; see also Kurbalija J, *An introduction to internet governance*, 216.

⁹¹ UNGA, *Report of the special rapporteur on the promotion and protections of the right to freedom of opinion and expression*, 5-7, 9, 14; see also Kurbalija J, *An introduction to internet governance*, 216.

Chapter Three

3.1. The dilemma concerning children's digital rights

Most children today have some form of access to the internet and actively use it.⁹² The rapid rate at which technology and digital media evolve is alarming, especially considering that children tend to outpace adults at comprehending these advancements, while adults grapple to keep up.⁹³ Further, and more deeply worrying, is that the rapid development of the internet and children's online interactions are largely happening in the absence of an appropriate, comprehensive and effective legal framework, both domestically and internationally, that acknowledges and caters for children as rights holders and internet users.⁹⁴ Many scholars, activists and key internet stakeholders are asking: how are we supposed to promote children's rights, empower their development, and ensure their protection when we refuse to holistically consider children in discussions on internet governance?⁹⁵ This problem has become even more pronounced and daunting in the wake of the devastating disruption the COVID-19 pandemic has had on education across the globe.⁹⁶ The COVID-19 pandemic has exposed and emphasised the severity of the lack of access to the internet children experience, the digital exclusion many children suffer, and the inadequacies in legislation and policies on internet governance and digital rights, especially with regard to minors.⁹⁷

Despite this bleak picture, there is some hope. Efforts are being made in the right direction to establish the importance of digital human rights and their awareness, realisation, enforcement, and protection.⁹⁸ This chapter will look at the development of digital human rights and

⁹² Livingstone S, Carr J and Byrne J, 'One in three: Internet governance and children's rights', 2.

⁹³ Gutnick A, Robb M, Takeuchi L and Kotler J, *Always connected: The new digital media habits of young children*, 1 ed, Sesame Workshop and the Joan Ganz Cooney Center, New York, 2011, 6, 8, 15.

⁹⁴ Livingstone S, 'Realizing children's rights in relation to the digital environment' 2-3.

⁹⁵ Committee on the Rights of the Child, *Report of the 2014 day of general discussion: "Digital media and children's rights"*, 12 September 2014, 4; see also Kurbalija J, *An introduction to internet governance*, 216; see also UNGA, *Report of the special rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN A/69/335 (21 August 2014), 12-13, 16.

⁹⁶ UNGA, *Right to education – Impact of the COVID-19 crisis on the right to education; concerns, challenges and opportunities: Report of the Special Rapporteur on the right to education*, UN A/HRC/44/39 (15 July 2020), 4-5, 7-8, 11-12.

⁹⁷ Human Rights Watch, *Impact of COVID-19 on children's education in Africa: Submission to the African committee of experts on the rights and welfare of the child*, 2020, 4-5; see also UNGA, *Right to education – Impact of the COVID-19 crisis on the right to education*, 6.

⁹⁸ Internet Rights and Principles Dynamic Coalition and UN Internet Governance Forum, *The charter of human rights and principles for the internet*, 1-2, 5.

conclude with a list of specific rights, part of the developing digital human rights system, that are important to the aim of this study. With the aid of doctrinal research, this chapter will evaluate the difficulties that surround the realisation of these specified rights for minors online.

3.2. The definition and development of digital human rights

Although there is no concrete definition of digital human rights, most descriptions and attempts at defining the term adopt the UN Human Rights Council's position that they are an extension of the traditional human rights, founded in the UDHR, into digital spaces, specifically to the internet.⁹⁹ To reiterate: 'the same rights that people have offline must also be protected online.'¹⁰⁰

Despite the good, all-inclusive intentions behind this assertion, the extension of offline rights to online interactions and activities is too broad to adequately regulate a rapidly evolving realm that poses a myriad of distinct and specific challenges.¹⁰¹ The general nature of this statement leaves too much room for ambiguities and legal grey areas to arise, that can be negatively exploited.¹⁰²

Consequently, over the past two decades, efforts have been taken to create an international framework within which to develop internet governance principles, rights, and regulations, that espouse the spirit of the UDHR and its extension to the online world.¹⁰³ Despite initial attempts at international cooperation regarding internet rights and governance, like the World Summit on the Information Society convened by the UN in December 2003,¹⁰⁴ notable efforts to

⁹⁹ UNGA Human Rights Council, *The promotion, protection and enjoyment of human rights on the internet*, UN A/HRC/Res/20/8 (16 July 2012); see also Nitsche L and Hairesine K, 'What are digital rights?' DW Akademie, 9 December 2016 – <<https://www.dw.com/en/what-are-digital-rights/a-36703292>> on 21 January 2021; see further – <<https://www.theiofoundation.org/what-are-digital-rights/#DigitalRights>> on 21 January 2021.

¹⁰⁰ UNGA Human Rights Council, *The promotion, protection and enjoyment of human rights on the internet*, UN A/HRC/Res/20/8 (16 July 2012).

¹⁰¹ Bachelet M, 'Human rights in the digital age – Can they make a difference?' Keynote speech at the UN High Commissioner for Human Rights Japan Society, New York, 17 October 2019 – <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25158&LangID=E#:~:text=Digital%20technology%20already%20delivers%20many,rights%20and%20development%20is%20enormous.&text=We%20can%20use%20encrypted%20communications,head%20off%20human%20rights%20violations>> on 27 January 2021.

¹⁰² – <<https://www.theiofoundation.org/what-are-digital-rights/#DigitalRights>> on 21 January 2021.

¹⁰³ Internet Rights and Principles Dynamic Coalition and UN Internet Governance Forum, *The charter of human rights and principles for the internet*, 1-2.

¹⁰⁴ Mansell R, 'Introduction – Human rights and equity in cyberspace' in Klang M and Murray A (eds), *Human rights in the digital age*, 1 ed, The GlassHouse Press, London, 2005, 1-2; see also Internet Rights and Principles

establish digital rights were spurred by the APC in 2006, when it produced the *Internet Rights Charter*, the first template for digital human rights.¹⁰⁵ The APC Internet Rights Charter established seven themes upon which to anchor digital rights: internet access for all; freedom of expression and association; access to knowledge; shared learning and creation; privacy, surveillance and encryption; governance of the internet; and finally, awareness, protection and realisation of rights.¹⁰⁶ From these themes were derived the first group of recognised digital rights, which notably include: the right to access the internet, also known as the right to access internet-enabling infrastructure; the right to equal access, use and governance of the internet, free from all forms of discrimination; freedom of speech and expression; freedom from censorship; the right to participate in online protests; the right to access knowledge and information; the right to data protection; freedom from surveillance; the right to use encryption; the right to transparency and accessibility of internet governance; the right to internet neutrality (net neutrality); the right to education; and the right to recourse if one's rights are violated online.¹⁰⁷

In the growing movement to define and secure digital rights, the IRPC embarked on developing a Charter on human rights and governance principles for the internet.¹⁰⁸ The result was *The Charter of Human Rights and Principles for the Internet*, published in 2010.¹⁰⁹ The IRPC Charter was an expansion of the APC Internet Rights Charter, as it incorporated the rights founded on the APC's seven themes, and extended additional rights to the digital world, including: the right to security from crime on the internet; freedom from hate speech and defamation; the right to development through the internet; freedom of religion and thought; the right to privacy; the right to culture on the internet; the right to use one's own language; the right to work and respect for workers' rights online; and consumer protection.¹¹⁰

Dynamic Coalition and UN Internet Governance Forum, *The charter of human rights and principles for the internet*, 5.

¹⁰⁵ Kreutz C, 'Introduction to digital human rights' Crisscrossed, 8 November 2018 – <<https://www.crisscrossed.net/2018/11/08/Introduction-human-digital-rights/>> on 27 January 2021.

¹⁰⁶ Association for Progressive Communications, *APC internet rights charter*, 2006.

¹⁰⁷ Association for Progressive Communications, *APC internet rights charter*, 2006.

¹⁰⁸ Internet Rights and Principles Dynamic Coalition and UN Internet Governance Forum, *The charter of human rights and principles for the internet*, 5; see also Kreutz C, 'Introduction to digital human rights' Crisscrossed, 8 November 2018 – <<https://www.crisscrossed.net/2018/11/08/Introduction-human-digital-rights/>> on 27 January 2021.

¹⁰⁹ Internet Rights and Principles Dynamic Coalition and UN Internet Governance Forum, *The charter of human rights and principles for the internet*, 5, 13-27.

¹¹⁰ Internet Rights and Principles Dynamic Coalition and UN Internet Governance Forum, *The charter of human rights and principles for the internet*, 13-27.

Article 12 of the IRPC Charter is significant to the pursuit of this study, as it appears to be the first instance where the rights of children on the internet were expressly considered in a recognised document on digital rights and internet governance.¹¹¹ Article 12 of the IRPC is on rights of children and the internet, and states that, ‘children are entitled to all of the rights in the present charter,’ meaning that they must be given ‘the freedom to use the internet,’ and protection from the dangers associated with it.¹¹² Although Article 12 recognises children as holders of digital rights, entitled to benefit from the internet, be free from exploitation and abuse online, be heard, and have their best interests preserved, this is subject to their ‘evolving capacities’ that require guidance from the State, parents and guardians.¹¹³

The IO Foundation, a non-profit concerned with human rights in digital spaces, recognises the efforts made so far towards securing digital human rights, and though commending their utility and vision, the IO Foundation believes that the advances made so far do not provide adequate protection for online users.¹¹⁴ Presently, the IO Foundation is collaborating with like-minded organisations, civil societies and relevant governance bodies towards achieving its long term goal of having its draft proposal of a ‘Universal Declaration of Digital Rights’ proclaimed at the UN General Assembly.¹¹⁵

3.3. Liberties recognised as digital rights

Section 3.2. of this study has illustrated that the body of digital human rights is an amalgamation of traditional civil and human rights and new, distinctively digital rights, that is ever growing and evolving.¹¹⁶ Therefore, the author posits that the digital human rights we possess can be described either as traditional rights that have been digitised, or as uniquely digital rights.

¹¹¹ Article 12, Internet Rights and Principles Dynamic Coalition and UN Internet Governance Forum, *The charter of human rights and principles for the internet*, 22.

¹¹² Article 12, Internet Rights and Principles Dynamic Coalition and UN Internet Governance Forum, *The charter of human rights and principles for the internet*, 22.

¹¹³ Article 12, Internet Rights and Principles Dynamic Coalition and UN Internet Governance Forum, *The charter of human rights and principles for the internet*, 22.

¹¹⁴ – <<https://www.theiofoundation.org/what-are-digital-rights/#DigitalRights>> on 24 January 2021.

¹¹⁵ – <<https://www.theiofoundation.org/what-are-digital-rights/#DigitalRights>> on 24 January 2021; see also – <<https://www.theiofoundation.org/we-are-tiof/>> on 24 January 2021.

¹¹⁶ Kreutz C, ‘Introduction to digital human rights’ Crisscrossed, 8 November 2018 – <<https://www.crisscrossed.net/2018/11/08/Introduction-human-digital-rights/>> on 24 January 2021; see also Association for Progressive Communications, *APC internet rights charter*, 2006, Theme 5.

At the core of traditional rights that have been digitised, are the right to privacy, freedom of expression, and data protection.¹¹⁷ Specialised forms of these rights, such as freedom from surveillance under the right to privacy, and freedom from censorship under the freedom of expression, are so well tailored to address internet-specific issues, such as covert government surveillance operations,¹¹⁸ that they make the right to privacy and freedom of expression fundamental to freedom on the internet.¹¹⁹ We divulge a lot of personal information in digital spaces that it has become increasingly paramount to guarantee the protection of this information against misuse and abuse by governments, corporations, and other nefarious third parties.¹²⁰ The importance of data protection is evidenced by the promulgation of regulations specifically dedicated to its preservation.¹²¹ Though provisions such as Article 8 of the GDPR and Article 27 of Kenya's Data Protection Act recognise that children have the right to have their data protected, it is implied that parents hold and exercise this right on behalf of their children, for their protection.¹²² Other digitised traditional rights include: freedom from discrimination, access to knowledge and information, right to education, freedom of association, and the right to development.¹²³

An exclusively digital right, arguably the foundation upon which all other digital human rights are founded, is the right to access the internet.¹²⁴ Without access to the internet, there would be no need to create or extend rights to the online world, since we would all be offline. Research has shown that lack of access to the internet is a primary cause of digital inequalities and the

¹¹⁷ Jun-E T, 'Digital rights in southeast Asia: Conceptual framework and movement building' in Hooi K and Simandjuntak D (eds) *Exploring the nexus between technologies and human rights: Opportunities and challenges in southeast Asia*, 1 ed, Shape Sea, Bangkok, 2019, 23.

¹¹⁸ See generally Berghel H, 'Through the PRISM darkly' 46 (7) *Computer*, 2013.

¹¹⁹ Association for Progressive Communications, *APC internet rights charter*, 2006, Theme 2.2 and Theme 5.2.

¹²⁰ Jun-E T, 'Digital rights in southeast Asia: Conceptual framework and movement building', 22-24; see also Queralt J, 'Let's talk data-centric digital rights' The IO Foundation, 2020, 3-6 – <https://docs.google.com/document/d/1YIKgxID7nEtGQrU6X2EOMi7511WjJ8_EAPv_X1KXe-E/edit> on 24 January 2021.

¹²¹ *GDPR* (European Union); see also *The Data Protection Act, 2019* (Act No. 24 of 2019); see further Article 9, Internet Rights and Principles Dynamic Coalition and UN Internet Governance Forum, *The charter of human rights and principles for the internet*, 19.

¹²² Article 8 (1) *GDPR* (European Union); see also Section 27, *The Data Protection Act, 2019* (Act No. 24 of 2019).

¹²³ Benedek W, 'Internet governance and human rights' in Benedek W, Bauer V and Kettemann M (eds) *Internet governance and the information society: Global perspectives and European dimensions*, 1 ed, Eleven International Publishing, The Netherlands, 2008, 36.

¹²⁴ Third A et al, *Children's rights in the digital age: A download from children around the world*, 8; see also Association for Progressive Communications, *APC internet rights charter*, 2006, Theme 1.

deepening of the digital divide.¹²⁵ Additionally, government orchestrated internet shutdowns have been condemned as a human rights violation, which further underscores the importance of the right to access the internet.¹²⁶ The right to be forgotten is another exclusively digital right, however unique to European countries, which allows an internet user to direct a controller to erase all personal data pertaining to the user.¹²⁷

From this conversation, and for the purposes of this research study, the following rights appear to be common to the composition of digital rights: the equal right to access the internet for and by all; freedom from discrimination; right to privacy; data protection; freedom from surveillance; freedom of expression; freedom from censorship; freedom of association; access to information and knowledge; and right to education. However, this list is not exhaustive, and the selection of these rights does not mean that other traditional civil, human and consumer protection rights cannot be applied to the digital world.

3.4. Evaluating the contention regarding children’s digital rights

The most common finding that links several of the studies and writings on this matter, is that the conflict between adults’ right and duty to protect versus children’s right to participate, prevents the inclusion of children in internet governance and denies them rights and opportunities they are entitled to enjoy online.¹²⁸ The failure of policy makers to acknowledge all internet stakeholders, including children, to resolve this conflict of rights inversely contributes to children using the internet in ways that go beyond the scope of adult control, with some scholars stating that this exclusion and restriction has motivated minors to rebel against existing authorities.¹²⁹

¹²⁵ Third A et al, *Children’s rights in the digital age: A download from children around the world*, 31-33; see also Human Rights Watch, *Impact of COVID-19 on children’s education in Africa: Submission to the African committee of experts on the rights and welfare of the child*, 2020, 4-5; see further UNGA, *Right to education – Impact of the COVID-19 crisis on the right to education; concerns, challenges and opportunities: Report of the Special Rapporteur on the right to education*, UN A/HRC/44/39 (15 July 2020), 7.

¹²⁶ CIPESA, *Digital rights in Africa: Challenges and policy options*, 2019, 5.

¹²⁷ Article 17, *GDPR* (European Union); see also Kurbalija J, *An introduction to internet governance*, 209; see further *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González* (2014), Grand Chamber, Court of Justice of the European Union.

¹²⁸ Livingstone S and Third A, ‘Children and young people’s rights in the digital age: An emerging agenda’, 2; see also Geary P, ‘Children’s rights in a digital world’, 12; see also Kurbalija J, *An introduction to internet governance*, 216.

¹²⁹ Ito M, Davidson C, Jenkins H, Lee C, Eisenberg M and Weiss J, ‘Forward’ in Buckingham D (ed) *Youth, identity and digital media*, 1 ed, The MIT Press, Cambridge Massachusetts, 2008, ix.

Based on the list of digital rights identified in the conclusion of Section 3.3., freedom from discrimination, freedom of expression, and right to education, are undisputed rights directly applicable to children, guaranteed by domestic and international laws, which they can exercise in the same way as adults.¹³⁰ Nevertheless, we must assess these rights against the theories tendered in Chapter 2, to determine whether children directly hold and exercise these rights, or whether these rights are entrusted to their parents.

The right to freedom from discrimination and the right education are universally renowned, accepted, and legally enshrined, at the international and domestic levels.¹³¹ A person does not need fully developed cognitive and decision-making capabilities to be duly afforded freedom from discrimination: by virtue of being a human, they are fully eligible to this protection.¹³² Freedom from discrimination is one of the four foundational principles of the CRC, so therefore is a right to which children are inherently entitled, and counts as a need that parents and States must provide for them.¹³³ Additionally, education is a need fundamental to the development of minors, which they receive from both their caregivers and the State. The protective dimension of the parent-child relationship and the State's obligation to defend children and the family unit, are in line with the position that children have the right to education and freedom from discrimination.¹³⁴ This all conveys that regardless of whether or not a child has a parent or guardian, they will always directly possess, enjoy, and be able to exercise their right to education and freedom from discrimination.

Though freedom of expression is an internationally recognised civil liberty, it is not absolute: for example, the Constitution of Kenya does not classify freedom of expression as a fundamental freedom that cannot be derogated.¹³⁵ Cyber bullying exemplifies how minors are still cognitively and emotionally immature and in need of protection.¹³⁶ Furthermore, internet

¹³⁰ Articles 2, 13 and 28, *Convention on the rights of the child*; Articles 27, 33 and 43 (f), *Constitution of Kenya* (2010); Sections 5 and 7 *Children Act* (Act No. 8 of 2001).

¹³¹ Article 7 UNGA, *Universal declaration of human rights*; Articles 4, 24 and 26, *International covenant on civil and political rights*; Articles 2 (2) and 10 (3), *International convention on economic, social and cultural right*, 16 December 1966, 993 UNTS 3; Article 2, *Convention on the rights of the child*; Article 27, *Constitution of Kenya* (2010); Section 5, *Children Act* (Act No. 8 of 2001).

¹³² Article 7 UNGA, *Universal declaration of human rights*; Articles 4 and 26, *International covenant on civil and political rights*;

¹³³ Shmueli B and Blecher-Prigat A, 'Privacy for children' 769-770; see also Kurbalija J, *An introduction to internet governance*, 209.

¹³⁴ Article 7 UNGA, *Universal declaration of human rights*; Article 26, *International covenant on civil and political rights*.

¹³⁵ Article 25, *Constitution of Kenya* (2010).

¹³⁶ UNICEF, *The state of the world's children 2017: Children in a digital world*, 74-76.

threats, like cyber bullying and sexual predators, demonstrate that parents need to be aware of how their children engage online in order to guide them, protect them, and prevent them from making poor decisions that could harm themselves or others.¹³⁷ Consequently, although children may have the right to freedom of expression, it can be deemed as one of the rights held in trust by their parents.

Considering that the right to access the internet is regarded as the foundation of digital human rights,¹³⁸ it is necessary to assess how children can exercise this right, and the limitations to it. The fundamental concern with providing children access to the internet is their security and protection from online risks.¹³⁹ However, access to the internet has also provided children with benefits, especially with respect to enhancing their education.¹⁴⁰ The right to access the internet is a primary source of conflict between parental rights and obligations to protect versus children's rights online.¹⁴¹ Given the various stages and areas of development children experience, such as cognitive, social, and educational development, it is understandable and expected that parents should be aware of how children engage online, not only for their protection, but to guide them too. Thus, parental involvement and guardianship, in cooperation with State support, is necessary to ensure that minors can access the benefits of the online world, but simultaneously receive counsel and protection regarding threats on the internet.¹⁴² Consequently, children's right to access the internet should be guaranteed under the custodianship of their parents, pursuant to the tenets of the parental trusteeship theory, with aid from the State in providing internet-enabling infrastructure and a comprehensive legal and regulatory framework that is alive to the realities of children in the digital world.

Children are also entitled to the right to privacy and the right to data protection, but subject to parental guidance, due to the special protection minors require under law.¹⁴³ Therefore, parents

¹³⁷ UNICEF, *The state of the world's children 2017: Children in a digital world*, 74-76; see also Huntington A, 'Review: Trust – The increasing dangers for children in a digital world' 34 (1) *Children's Legal Rights Journal*, 2013, 134.

¹³⁸ Third A et al, *Children's rights in the digital age: A download from children around the world*, 8; see also Association for Progressive Communications, *APC internet rights charter*, 2006, Theme 1.

¹³⁹ UNICEF *Children's rights and the internet: From guidelines to practice*, 13, 15-16.

¹⁴⁰ Committee on the Rights of the Child, *Report of the 2014 day of general discussion: "Digital media and children's rights"*, 12 September 2014, 16, 21.

¹⁴¹ Livingstone S and Third A, 'Children and young people's rights in the digital age: An emerging agenda', 6-7.

¹⁴² Livingstone S, 'Realizing children's rights in relation to the digital environment', 2, 9.

¹⁴³ Article 16, *Convention on the rights of the child*; Article 8, *GDPR* (European Union); Section 27, *The Data Protection Act, 2019* (Act No. 24 of 2019); Article 19, *Children Act* (Act No. 8 of 2001); see also Krivokapić D and Adamović J, 'Impact of general data protection regulation on children's rights in digital environment', 205 (abstract), 206.

become the trustees of their children's' rights to privacy and data protection until they are deemed capable of managing these rights on their own, or until they attain the stipulated statutory age.¹⁴⁴ In the same way that the parental trusteeship theory has been applied to children's rights to privacy and data protection, it should apply to the right of minors to access the internet. This is a fundamental right which facilitates and promotes their rights to education, expression, and development.¹⁴⁵ Hence, parents should not excessively curtail their children's access to the internet but should endeavour to fulfil their parental duties in ways that accommodate their child's needs and best interests and embrace the benefits the internet can offer.¹⁴⁶

¹⁴⁴ Article 8, *GDPR* (European Union); Article 19, *Children Act* (Act No. 8 of 2001); see further Sorensen S, 'Protecting children's rights to privacy in the digital age', 172; see also Article 12, Internet Rights and Principles Dynamic Coalition and UN Internet Governance Forum, *The charter of human rights and principles for the internet*, 22.

¹⁴⁵ Third A et al, *Children's rights in the digital age: A download from children around the world*, 31-33; see also Livingstone S, Carr J and Byrne J, 'One in three: Internet governance and children's rights', 4-6

¹⁴⁶ Livingstone S, Carr J and Byrne J, 'One in three: Internet governance and children's rights', 16.

Chapter Four

Conclusion: The way forward

Based on the widely agreed premise that offline rights are online rights, it is evident that children indeed possess digital rights. However, some of these rights, such as the right to privacy and data protection, require parental guidance. Therefore, to comply with their statutory and societal obligations, parents should act not as owners of their children, but as trustees acting in the best interests of those under their care. The trusteeship approach to children's online rights extends to educational professionals, governments and other internet governance stakeholders too, as they also have a duty, under the CRC, to promote the best interests of children. Furthermore, as posited under the relationship-based theory, their actions affect children too.

Professor Sonia Livingstone is an authority on children's rights in the digital environment, whose research studies and collaborations have established a promising foundation upon which individuals and organisations can critically analyse the marginalisation of children in internet governance.¹⁴⁷ Her work has greatly influenced and contributed to fruitful studies carried out by human rights and internet governance bodies, such as UNICEF, CIGI and EU Kids Online. These studies have formulated proposed guidelines policy makers can follow to secure children's rights on the internet.¹⁴⁸ Livingstone's work in this area and the findings of these bodies have inspired and guided the direction of this dissertation.

It fully realise children's digital rights and enhance their inclusion in internet governance legal frameworks and discussions, we must endeavour apply and enforce children's existing offline rights to the internet in reality, not just theoretically.¹⁴⁹ Additionally, Livingstone and Kurbalija suggest that policy makers should adopt a rights-based approach to secure and maximize children's rights and opportunities online.¹⁵⁰ This is inline with the hybrid human rights-based, parental trusteeship approach proposed in Section 2.4. of this study.

¹⁴⁷ See generally, Livingstone S, Carr J and Byrne J, 'One in three: Internet governance and children's rights'; see generally, Livingstone S, 'Realizing children's rights in relation to the digital environment'.

¹⁴⁸ Livingstone S, Carr J and Byrne J, 'One in three: Internet governance and children's rights', 15-16.

¹⁴⁹ Committee on the Rights of the Child, *Report of the 2014 day of general discussion: "Digital media and children's rights"*, 12 September 2014, 11.

¹⁵⁰ Livingstone S and Third A, 'Children and young people's rights in the digital age: An emerging agenda', 10; see also Kurbalija J, *An introduction to internet governance*, 216.

Another key suggestion is to improve the digital literacy of both children and adults, to enhance their knowledge of the importance of children's digital rights.¹⁵¹ Furthermore, educating parents and children on the rights, duties, and consequences they have on the internet will create a greater number of responsible digital citizens.¹⁵²

The findings and recommendations from this body of legal literature convey that children's online rights is an important issue that requires attention and appropriate, holistic regulation. Furthermore, it is inspiring to see that more people are aware and open to discussing, the importance of including children in the realm of internet governance, which illustrates the relevance of this study to the existing body of knowledge.

¹⁵¹ Livingstone S, 'Realizing children's rights in relation to the digital environment', 10.

¹⁵² Geary P, 'Children's rights in a digital world', 12.

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