

A child's right to privacy, a parent's duty to care and social media

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It all starts here TM



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ABSTRACT

The expansion in the use of social media has resulted in children of a very young age engaging in the extensive use of social media platforms. In as much as social media are an effective and inexpensive medium of communication, it also carries challenges which are of growing concern. Social media are associated with many cybercrimes and because of that parents and other caregivers feel the need to check the activities of their children in the use of social media in order to fulfil their parental duties. In the course of checking the activities on social media, parents and other caregivers will end up invading the child's right to information privacy. This mini-dissertation is motivated by the following legal question: To what extent do parental responsibilities and rights include a right to interfere with a child's right to privacy in using social media? The mini-dissertation answered the research question through an extensive and comprehensive discussion of the relevant international, regional and national laws applicable to the topic. The above-mentioned was carried out through an investigation of the interface between social media and law in attempting to ascertain whether there is law regulating activities on social media. Furthermore the mini-dissertation deals with the international, regional as well as South African legal framework dealing with the parental responsibilities and rights and the child's right to privacy. The mini-dissertation produced a number of key findings which include that there is no law which directly deals with the issue of social media but the interface between social media and the law is extracted indirectly; children are bearers of the right to privacy like any other human being both in international and South African law; parents are vested with parental responsibilities and rights but the duty to care is not only limited to biological parents, it extends to other care-givers, including the state. The main conclusion drawn from this mini-dissertation is that when exercising the duty to care, parents and other caregivers are governed by the best interests of the child and also the fact that the right to privacy can be limited by law of general application in terms of section 36 of the *Constitution*. It is concluded that when parents interfere with the child's right to privacy they should do so only if they are acting in the best interests of the child, whilst fulfilling their parental duties. Lastly, like any other right the child's right to privacy can be limited by section 36.

Key words: Parental responsibilities and rights; right to privacy; social media and the law.

OPSOMMING

Die uitbreiding in die gebruik van sosiale media het veroorsaak dat kinders vanaf 'n baie jong ouderdom al uitgebreid gebruik maak van sosiale mediaplatforms. Binne die bestek van die feit dat sosiale media 'n effektiewe en goedkoop manier van kommunikasie is, is daar ook uitdagings aan verbonde wat toenemend kommer wek. Sosiale media word geassosieer met baie kubermisdade en daarom voel baie ouers en ander sorggewers van kinders die noodsaak om kinders se aktiwiteite wat sosiale media betref te bekyk om hulle ouerlike plig na te kom. In die loop van die proses van "bekyk" van aktiwiteite op sosiale media, kan ouers en ander sorggewers dalk skuldig wees daaraan om kinders se reg op privaatheid van inligting te skend. Hierdie skripsie het ten doel om die volgende regsvraag te beantwoord: Tot watter mate kan ouerlike verantwoordelikhede en regte die reg insluit om met 'n kind se privaatheid in te meng in die hantering van sosiale media? Die skripsie beantwoord die navorsingsvraag deur 'n uitgebreide en omvattende bespreking van die relevante internasionale, regionale- en nasionale wette wat van toepassing is op die onderwerp. Die bogenoemde is uitgevoer deur 'n ondersoek na die skakelvlak tussen sosiale media en die reg in 'n poging om vas te stel of daar wetgewing is vir die regulering van aktiwiteite op sosiale media. Die verhandeling kyk ook na internasionale, regionaal en Suid-Afrikaanse wetsraamwerke wat handel oor die ouerlike verantwoordelikhede en regte en die kind se reg op privaatheid. Die verhandeling bevat 'n aantal sleutelbevindinge wat insluit dat daar geen wet is wat direk handel met die probleem van sosiale media nie, maar die skakelvlak tussen sosiale media en die reg word indirek afgelei want kinders het die reg tot privaatheid soos enige ander mens, beide in die internasionale en die Suid-Afrikaanse reg; ouers het ouerlike verantwoordelikhede en regte maar die sorgplig is nie beperk tot biologiese ouers nie, dit word uitgebrei na ander sorggewers, insluitende die staat. Die belangrikste bevinding van hierdie verhandeling is dat wanneer ouers en ander sorggewers hulle sorgplig uitvoer, hulle handeling gerig word deur die beste belange van die kind, en ook die feit dat die reg op privaatheid beperk kan word deur die algemene toepassing in terme van artikel 36 van die Grondwet. Daar word aangevoer dat wanneer ouers inmeng met die kind se reg op privaatheid hulle dit net kan doen met inagneming van die beste belange van die

kind terwyl hulle dan hulle ouerlike pligte vervul. Laastens, soos met enige ander reg, word die kind se reg op privaatheid kan beperk word deur artikel 36.

Sleutelwoorde: Ouerlike regte en verpligtinge; reg op privaatheid; sosiale media en die reg.

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LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
ALT	Association for Learning Technology
ASSAL	Annual Survey of South African Law
AHRLJ	African Human Rights Law Journal
BCRP	Berkman Centre Research Publication
BOR	Bill of Rights
CHRLR	Columbia Human Rights Law Review
CILJSA	Comparative and International Law Journal of Southern Africa
CRC	Convention on the Rights of the Child
GJISS	Global Journal of Interdisciplinary Social Sciences
HPLWP	Harvard Public Law Working Paper
IJCR	International Journal of Children's Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NGOs	Non-Governmental Organizations
OSN	Online Social Networks
PER	Potchefstroom Electronic Law Journal
PoPI	Protection of Personal Information Act
SAJAA	Southern African Journal of Anaesthesia and Analgesia

SNS	Social Network Sites
THRHR	Tydskrif vir Hedensdaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UDHR	Universal Declaration of Human Rights
UNICEF	United Nations Children's Emergency Fund

Chapter 1 Introduction and problem statement

1.1 Introduction

The *Constitution of the Republic of South Africa*, 1996 (hereafter to be referred as the Constitution) in section 28 provides for the protection of children. Children as individual bearers of human rights enjoy all the fundamental rights that are granted to "everyone" in the *Constitution*, and amongst those rights is the right to privacy.¹ The *Constitution* also imbues parents with responsibilities and rights to care for their children.² The extensive development of technology and the use of social media in South Africa have led children to be very active on social media platforms.³ The way in which people communicate and interact with each other nowadays is heavily dependent on the use of social media. Social media includes Facebook, WhatsApp, twitter, Instagram, LinkedIn, to mention only a few. Technology is helping to improve and promote further advancement in the way people communicate; however, it can also be used as a tool for bullying, child sexual exploitation as well as child prostitution.⁴

Under common law, parents have always had parental authority over their children, and this authority imbued parents with rights, powers, duties and responsibilities in respect of the child and the child's property.⁵ The result was that children were regarded as legal subjects lacking legal accountability and they could not have the capacity to act on their own behalf. Parental authority included guardianship, custody, and access.⁶ In 1924 the Geneva Declaration of the Rights of the Child⁷ was adopted by the League of Nations and in its preamble, it was mentioned that mankind owes the child the best that it could give.⁸

¹ *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2013 ZACC 35 para 38. See also *S v M* 2008 3 232 (CC) para 18-19.

² Section 28(1)(b) of the *Constitution of the Republic of South Africa*, 1996.

³ Blaschke 2014 *ALT* 6.

⁴ Veerman 2010 *IJCR* 612.

⁵ Heaton *South African Family Law* 283.

⁶ Robinson et al *Family Law in South Africa* 238.

⁷ Geneva Declaration of the Rights of the Child (1924).

⁸ The preamble of the Geneva Declaration of the Rights of the Child (1924) states that men and women of all nations, recognizing that mankind owes to the child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed.

The Declaration of the Rights of the Child which was adopted by the UN in 1959 stated in its preamble that a child should be accorded special protection because of its vulnerability and immaturity.⁹

The United Nations Convention on the Rights of the Child (hereafter to be referred as the CRC) was adopted in 1989. The CRC changed the way children were considered and how they were treated; the central necessity for the usage of the CRC was the acknowledgement of the child as a full individual and also an appreciation for all the associative rights they hold.¹⁰ South Africa ratified this CRC in 1995 and for that reason it is impelled to comply with the obligations the CRC imposes on states.¹¹ The African Charter on the Rights and Welfare of the Child (hereafter to be referred as the African Charter) which is a regional instrument in Africa dealing with the rights of children in the African context was adopted in 1999. South Africa became a signatory to the ACRWC in 2000 and it also had to comply with the obligations imposed on states by the convention.¹² International law at its most fundamental level of engagement gives an outside arrangement of models against which existing laws, legislative projects, monetary choices, strategies and all different activities and inactions of the legislature can be measured.¹³

In 1996 South Africa adopted a *Constitution* which is the supreme law of the country and any law which is inconsistent with it is invalid.¹⁴ This instrument is the most important tool in the recognition and protection of the rights of children in South Africa.¹⁵ The Bill of Rights in the *Constitution* sets out different obligations on the state with regards to

⁹ Declaration of the Rights of the Child (1959). The preamble states that whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.

¹⁰ Mezmur 2008 *SA Public Law* 1.

¹¹ Heaton *South African Family Law* 278.

¹² Heaton *South African Family Law* 279.

¹³ Schafer *Child Law in South Africa: Domestic and International Perspectives* 82.

¹⁴ Section 2 *Constitution of the Republic of South Africa*, 1996. This *Constitution* is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled

¹⁵ Heaton *South African Family Law* 271.

promotion, protection and realisation of fundamental rights,¹⁶ and children are entitled to all the rights in the *Constitution* except to the right to vote.¹⁷ Section 28 of the *Constitution* sets out the rights of the children. This section recognises that children are mostly vulnerable to violation of their rights and that they accordingly need special protection in addition to their ordinary rights as residents of South Africa.¹⁸

In 2007 and 2010 the *Children's Act* 38 of 2005 came into effect.¹⁹ This Act was enacted to give effect to the constitutional rights stated in section 28.²⁰ The Act goes on to give effect to the obligations regarding the well-being of children that South Africa has acquired in terms of the CRC and the African Charter.²¹ The Act profoundly changes aspects of the law of parent and child and extends the rights and protection that children enjoy, it also codifies aspects of the law of parent and child.²² This legal document created a provision for the care and protection of children and outlines parental responsibilities and rights.²³ The document, therefore, influenced the relationship between parents and their children, for now parents are obliged to respect the rights of the children when exercising parental responsibilities and rights.

1.1.1 *Child's right to privacy*

Article 16 of the CRC states that the child's privacy shall not be unlawfully and arbitrarily interfered with, and it also states that this right has to be protected by law.²⁴ The African

¹⁶ Section 7(2) of the *Constitution of the Republic of South Africa*, 1996.

¹⁷ Skelton and Proudlock "Interpretation, objects, application and implementation of the Children's Act" 7.

¹⁸ Robinson 2006 *De Jure* 615.

¹⁹ Schafer *Child Law in South Africa: Domestic and International Perspectives* 219. The first sections of the Act became operational on the 29th of June 2007 and the remaining sections of the *Children's Act* became operational on the 31st of March 2010.

²⁰ The long title of the *Children's Act* 38 of 2005. See also section 1 of the *Children's Amendment Act* 41 of 2007.

²¹ Heaton *South African Family Law* 281.

²² Heaton 2007 *ASSAL* 885.

²³ Thomas 2015 *SAJAA* 34.

²⁴ Article 16 of the Convention on the Rights of the Child (1989) states that:

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

Charter also in A10 awards a child the right to privacy. The charter provides that parents or guardians shall have the right to exercise reasonable supervision over the conduct of their child.²⁵ Section 14 of the *Constitution* awards everyone the right to privacy which also includes children.²⁶ Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships short of intrusion from the outside public.²⁷ There is a need to balance certain interests such as the right to privacy and the right to freedom of expression of children on one hand and on the other hand the responsibilities and rights of parents.²⁸

1.1.2 Parental responsibilities and rights

The concept of parental responsibilities replaced parental authority by means of the Children's Act. The concept includes four components namely; care for the child, maintaining contact with the child, acting as a guardian of the child and lastly contributing to the maintenance of the child.²⁹ Even though holders of parental responsibilities and rights automatically and rightly enjoy a broad freedom of choice to choose how best to raise their children, there are minimum values that all parents must respect.³⁰

The CRC respects the rights and responsibilities of a parent and that includes the parental duty to care, which is found in Article 5.³¹ The African Charter also makes provision for

²⁵ S 10 of the African Charter on the Rights and Welfare of the Child (1999) states that: No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

²⁶ Section 14 of *Constitution of the Republic of South Africa*, 1996 Everyone has the right to privacy, which includes the right not to have—

- a. their person or home searched;
- b. their property searched;
- c. their possessions seized; or
- d. the privacy of their communications infringed.

²⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) par 32).

²⁸ Nel 2008 *CILJA* 221.

²⁹ S 1 and 18 of the *Children's Act* 38 of 2005.

³⁰ Schafer *Child Law in South Africa: Domestic and International Perspectives* 219.

³¹ S 5 of the Convention on the Rights of the Child (1989) states that parties shall respect the responsibilities, rights and duties of parents, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention. See also A 14(2) of the Convention on the Rights of the Child

the parental rights and responsibilities in Article 19³² and Article 20,³³ to which governments were also given a duty to assist parents in exercising these duties and also to respect the rights and responsibilities of parents.

Section 28 of the *Constitution* discusses the rights of a child and section 28(1)(b) provides that every child has the right to family care or parental care as well as alternative care when removed from a family environment. The *Children's Act* provides that parents are the primary caregivers of the child and the duty to care for the child vests in them also.³⁴ In the case of *Government of the RSA v Grootboom*,³⁵ the Court held that a child has the right to parental care as the first consideration which means that parents are the ones who oversees the day-to-day living of the child as primary caregivers.

When a parent or any caregiver is exercising the duty to care, he or she must do so in accordance with the best interests of the child.³⁶ The duty to care is explained in detail in section 1 of the *Children's Act*. It includes guiding the behaviour of the child in a humane manner, and guiding and directing the child in a manner appropriate to the child's age, maturity and stage of development.³⁷ However, currently, there are no clear guidelines on how the responsibilities and rights of parents extend to the issue of interference with children's rights to privacy.

(1989): States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child, and A 18(1) of the Convention on the Rights of the Child (1989):-Part 2 of the sub-article states that: Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

³² Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents.

³³ Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development the child.

³⁴ Section 28(1)(b) the *Constitution* and given effect by Section 18(2)(a) of the *Children's Act* 38 of 2005 states that The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right-(a) to care for the child.

³⁵ *Government of the RSA v Grootboom* 2001 1 SA 46 (CC).

³⁶ Section 28(2) of the *Constitution* together with section 9 of the Children's Act states that in all matters which concerns or involves a child the child's best interests should be of paramount importance.

³⁷ Section 1(h) and (f) of the *Children's Act* 38 of 2005.

1.1.3 Conclusion

The parents' responsibilities and rights can be a limitation to the child's right to privacy but it is always difficult to ascertain the extent of the limitation. It is, therefore, important to understand what parental responsibilities and rights are. It should also be noted that parental responsibilities and rights do not confer absolute control over the child by the parent but instead it should be exercised with caution.³⁸ As stated above there are no clear guidelines on how the responsibilities and rights of parents extend to interference with the children's right to privacy.

1.1.4 Legal question

The question to be investigated by the research is the extent to which parental responsibilities and rights include a right to interfere with a child's right to privacy in using social media.

1.2 Framework

Chapter 2 outlines the concept of social media in South Africa. In addition, the chapter will define the concept of social media and discuss the characteristics of social media as well as the use of social media. Lastly, the chapter outlines how social media interfaces with the law in South Africa. This is achieved by looking at the fundamental rights involved in the use of social media as well as the crimes associated with the use of social media.

Chapter 3 examines the international and the regional instruments which regulate the child's right to privacy and the parental duty to care. A comprehensive analysis of instruments which directly and indirectly deal with the rights will be given. International instruments to be discussed includes the conventions, declarations, general comments, additional protocols, United Nations guidelines as well as other United Nations documents on the rights of children. On the regional instruments the African Charters, reports of the Committees and other African regional documents will be discussed.

³⁸ Schafer *Child Law in South Africa: Domestic and International Perspectives* 219.

Chapter 4 covers the South Africa legal framework which governs the right of privacy of a child and also the parental duty to care. The point of departure when dealing with all the laws in the country is the *Constitution*. The chapter deals with the right to privacy from a common-law perspective to a constitutional law perspective, this is because South Africa is governed by both common law and the *Constitution*. The parental duty to care will be addressed from a common law perspective to a constitutionally entrenched right. Furthermore, the chapter will also provide a discourse on how rights can be limited with reference to the relationship between the parent and the child and how the child's best interests always play a role.

Finally, chapter 5 of the research will give a conclusion based on the discussions analysed in the preceding chapters. The chapter concludes the research by looking at the recommendations which can be put in place by the South African law in dealing with the parent-child relationship in the use of social media. The extent upon which the interference of a parent to the privacy of a child in social media will be argued in this chapter after looking at the applicable law.

Chapter 2 Social media and the law

2.1 Introduction

In determining the legal aspects applicable to the use of social media, it is very important to firstly have a clear understanding of the inner workings of social media. This chapter will aid in introducing the technical aspects concerning social media and will also help in understanding the interface between the law and social media in South Africa. All this will be done by exploring the definitions, the development and history, the types of social media and the use and availability of social media as well as the problems associated with the use of social media.

Firstly the chapter will embark on a discussion of the concept of social media and will provide a definition of the term as it has been defined by different authors from different fields. In addition, the characteristics or key features of social media will be briefly examined. Thereafter advantages and disadvantages of the use of social media will be critically evaluated. Furthermore, the chapter will elaborate on how the law regulates the use of social media.

2.2 Brief history of social media

In the past people made use of various methods of communication which included smoke signals, beating of drums and beacon fires during the night.³⁹ The next phase of communication was the use of telephone, telegraph, radio, advancement of alphabets, *et cetera*.⁴⁰ Thereafter the printing presses and ultimately e-mail prompted the increased enthusiasm for social interaction and communication,⁴¹ resulting in the rise of the internet⁴² in the 20th century. The easiest way to describe the internet is that it is a global

³⁹ Baruah 2012 *International Journal of Scientific and Research Publications* 3.

⁴⁰ Baruah 2012 *International Journal of Scientific and Research Publications* 1. This was a form of breakthrough period during the 18th and the 19th century before the growth of internet in the 20th century.

⁴¹ McFarland and Ployhart 2015 *Journal of Applied Psychology* 1653.

⁴² According to the *Oxford Dictionary* Internet is defined as an international computer network connecting other networks and computers from companies, universities etc.

computer network or a "network of networks" which uses a "standard internet protocol suite"⁴³ to communicate with one another on an international scale.⁴⁴ The internet has made a revolutionary impact in the way upon which people communicate.

Social media platforms have existed since the start of the Internet and they are administered by individual enterprises such as Google and Yahoo, and are available by means of the internet.⁴⁵ The 21st century has so far been marked by the rise in the availability and use of social media even though social media had already started to exist in the 20th century but on a smaller scale.⁴⁶ Social media are a very important part of internet communication. The major social media sites make updates and improvements regularly which means that they will continue to evolve with time.⁴⁷ Social media platforms depend on mobile and web-based technologies to create vastly interactive platforms through which people communicate and transform user-generated content.⁴⁸

The trend of social networking started with individuals who wanted to reconnect with friends and former school colleagues, but it later reached out to sharing messages, photographs, recordings, and music with individuals of the same society and life interests.⁴⁹ The pattern later started growing beyond mere friendships to business and trade professionals, who recognised how social media could benefit them by marketing their businesses.⁵⁰

Social media have transformed the way individuals communicate and cooperate, at the same time serving as a platform for information distribution, content association and

⁴³ A protocol is usually a mutual format for doing something which is agreed upon, when it comes to internet protocols these are sets of rules which govern the exchange or transmission of information between devices.

⁴⁴ Homann *The legal implications of defamatory statements on social media platforms in South Africa* 9-10.

⁴⁵ Mislove et al "Measurement and analysis of online social networks" 31.

⁴⁶ Baruah 2012 *International Journal of Scientific and Research Publications* 4.

⁴⁷ Baruah 2012 *International Journal of Scientific and Research Publications* 4.

⁴⁸ Homann *The legal implications of defamatory statements on social media platforms in South Africa* 14.

⁴⁹ Ellison & Boyd 2008 *Journal of Computer-Mediated Communication* 213.

⁵⁰ Mulero *Acceptance and Impact of Social Networks Marketing Using Extended Technology Acceptance Model* 4.

pursuit, expertise identification, and impacting innovation.⁵¹ Due to the wide use of mobile devices, more and more web applications are being created every day expanding to mobile platforms, as have online social networks services.⁵² Most major Online Social Networks (OSN) platforms are releasing mobile applications to allow users to access their services through mobile devices, which include Facebook, Twitter and LinkedIn *et cetera*.⁵³

2.3 Definition of social media

There is no single definition when it comes to social media but instead, there are descriptions of what the process of social media entails.⁵⁴ Social media include blogs, collaborative projects, social networking sites, virtual social worlds, content communities and virtual game worlds.⁵⁵ For the purposes of this research social media and social networks will be used interchangeably.

A social networking site can be described as a public web-based space⁵⁶ upon which people create profiles,⁵⁷ and create relationships with other users with whom they share a connection.⁵⁸ Social networks are also defined as web-based services⁵⁹ which permit individuals to build a public or semi-public profile within a bounded system.⁶⁰ Social

⁵¹ Chelmiss & Prasanna "Microblogging in the Enterprise: A few comments are in order" 62.

⁵² Jin et al 2013 *IEEE Communications Magazine* 147.

⁵³ Jin et al 2013 *IEEE Communications Magazine* 147.

⁵⁴ Zeitel-Bank and Tat "Social Media and Its Effects on Individuals and Social Systems" 1185.

⁵⁵ Kaplan and Haenlein 2010 *Business Horizons* 62.

⁵⁶ A public web-based space is a platform used by the public relating to or done using the web on internet rather than being existing within a devices memory.

⁵⁷ A social network profile is a description of an individual characteristics that identifies or defines them on social media sites. In a person's profile a description of a person's interests, expertise, professional affiliations, relationship status, geographic locations, recent activities and so forth are found. A profile also shows how a person interacts with others and will give an outline of the type and strength of an individual's relationship with others. See also Gartner 2016 <http://www.gartner.com/it-glossary/social-profiles/>.

⁵⁸ Mutula 2013 *SA Journal of Information Management* 2.

⁵⁹ Web-based services is a software concept and infrastructure given support by numerous computing vendors. Its use if for programme to programme communication and application delivery. It can be accessed by another application too.

⁶⁰ Ellison & Boyd 2008 *Journal of Computer-Mediated Communication* 211.

networking sites are also described as applications⁶¹ that enable users to connect by creating personal information profiles, inviting friends and colleagues to have access to those profiles, and sending e-mails and instant messages between each other.⁶²

Livingstone described social media as follows:

In terms of their affordances, social networking sites enable communication among ever-widening circles of contacts, and they invite convergence among the hitherto separate activities of email, messaging, website creation, diaries, photo albums, and music or video uploading and downloading. From the user's viewpoint, more than ever before using media means creating as well as receiving, with user-control extending far beyond selecting readymade, mass produced content. The very language of social relationships is being reframed; today, people construct their "profile", make it "public" or "private", they "comment" or "message" their "top friends" on their "wall", they "block" or "add" people to their network, and so forth.⁶³

These web-based applications give people the chance to become creators of their own content and contributors to online discussions utilising the internet or available cell phones.⁶⁴ Due to the expansion of the use of mobile phones or cell phones some social networks can be accessed online and offline and this has made the use of social media easier because people can now engage anytime and anywhere.

2.4 Characteristics and use of a social media

For social media to function effectively it relies on web-based technologies which summarise the user's contributions such as status updates or comments into an activity stream.⁶⁵ Each social network has an audience that is a "user" who is a person registering to use the social network; however, there are also sites which do not require registration

⁶¹ An application is either a computer programme or a mobile phone programme designed to perform a particular job, it can also be called a piece of software. In terms of social network these applications provide a platform where people enjoy different value-added services and also try to attract new users. The applications require only a web browser for it to be installed on the device.

⁶² Kaplan and Haenlein 2010 *Business Horizons* 63.

⁶³ Livingstone 2008 *New Media & Society* 397.

⁶⁴ Pham 2014 *Psychology in the Schools* 768.

⁶⁵ Cann 2011 www.rin.ac.uk/system/files/.../social_media_guide_for_screen_0.pdf. An activity stream is a list of all the recent and even past activities done by an individual and in most cases this would have been performed on a single website for an example Facebook has an activity stream called news feed.

or signing up⁶⁶ of an individual.⁶⁷ Social networks are composed of links and those links allow an individual to connect with other users with or without the consent of the other user.⁶⁸

Most social networks allow users to create groups which is usually done by people with joint special interests and users can posts messages to these groups or upload different content within the group.⁶⁹ The visibility of a profile differs depending on the type of social media platform or application and this is usually according to users' discretion.⁷⁰ Social networks mobile users can publish and share information according to their social connections.⁷¹ A common characteristic that most social networks have is the engagement of people in private chats and instant messaging with other people in their friend list or contact list.⁷² Examples of social network sites (SNS) include MySpace, Facebook, Orkut, Mixit, Twitter, WhatsApp, and Hi5 only to mention a few. These networks are considered to be extremely popular among young people all over the world.⁷³

Nowadays social media have unquestionable power in that it has exceeded its usual capacity to communicate with loved ones on news about birthdays and making reconnections with long-forgotten friends and relatives.⁷⁴ As stated above the main use of social media is for communication purposes; the use of social media has now surpassed mere communication between friends and families. The online sharing of information has become a very important tool especially in educational institutions and it has increased communication skills among students.⁷⁵ Social media are a very active, cheap and a fast

⁶⁶ Signing-up on a social media is when a person registers to use a social network site by filling in certain details which include birthdays, sex, marital status, age and so forth.

⁶⁷ Mislove et al "Measurement and analysis of online social networks" 32.

⁶⁸ Mislove et al "Measurement and analysis of online social networks" 32. The first recognisable social network site is said to have been launched in 1997 and it was called Six Degrees.

⁶⁹ Mislove et al "Measurement and analysis of online social networks" 32.

⁷⁰ Ellison & Boyd 2008 *Journal of Computer-Mediated Communication* 213.

⁷¹ Jin et al 2013 *IEEE Communications Magazine* 147.

⁷² Pham 2014 *Psychology in the Schools* 768.

⁷³ Marwick et al 2010 *BCRP, HPLWP* 28, Livingstone 2008 *New Media & Society* 394.

⁷⁴ Cohen 2012 *Pace Law Review* 289.

⁷⁵ Baruah 2012 *International Journal of Scientific and Research Publications* 1.

moving domain, and the results are that people are always up-to-date about what will be happening in the virtual landscape.⁷⁶

Children and teenagers make use of social network sites to develop closeness, take part in inventive work, give each other emotional support, learn more about individuals they have met in different connections, and stay in contact with treasured connections, for example, far-away friends.⁷⁷ There are intellectual benefits that are also associated with social media, these include the development of problem-solving and critical thinking.⁷⁸

Companies and political parties are now greatly using social media in their marketing strategies and campaigns.⁷⁹ Above and beyond the fact that social media are effective and inexpensive to businesses, it also enables direct consumer and producer interaction and it is an effective method of luring customers.⁸⁰ As a medium of promoting goods and services, social media also create a healthy and effective way of branding products in an online environment.⁸¹

Social media have also become an important tool used by courts both in South Africa and internationally in the enforcement of law. In the case of *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens*,⁸² the court allowed the plaintiff to serve a court notice to the defendant on a social media platform. International case law has also used social media posts and pictures as evidence in custody issues between parents or legal guardians.⁸³

⁷⁶ Kaplan and Haenlein 2010 *Business Horizons* 65.

⁷⁷ Livingstone 2008 *New Media & Society* 395.

⁷⁸ Undiyaundeye 2014 *GJISS* 2.

⁷⁹ Ciprian 2014 *Quaestus Multidisciplinary Research Journal* 96. Strategic marketing consists of a methodology of analysis done by companies to have knowledge of their customers and make choices about the organisation which addresses its customers in the context of a competitive environment.

⁸⁰ Ciprian 2014 *Quaestus Multidisciplinary Research Journal* 96.

⁸¹ Baruah 2012 *International Journal of Scientific and Research Publications* 1.

⁸² *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 5 SA 604 (KZD).

⁸³ *Lalonde v. Lalonde* No. 2009-CA-002279-MR, Unpublished.

2.5 Problems associated with social networks

Online communications particularly are prone to invasion of privacy and inadvertent revelation of sensitive or potentially embarrassing information can be obtained.⁸⁴ Tools of social media are prone to be misused by third parties other than the owner leading to an invasion of one's privacy.⁸⁵ The anonymity which is encouraged by social media enables people to be at liberty with being untruthful and be able to behave badly without any negative consequences.⁸⁶ An individual's behaviour on social media at times is not the exact impression, but rather a glorification in the light of who that individual desires to be, or who she or he hopes those reviewing the profile will consider most alluring, attractive, appealing or engaging.⁸⁷ The demand that is made by social media for access to information in the name of freedom of the press has had devastating impacts on family privacy, national security, relationship privacy and also affects decisions made in the boardroom.⁸⁸

Since the introduction of social media, the number of children (including both adolescents and non-adolescents) using these social media sites has increased dramatically.⁸⁹ More than eighty per cent of youth around the world spend most of their time on the internet.⁹⁰ The period of adolescence is the time where the transition from childhood and adulthood occurs, where identity formation happens as well the establishment of peer relationships, self-worth and sexuality, and these stages of evolving capacities are easily exploited.⁹¹ The fact that these children are introduced to social media at a very young age means that they have become a generation to use social media on a larger scale and unfortunately are also the ones to begin experiencing problems associated with excessive use.⁹² In this digital world social media have become the new social environment where

⁸⁴ Mathiesen 2013 *Ethics Information Technology* 266-267.

⁸⁵ Baruah 2012 *International Journal of Scientific and Research Publications* 1.

⁸⁶ Zeitel-Bank and Tat "Social Media and Its Effects on Individuals and Social Systems" 1187.

⁸⁷ Harawa 2014 *Pace Law Review* 375.

⁸⁸ Jallow 2015 *Global Media Journal: American Edition* 2.

⁸⁹ Clarke-Pearson et al 2011 *American Academy of Pediatrics* 800.

⁹⁰ Subrahananyam, Greenfield & Tyres 2004 *Journal of Applied Developmental Psychology* 654.

⁹¹ Undiyaundeye 2014 *GJISS* 1.

⁹² Subrahananyam, Greenfield & Tyres 2004 *Journal of Applied Developmental Psychology* 654.

children's issues are explored, and in many instances gone are the days when children used to play with dolls and watch cartoons.⁹³

Children are at greater risk when it comes to social media than adults especially with the regular worrying reports over internet predators.⁹⁴ The predators may start by reaching minors on-line, requesting photographs of the child resulting in children taking part in improper interchanges, and may go so far as to persuade the child to meet in person.⁹⁵ Other issues like cyber bullying⁹⁶ and online harassment are also associated with social media, sexting⁹⁷ and distorted sense of reality might have negative impacts on children.

2.6 Social media and the law

As time progresses there are always new technological inventions that will challenge the law in terms of its function of regulating human relations.⁹⁸ Millions of people enjoy the benefits of using social media daily; however, these social media sites have also been involved in a significant number of crimes (for example Facebook, WhatsApp, Twitter), many of which have ended in litigation.⁹⁹ The use of social media has become a key instrument for communication and for exercising the right to freedom of expression which does not only include the right to freedom of speech but also includes the right to receive information.¹⁰⁰ The right to freedom of expression and opinion plays a role in an open and fair society in South Africa and is acknowledged as a basic human right that should

⁹³ Undiyaundeye 2014 *GJISS* 1.

⁹⁴ An internet predator is an adult who lures and exploits young vulnerable children to participate in sexual or other abusive purposes Undiyaundeye 2014 *GJISS* 1.

⁹⁵ Mathiesen 2013 *Ethics Information Technology* 266.

⁹⁶ Cyber bullying is the use of electronic communication to bully a person, harass, embarrass or even target a specific person all the time *Ethics Information Technology* 266.

⁹⁷ Sexting is legally defined as the act of conveying sexually explicit messages through the use of social media and the messages will be containing illicit pictures or some video links depicting the person sending them or another. *South African Law Journal* 375.

⁹⁸ Roos 2012 *South African Law Journal* 375.

⁹⁹ Foster & Greene 2012 *Journal of Law, Business & Ethics* 131.

¹⁰⁰ Nel "Freedom of expression, anonymity and the internet" 251. See also section 16 of the *Constitution of the Republic of South Africa* (1996).

be available to all.¹⁰¹ The use of social media has increased the violation of individuals' right to privacy.¹⁰²

Serious crimes are committed on social media, and these include child trafficking, sexual exploitation, child abduction, child pornography, sexual harassment, cyber bullying, identity theft, defamation, stalking, robbery, and much more.¹⁰³ Due to the increase of crimes and the flow of information across international borders, restrictions on the content of social media communications have also increased as governments have seen the need to protect its citizens from online defamation, pornography and hate speech.¹⁰⁴ There is no law in South Africa which directly deals with social media *per se* but social media are linked to the law through the regulation of activities performed on social media by legislatures and courts. The discussion below will give an outline of how the law has interfaced with social media in South Africa. The relevance of the discussion below is to show that South Africa does not have laws put in place to deal with social media directly; however, it has dealt with matters involving social media indirectly. The list of the issues is exhaustive but only a few will be discussed as an illustration.

2.6.1 Social media and defamation

Defamation is the unlawful and intentional publication of a statement referring to another person which has the effect of causing the person's reputation, status or good name to be impaired or damaged.¹⁰⁵ The law of defamation tries to find a balance between two fundamental rights namely the right to dignity which encompasses a good name (*dignitas*) as well as the right to freedom of expression.¹⁰⁶ The extensive use of social media has resulted in a rise in defamation cases committed online, for example on Facebook or Twitter.

¹⁰¹ Nel "Freedom of expression, anonymity and the internet" 251.

¹⁰² The rights to privacy will not be comprehensively discussed in this chapter as it forms the crux of chapter 3 and 4 to follow.

¹⁰³ Roos 2012 *South African Law Journal* 378.

¹⁰⁴ Nel "Freedom of expression, anonymity and the internet" 251.

¹⁰⁵ Burns *Media law* 143.

¹⁰⁶ Nel "Freedom of expression, anonymity and the internet" 251.

In the case of *Isparta v Richter*,¹⁰⁷ the plaintiff instituted an action against the defendant for defamation following the comments made by defendant on her Facebook wall. The South African courts for the first time awarded damages for the defamatory words written on a social media platform.¹⁰⁸ In the case of *Heroldt v Wills*,¹⁰⁹ the court interdicted a plaintiff and made an order to remove the defamatory post from a Facebook page.

For a case of defamation which is committed online to be successful, the plaintiff has to show that the defendant was responsible for the publication.¹¹⁰ The defamatory statement must be published and made known to someone other than the person defamed.¹¹¹ The defendant has an onus to rebut the two presumptions of wrongfulness as well as the presumption that the publication took place intentionally.¹¹² Defences such as intoxication, error, jest and insanity can be raised in this scenario.¹¹³ The law has adapted to the changes upon which defamation is being committed, that is through the use of social media and the public being made aware of the consequences.

2.6.2 Child pornography and social media

One of the growing concerns is that social media are being used for the sexual exploitation of children, for example, the creation and distribution of child pornography.¹¹⁴ Child pornography has become a pervasive crime and it goes to the heart of the dignity of children and it lures the children into wanting to engage in sexual conduct.¹¹⁵ South Africa has taken steps in the criminalisation of child pornography. In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division*¹¹⁶ the court found that the problem with child pornography has expanded and it was justified that legislative measures should

¹⁰⁷ *Isparta v Richter* 2013 6 SA 4529 (GP).

¹⁰⁸ *Isparta v Richter* para 12.

¹⁰⁹ *Heroldt v Wills* [2014] JOL 31479 (GSJ).

¹¹⁰ Neethling et al *Neethling's Law of Personality* 133.

¹¹¹ Burns *Media law* 173.

¹¹² Nel "Freedom of expression, anonymity and the internet" 254.

¹¹³ Neethling et al *Neethling's Law of Personality* 341-342.

¹¹⁴ Watney "Cybercrime and the investigation of cybercrime" 349.

¹¹⁵ Mollema & Terblanche 2011 *SACJ* 283.

¹¹⁶ *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC).

be taken to combat and deter the problem.¹¹⁷ The latest definition of child pornography is found in the *Films and Publications Act*¹¹⁸ and it is stated as follows:

"... any image, however, created, or any description of a person, real or simulated, who is or who is depicted, made to appear, look like, represented or described as being under the age of 18 years–

- a) engaged in sexual conduct;
- b) participating in, or assisting another person to participate in, sexual conduct or
- c) Showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation."

Section 27 of the *Films and Publications Act* finds any person who knowingly creates, produces, imports or possesses materials of child pornography to be guilty of an offence.¹¹⁹ Another Act which deals with the issue of child pornography in South Africa is the *Criminal Law (Sexual Offences and Related Matters) Amendment Act*.¹²⁰ The challenges which make the detection of the crime difficult include that child pornography can now be accessed through the means of peer-to-peer file sharing on social media.¹²¹ Applications like WhatsApp sharing as well as "tweets and re-tweets" are making the issue of combating child pornography on social media a hard task.

2.6.3 Hate speech and social media

The term "hate speech" refers to derogatory and abusive words or phrases that are directed at certain individuals who represent a certain race, group, gender, ethnic background, religion or any other grounds.¹²² As the use of social media has expanded in

¹¹⁷ *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC) para 65-67. The applicant in this case was a film producer, who had appeared in the Randburg Regional Court where he was charged under section 27(1) of the *Films and Publications Act* 65 of 1996 (the Act), a provision which relates to child pornography.

¹¹⁸ Section 1(c) of the *Films and Publications Amendment Act* 3 2009.

¹¹⁹ The person found guilty of the crime may be sentenced to a fine or imprisonment for a period not exceeding five years, but if there are aggravating circumstances the person will be sentenced to both imprisonment and a fine. Section 30 of the *Films and Publications Act*.

¹²⁰ *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

¹²¹ Watney "Cybercrime and the investigation of cybercrime" 350.

¹²² Burns *Communications Law* 143. The original definition of the term is found in the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.

South Africa so have the hateful words and images circulated on the platforms.¹²³ The challenge is always on how hate speech can be regulated and also on how this can be achieved on the social media platforms as there is a thin line between hate speech and free speech.¹²⁴ South Africa has laws which regulate hate speech even on social media starting with section 16(2) of the *Constitution* which indicates that the protection of freedom of expression does not extend to advocacy of hatred based on race, ethnicity, gender, religion or any other grounds which may result in an incitement to cause harm.

Section 29(1) of the *Films and Publications Act* criminalises the distribution of hate speech and that also includes the distribution on social media platforms. Section 10(1) of the *Promotion of Equality and Prevention of Unfair Discrimination Act* (PEPUDA),¹²⁵ provides that:

"....no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to

- a) be hurtful;
- b) be harmful or to incite harm;
- c) promote or propagate hatred.

The operation of social media happens freely across borders and efforts by the governments to regulate speech on the platforms are virtually doomed to failure although legislative attempts have been made; the failure is due to technological advancements.¹²⁶ South Africa has also resorted to other measures which are not legislative in nature and which include the use of self-regulation means by service providers.¹²⁷

2.6.4 Social media: Parent-child relationship

Social media have an impact on family dynamics especially the relationship between parents and their children. On the other hand, children also enjoy the fundamental rights associated with the use of social media, and these rights include the right to freedom of

¹²³ Nel "Freedom of expression, anonymity and the internet" 270.

¹²⁴ Nel "Freedom of expression, anonymity and the internet" 270

¹²⁵ *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.

¹²⁶ Nel "Freedom of expression, anonymity and the internet" 272.

¹²⁷ Examples include software programmes that filter hate speech platforms.

association, the right to privacy as well as the right to freedom of expression. Since children have a limited capacity for self-regulation and are susceptible to peer pressure, they become at risk because they are prone to make immature and dangerous decisions on social media.¹²⁸ Parents are invested with legal responsibilities and rights to care for their children and that duty also includes making sure that the children are safe from all the dangers found in the use of social media.¹²⁹ The legal problem will only come when parents or guardians feels the burden of wanting to regulate how their children use social media and in the process violating the rights mentioned above.

2.7 Conclusion

From the discussion above it was noted that social media have become a way of life for both adults and children. The definition of social media has been examined as well in the discussion, looking at the characteristics as well as the use of social media. Problems which are associated with the use of social media were also outlined in the examination above and that led to the discussion of the laws in South Africa which regulate the use of social media. The discussion argued that there are no laws which directly deal with social media, but the law intervenes when the exercise of rights in using social media infringes the rights of others.

Even though there are different audiences of social media ranging from state entities to individuals, the main focus of the whole research will be on the use of social media within the family environment especially the parent-child relationship. For that reason, the following chapter will discuss the instruments regulating the right to privacy of a child as well as the parental duty to care from an international and regional law perspective, applicable in South Africa.

¹²⁸ Undiyaundeye 2014 *GJISS* 1.

¹²⁹ A comprehensive discussion of parental rights and responsibilities, which includes the duty to care for the child will be done in the chapters to follow.

Chapter 3 International and regional framework

3.1 Introduction

This chapter will give an exposition of the international framework for the purpose of understanding children's rights, particularly the right to privacy. It will examine the rights and responsibilities of parents and families in international and regional law. The chapter will also consider whether the rights of a child and those of parents can be seen to be implicit through interpretation of the human rights instruments which do not expressly stipulate them. Furthermore, the chapter will proceed by determining whether international law recognises the right to privacy of a child and whether it can be limited by the parental control in the use of social media. The aim of the discussion in this chapter is to provide an overview of the right to privacy of a child and the complex relationship between such a right and the rights and responsibilities.

3.2 Children's rights in international law

The fundamental principle underlying the International Bill of Rights¹³⁰ is the idea of the inherent dignity and credibility of each individual, whether child or adult.¹³¹ Children's rights are those human rights that specifically deal with the special protection and care of a child. They also include the relationship between parent-child, the realisation of human identity as well as the basic needs of a child, which are appropriate for the age and the development of the child.¹³² It can be observed that inside the wider global community, the attention of private law in connection to the parent-child relationship is progressively moving from the rights and powers of parents to the rights and privileges

¹³⁰ The International Bill of Rights refers to the compendium of documents comprising the Universal Declaration of Human Rights, adopted 10 December 1948, International Covenant on Civil and Political Rights (CCPR), adopted 18 December 1966 (entered into force 23 March 1976) and International Covenant on Economic, Social and Cultural Rights (CESCR), adopted 16 December 1966 (entered into force 3 January 1976).

¹³¹ Kaime 2005 *African Human Rights Law Journal* 223.

¹³² Rai 2014 *History of child rights and child labour* <http://menengage.org/wp-content/uploads/> accessed 15 August 2016. Article 1 of the Convention on the Rights of the Child states that: For the purposes of the present Convention, a *child* means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

of children.¹³³ The idea that children are rights-bearers, as opposed to passive receivers of their parents' and the state's support and largesse, is generally a recent development.¹³⁴

By the time the First World War ended (from 1914-1918), there has been a movement aimed at protecting the rights of children. It was a crucial concern on the political agenda of the international community.¹³⁵ The first instrument to realise children's rights was the Minimum Age (Industry) Convention which was adopted by the International Labour Organisation in 1919.¹³⁶ Although in 1921 the League of Nations adopted the Convention on the Suppression of Traffic in Women and Children,¹³⁷ the Geneva Declaration of the Rights of the Child,¹³⁸ was the first instrument to use the word "rights" when dealing with the protection of children.¹³⁹

The United Nations Declaration of the Rights of the Child (1959) and the Convention on the Rights of the Child (1989), are regarded as the international instruments on the subject of children's rights, with the latter being the most authoritative one. Apart from the above-mentioned instruments which directly deal with the rights of children, the normative framework of the rights of a child can be gathered from other international instruments which do not directly relate to children.¹⁴⁰ More and more present-day national, regional and international fundamental rights instruments are being established

¹³³ Cronje and Heaton *South African Family law* 257.

¹³⁴ Viljoen 2009 *African Human Rights Law Journal* 353.

¹³⁵ Olowu 2008 *Law, Democracy and Development* 63.

¹³⁶ *International Labour Organisation Minimum Age (Industry) Convention* was adopted in 1919 and then revised in 1937 and 1973 in that order.

¹³⁷ It was opened for signature at Geneva from 30 September 1921 to 31 March 1922, and was amended by the Protocol signed at Lake Success, New York, 12 November 1947.

¹³⁸ Geneva Declaration of the Rights of the Child of 1924. The opening statement of the Declaration stated that: "By the present Declaration of the Rights of the Child, commonly known as 'Declaration of Geneva,' men and women of all nations, recognizing that mankind owes to the Child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed"

¹³⁹ Olowu 2008 *Law, Democracy and Development* 64.

¹⁴⁰ Olowu 2008 *Law, Democracy and Development* 64.

with an end goal to progress and ensure the protection of the personal rights of children.¹⁴¹

In many African states, particularly South Africa, one of the visible components of reasonable change in the twenty-first century has been the further elaboration and selection of national laws relating to children.¹⁴² The first instrument in Africa as a region was in 1979 in which the African states adopted the African Declaration on the Rights and Welfare of the Child and then later in 1990 the African Charter on the Rights and Welfare of the Child was adopted.¹⁴³ African traditional culture recognises the intrinsic worth of children and the need to protect them.¹⁴⁴ African culture also conveys a notion that children must be protected and nurtured because they are the future and also hold the future.¹⁴⁵

3.3 Right to privacy

The growing concern expecting states to pass laws that specifically deal with the right to privacy rests on a growing understanding that privacy is a fundamental right.¹⁴⁶ The right to privacy is underpinned by values like freedom of association and freedom of expression.¹⁴⁷ These rights are based in international instruments and well-observed and are included into the laws and constitutions of more than 60 nations.¹⁴⁸

In human rights law, privacy is often described as a residual right normally used to reinforce claims that might otherwise be based on respecting identity, home, communication, sexuality, identity or family.¹⁴⁹ In spite of the fact that the right to privacy

¹⁴¹ Bekink 2006 *South African Journal of Criminal Justice* 173.

¹⁴² Viljoen 2009 *African Human Rights Law Journal* 353.

¹⁴³ Kaime 2005 *African Human Rights Law Journal* 223.

¹⁴⁴ Kaime 2005 *African Human Rights Law Journal* 223.

¹⁴⁵ Kaime 2005 *African Human Rights Law Journal* 225. Literally translated the notion that children are our future comes from an African adage expressed in different languages. The Shona proclaim that as *vana ndivo ramangwana redu*, the Nyanja declare *ana ndiwo tsogolo lathu*, Swazi insist that *bantfwana bangulimba loya embili*, and the Tswana in South Africa say *banna ke bokamosa ba rona*

¹⁴⁶ It is a question of degree involving a consideration of all the circumstances. Individuals do not live in isolation and the rights and interests of others must also be considered.

¹⁴⁷ Davies "The right to privacy" 289.

¹⁴⁸ Davies "The right to privacy" 289.

¹⁴⁹ Clapham *Human Rights - a very short introduction* 109.

is not unconditional, and must yield when other societal interests are in question, a balancing test must be applied checking the extensive exercising of the right and the demonstrations it ensures.¹⁵⁰

It is pointed out that not much special attention was paid to privacy of children in general and also *vis-à-vis* their parents; instead researchers' engagement has mainly focused on the privacy of adults.¹⁵¹ This was due to the fact that children were not thought of as human beings who also need privacy.¹⁵² It should also be stated that children need their own privacy so that they can individually develop, have a sense of independence as well as of self-reliance.¹⁵³ Above all, even the youngest child at times has a need to manage his or her own interactions.¹⁵⁴ Children must get to choose when and how they will want to interact, and also who not and to whom to give their personal information, and this need can first be realised at home.¹⁵⁵ These kinds of interactions and communications also need to be respected by both parents and other family members.

3.4 Child privacy: International and Regional Human Rights Law

International human rights are universal standards of human rights that are above local and cultural customs, and they are considered necessary for human beings to live a normal dignified life.¹⁵⁶ The right to privacy has been acknowledged in most essential international and regional human rights treaties.¹⁵⁷ The legal affirmation of this right in

¹⁵⁰ Rengel 2014 *Groningen Journal of International Law* 42.

¹⁵¹ Shmueli and Blecher-Prigat 2011 *Columbia Human Rights Law Review* 766.

¹⁵² Rengel 2014 *Groningen Journal of International Law* 39. See also Shmueli and Blecher-Prigat 2011 *Columbia Human Rights Law Review* 766.

¹⁵³ Shmueli and Blecher-Prigat 2011 *Columbia Human Rights Law Review* 772. For psychological literature on (even very young) children's need for privacy, see Christine A. Readdick, *Solitary Pursuits: Supporting Children's Privacy Needs*, 49 *Young Children* 60 (1993); Karyn D. McKinney, *Space, Body, and Mind: Parental Perceptions of Children's Privacy Needs*, 19 *J. Fam. Issues* 75 (1998); Ellen Jacobs, *The Need for Privacy and the Application of Privacy to the Day Care Setting*, Paper presented at the Biennial Meeting of the Society for Research in Child Development (New Orleans, Louisiana, March 17–20, 1977). However, according to some research, privacy is a by-product of self-development, meaning that children do not fully comprehend privacy and thus do not require it until they are self-conscious see also McKinney at 76.

¹⁵⁴ Rengel 2014 *Groningen Journal of International Law* 36.

¹⁵⁵ Shmueli and Blecher-Prigat 2011 *CHRLR* 775.

¹⁵⁶ Rengel 2014 *Groningen Journal of International Law* 36.

¹⁵⁷ Davies "The right to privacy" 290.

most legal frameworks and also including the conviction among legal scholars and researchers for the protection of the right can draw an inference that the right to privacy has turned out to be a vital part of international law.¹⁵⁸

The right to privacy is discussed in international human rights instruments which apply to all human beings. There are other international human rights instruments which have explicitly dealt with the right to privacy in the context of children. In those instruments which generally deal with the right to privacy for everyone, children will become participants by virtue of being human beings. The instruments which indirectly deal with children's right to privacy will be discussed first followed by the international instruments that directly relate to children.

3.4.1 General Human Rights Law: Privacy

The first document to be discussed is the Universal Declaration of Human Rights (Declaration).¹⁵⁹ This was the first document to set out lists of rights and to state that certain rights ought to be universally protected.¹⁶⁰ The Declaration denoted the benchmark of the rights to privacy at a universal level and it particularly safeguarded regional and communications privacy.¹⁶¹ Section 12 of the Declaration¹⁶² states that "no one" should be subjected to arbitrary interference with their privacy and also that everyone is awarded protection from such interferences. Through interpretation, the word "no one" means both children and adults as bearers of this right.

In 1959 the Declaration of the Rights of the Child ¹⁶³ was drafted and this instrument specifically dealt with the rights of children. This document did not mention the right to privacy or did it say anything in connection with the child privacy but it put emphasis on

¹⁵⁸ Rengel 2014 *Groningen Journal of International Law* 42.

¹⁵⁹ Universal Declaration of Human Rights (1948).

¹⁶⁰ Rengel 2014 *Groningen Journal of International Law* 36.

¹⁶¹ Davies "The right to privacy" 289.

¹⁶² No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

¹⁶³ Declaration of the Rights of the Child (1959).

the child's right to freedom and dignity and the best interests.¹⁶⁴ In 1966 the International Covenant on Civil and Political Rights (ICCPR)¹⁶⁵ was drafted. South Africa ratified the ICCPR in 1998 on the 10th of December after signing the document on the 3rd of October 1994.¹⁶⁶ The ICCPR, for the most part, covers civil and political rights which are by and large classified as "first generation" rights.¹⁶⁷ Article 17 of the ICCPR provides that the right to privacy must be awarded to "everyone".¹⁶⁸ The word "everyone" affirms that children should also be accorded the right to privacy since they are also beneficiaries of fundamental human rights. The Human Rights Committee issued a General Comment on A17 of the ICCPR, which contain the right to privacy as a constituent part, discussing and clarifying concepts such as; arbitrary interference, family, home and correspondence.¹⁶⁹ The General Comment gives states an obligation to adopt legislative as well as other measures to make sure that there is no unlawful interference with people's privacy, as well as for protection of this right.¹⁷⁰ The legislative and other measures that states were obliged to enact also apply to children.

3.4.2 International law on the child's right to privacy

The first international instrument to explicitly state that children have a right to privacy was the Convention on the Rights of the Child (CRC). The objective of the CRC is to fill a gap in existing human rights law by giving an extensive code of universal minimal

¹⁶⁴ Principle 2 of the Declaration of the rights of the Child (1959) states that: "The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration."

¹⁶⁵ The International Covenant on Civil and Political Rights (ICCPR) 1966. The ICCPR was adopted by the United Nations General Assembly in 1966 and entered into force in 1976.

¹⁶⁶ *South African Human Rights Commission* 2015 <http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20>

¹⁶⁷ Rengel 2014 *Groningen Journal of International Law* 36. First generation rights

¹⁶⁸ Article 17 of the ICCPR states that: 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.

¹⁶⁹ CCPR General Comment No. 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation GA Report of the Human Rights Committee (43rd session) A/43/40, 1988.

¹⁷⁰ Article 1 of the CCPR General Comment No. 16: Article 17 (Right to Privacy).

principles to guarantee the survival, protection and advancement of children.¹⁷¹ The CRC is founded on four basic principles that are crucial for its implementation,¹⁷² these are non-discrimination,¹⁷³ the best interests of the child,¹⁷⁴ the right to life, survival and development,¹⁷⁵ and to have their views respected.¹⁷⁶ The CRC is one of the most ratified instruments with only one state which has not yet ratified it.¹⁷⁷ In its preamble, the CRC expresses the view that the child should live in an atmosphere filled with happiness, love and understanding for the child to have the full and harmonious development of his or her personality. South Africa signed the treaty on the 29th of January 1993 and then ratified the treaty on the 16th of June 1995.

The child's right to privacy is explicitly recognised in Article 16 of the CRC.¹⁷⁸ The article states that the child should not be subjected to arbitrary or unlawful interference with his

¹⁷¹ Standley 1990 *The Journal of Child Law* 7.

¹⁷² Mahery "The United Nations Convention on the Rights of the Child" 315.

¹⁷³ A 2 of the *CRC* states:

1. State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. State Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members

¹⁷⁴ A 12 of the *CRC* states that:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

¹⁷⁵ A 6 of the *CRC* states that:

- 1) States parties recognise that every child has the inherent right to life.
- 2) States parties shall ensure to the maximum extent possible the survival and development of the child.

¹⁷⁶ A 12 of the *CRC*

- 1) State parties shall assure the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child; the views of the child being given due weight in accordance with the age and maturity of the child.
- 2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

¹⁷⁷ The United States of America is the only country which has not yet ratified the CRC although it is a party to some of the optional protocols. See Mahery "The United Nations Convention on the Rights of the Child" 326

¹⁷⁸ A 16 of the *CRC* states that "(1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation; (2) The child has the right to the protection of the law against such interference or attacks.

or her privacy and part two of the article gives an obligation to the law to guard against such interference. Arbitrary interference was defined in Human Rights Committee, General Comment 16 as follows:

The expression "arbitrary interference" is also relevant to the protection of the right provided for in article 17 of the ICCPR. In the Committee's view the expression "arbitrary interference" can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.¹⁷⁹

Unlawful interference was also described by the Committee:

The term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorised by States can only take place on the basis of law, which itself must comply with the provisions, aims, and objectives of the Covenant.¹⁸⁰

According to Oxford Dictionary, the word *arbitrary* means an action not seeming to be based on reason, system or plan and sometimes seeming unfair or an act of using power without restriction and without considering the other part. Looking at the CRC there is the use of two notions, *arbitrary* and *unlawful invasion of privacy*, what is not made clear is whether the invading of privacy by a parent¹⁸¹ is also unlawful or arbitrary or that it is justified. The CRC explicitly awards children the right to privacy; however, it is unclear whether this right is recognised only against the state or whether it can also be applied in the family situation as well.¹⁸²

The African Charter on the Rights and Welfare of the Child (African Charter),¹⁸³ is the first and only comprehensive regional human rights instrument on children's rights in Africa. The African Charter was adopted in 1990 but because it needed to be ratified by at least

¹⁷⁹ A 4 of the Human Rights Committee, General Comment 16 (1994).

¹⁸⁰ A 4 of the Human Rights Committee, General Comment 16 (1994).

¹⁸¹ For the purpose of this document the word *parent* means the person who is a legal parent of the child or a guardian acting as a parent of the child. Legal parentage entitles a parent to all the rights, responsibilities, privileges and benefits of parentage.

¹⁸² Shmueli and Blecher-Prigat 2011 *CHRLR* 785.

¹⁸³ African Charter on the Rights and Welfare of the Child (1990). It came into force on Nov. 29, 1999.

fifteen states before it came into force,¹⁸⁴ the Charter came into force on 29 November 1999,¹⁸⁵ after almost ten years after its adoption.¹⁸⁶ South Africa signed the document in 1997 and then ratified it on the 7th of January 2000.¹⁸⁷ Article 10 of the African Charter protects the right to privacy of a child in Africa. The wording of the article differs from the one used in the CRC in that it brings parents the right to exercise reasonable supervision over the conduct of their children.¹⁸⁸ The right to privacy of a child provided in the African Charter is limited through the right of parents or legal guardians to exercise supervision. What still remains unclear here is what will then constitute 'reasonable supervision' over the conduct of children.

In 2006 the African Union Commission drafted the African Youth Charter (Youth Charter), it came into force in 2009.¹⁸⁹ The Youth Charter is a legal framework which gives strategies and direction for the youth empowerment and developmental activities in Africa.¹⁹⁰ Article 7 of the Youth Charter provides that no young person shall be subjected to interference with his or her own privacy, honour and also reputation.¹⁹¹ The Youth Charter in its definitions defines a youth as any person who is between the ages of 15-35. According to the CRC¹⁹² and the African Charter¹⁹³ a child is any person below the age

¹⁸⁴ Article 47(3) of the African Charter states that: the present Charter shall come into force 30 days after the reception by the Secretary-General of the Organization of African Unity of the instruments of ratification or adherence of 15 Member States of the Organization of African Unity.

¹⁸⁵ Viljoen "The African Charter on the Rights and Welfare of the Child" 331.

¹⁸⁶ Durojaye 2013 *Comparative and International Law Journal of Southern Africa* 390.

¹⁸⁷ Durojaye 2013 *Comparative and International Law Journal of Southern Africa* 390.

¹⁸⁸ Article 10 of the African Charter on the Rights and Welfare of the Child No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

¹⁸⁹ African Youth Charter, July 2, 2006.

¹⁹⁰ Campaign on Accelerated Reduction of Maternal, Newborn and Child Mortality in Africa. (2012) <http://www.carmma.org/page/why-carmma>.

¹⁹¹ Article 7 of the African Youth Charter 2006 states that No young person shall be subject to the arbitrary or unlawful interference with his/her privacy, residence or correspondence, or to attacks upon his/her honour or reputation.

¹⁹² Article 1 of the CRC states that, for the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

¹⁹³ Article 2 of the African Charter provides that, for the purposes of this Charter, a child means every human being below the age of 18 years.

18 years, this means that children who are between the ages of 15-17 can still be protected by the youth charter.

3.5 Parental responsibilities and rights

Parental responsibilities and rights can be described as a collection of rights and duties awarded to a parent with the intention of promoting and safeguarding the welfare and wellbeing of the child.¹⁹⁴ Parental rights and responsibilities include the right to care for the child, make contact with the child as well as maintenance of the child. Looking at international and regional frameworks there are instruments which directly deal with parenting and some which look at the family as a whole.¹⁹⁵ There are international instruments that do not deal with parental responsibilities and rights, but they deal with a child's right to a family. According to Heaton, *a family* is used in both a wide and a narrow sense.¹⁹⁶ In a wide sense it includes all the people who are related by blood, or through adoption or through marriage and the narrow sense restricts the definition to parties in a marriage and their children,¹⁹⁷ the committee of the CRC in its General Comment has noted that:

Children's rights will gain autonomy, but they will be especially meaningful in the context of the rights of parents and other members of the family, to be recognised, to be respected, to be promoted. And this will be the only way to promote the status of, and the respect for, the family itself.¹⁹⁸

Judging from the explanations as well as the definitions given above, it is submitted that for the purpose of this chapter the concept *family* includes parents, siblings, as well as the extended members of the family. Deliberating on the above it is important to discuss the child's right to family as outlined by the international instruments. Another reason for discussing the role of the family is the fact that children can also receive care from other members of the family who are not necessarily biological parents.

¹⁹⁴ Nikolina 2012 *Utrecht Law Review* 124.

¹⁹⁵ Nikolina 2012 *Utrecht Law Review* 124.

¹⁹⁶ Heaton *South African Family Law* 3.

¹⁹⁷ Heaton *South African Family Law* 3.

¹⁹⁸ CRC Committee (1994) General Day of Discussion 'Role of the Family in the Promotion of the Rights of the Child' para 198.

3.5.1 General Legal Framework dealing with right to family

The general framework of the international human rights law deals with the instruments that generally look at the child's right to a family. Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990s,¹⁹⁹ described the role of a family in its Article 18 as follows:

The family has the primary responsibility for the nurturing and protection of children from infancy to adolescence. The introduction of children to the culture, values, and norms of their society begins in the family. For the full and harmonious development of their personality, children should grow up in a family environment, in an atmosphere of happiness, love, and understanding. Accordingly, all institutions of society should respect and support the efforts of parents and other caregivers to nurture and care for children in a family environment.

The first document to consider the protection of the family and the child is the International Covenant on Civil and Political Rights, (ICCPR).²⁰⁰ Article 23 of the ICCPR describes a family as a natural and fundamental group unit of society which also needs protection from the state.²⁰¹ Over the years that followed its entry in 1976 the ICCPR had managed to generate several instances of case law that had branched out into issues concerning parentage and contact.²⁰²

The International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR)²⁰³ outlines the importance of the protection of children by the family and the society in

¹⁹⁹ This in one of the publications by the United Nations Children's Emergency Fund, and its aim among others was defined in its introduction, and the introduction was written as follows; This Plan of Action is intended as a guide for national Governments, international organizations, bilateral aid agencies, non-governmental organizations (NGOs) and all other sectors of society in formulating their own programmes of action for ensuring the implementation of the Declaration of the World Summit for Children.

²⁰⁰ International Covenant on Civil and Political Rights (1966). It was adopted and opened for signature, ratification and accession by General Assembly resolution on 16 December 1966 and its entry into force was 23 March 1976, in accordance with Article 49. Article 49 stated that the present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

²⁰¹ A 23 International Covenant on Civil and Political Rights (1966), provides that, the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

²⁰² Nikolina 2012 *Utrecht Law Review* 124.

²⁰³ International Covenant on Economic, Social and Cultural Rights (1966), it was adopted and opened for signature, ratification and accession by General Assembly resolution on the of 16th of December 1966 and its entry into force was 3 January 1976, in accordance with article 27. Article 27 provided that: The present Covenant shall enter into force three months after the date of the deposit with

general. Article 24 lays down rights of the child to be protected by the family, and it defines family as comprising either parents or any legal guardian. States were also given an obligation to determine measures needed for the protection of families in their territories.²⁰⁴ Article 10 of the ICESCR also states that the family, as a natural and fundamental group unit of society, was also responsible for the care of the child depending on the family.²⁰⁵ Article 18 of the African [Banjul] Charter on Human and Peoples' Rights which was adopted on June 27, 1981,²⁰⁶ also shares the same idea with the ICESCR and ICCPR on the importance of family. The African (Banjul) Charter on Human and Peoples' Rights provides that a family shall be a natural unit and basis of society, it also gives states an obligation to take care of the physical health and moral of the family.²⁰⁷

3.5.2 International and Regional law on parental responsibilities and rights

The first document to address the rights and duties of parents was the Declaration of the Rights of the Child.²⁰⁸ Principle 6 of the Declaration stated that a child needs love and understanding and it went on to give the parents a duty to care and also to be responsible for the child.²⁰⁹ Hence it shows that parents were given rights and responsibilities by the

the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

²⁰⁴ Human Rights Committee, *General Comment 17 (Thirty-fifth session, 1989)*, 7 April 1989, para. 3.

²⁰⁵ Article 10 of the International Covenant on Economic, Social and Cultural Rights (1966) states that The States Parties to the present Covenant recognize that: The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

²⁰⁶ African [Banjul] Charter on Human and Peoples' Rights (1981) entered into force Oct. 21, 1986

²⁰⁷ Article 18 of the The African (Banjul) Charter on Human and Peoples' Rights (1981) states that;

- 1) The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
- 2) The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
- 3) The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

²⁰⁸ Declaration of the Rights of the Child (1959).

²⁰⁹ Principle 6 of the Declaration of the Rights of the Child (1959) provides that; the child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an

Declaration to make sure that the child grows in a loving environment and also that the welfare and the upkeep of the child are also responsibilities of the parents.

The CRC comprehensively addresses the responsibilities, rights and duties of parents.

The CRC first mentions the rights and responsibilities of parents as follows;

States parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.²¹⁰

The CRC characterises the term parental duty as incorporating parental authority, or any comparable duty in the relationship of authority determining the rights, powers and responsibilities of guardians, parents or other lawful representatives in connection with the individual or the property of the child.²¹¹

The CRC considers the rights and obligations of parents and puts the primary responsibility regarding the upbringing and the advancement of the child on the child's parents (or legal guardians).²¹² The CRC does not set out what responsibilities parents have or what they involve. However, article 27(2) expresses the view that those individuals who are in care for the child have the essential duty to secure, inside their capabilities and financial capacities, the living conditions which are vital for the child's advancement.

atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother.

²¹⁰ Article 5 of the CRC states that: States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

²¹¹ Nikolina 2012 *Utrecht Law Review* 129.

²¹² Article 18(1) of the CRC states that; States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

Article 3(2) of the CRC gives an obligation to State Parties to take all fitting authoritative and regulatory measures to guarantee that the child gets protection and care as is fundamental for the child's well-being, checking the rights and obligations of the child's parents, legal guardians, or different people lawfully in charge of the child. The trouble in applying article 3(2) is that the states needs to guarantee the child's protection and care, while, on the other, they need to regard the parents' rights and obligations and maintaining both can be exceptionally troublesome when there are clashing interests.²¹³

The Committee on the Rights of the Child²¹⁴ in 2009 made a general comment on the right of the child to be heard (Article 12 of the CRC). The General Comment held that the Committee stated that the rights and responsibilities of parents are to enable the child to exercise his or her rights and requires direction and guidance from the parents or those having the rights and responsibilities.²¹⁵

Article 20 of the African Charter deals with parental rights and responsibilities. The article states that parents shall have the primary responsibility for the upbringing and development of the child and it lays out the duties of the parent.²¹⁶ The Charter avoids the term "legal guardian" and uses the expression "other persons responsible for the child" - this shows that document is more realistic in Africa because Africa also recognises extended family to be responsible for the child.²¹⁷

²¹³ Nikolina 2012 *Utrecht Law Review* 128.

²¹⁴ Committee on the Rights of the Child, General comment No. 12, The right of the child to be heard, U.N. Doc. CRC/C/GC/12 (2009).

²¹⁵ Paragraph 91 of the Convention recognizes the rights and responsibilities of parents, or other legal guardians, to provide appropriate direction and guidance to their children (para. 84), but underlines that this is to enable the child to exercise his or her rights and requires that direction and guidance are undertaken in a manner consistent with the evolving capacities of the child.

²¹⁶ Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development the child and shall have the duty: (a) to ensure that the best interests of the child are their basic concern at all times- (b) to secure, within their abilities and financial capacities, conditions of living necessary to the child's development; and (c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.

²¹⁷ Mezmur 2008 *SA Public Law* 25.

3.6 Social media: Children and parents

As seen from the discussion above, children as bearers of rights also enjoy the right to privacy. On the other hand, parents also are given rights and responsibilities to take care of children and make sure that they are protected at all times. Article 13 of the CRC gives a child the right to seek, receive and communicate information regardless of frontiers, through any media of the child's choice.²¹⁸ It is submitted that the term *media* as used by the CRC also includes *social media*. Article 17 of the CRC states that the child has a right to access to appropriate information, it further provides that the States Parties shall ensure that a child has access to information and diverse material.²¹⁹

The rapid growth of social media has seen most children spending most of their time on social networking sites in the name of "getting access to information".²²⁰ During the time when the CRC was drafted children had not been as overwhelmed by information as they are today and the CRC did not foresee that such a time would come.²²¹ The era is now different from the one when children used to play with toys but now children feel that they will face the world more effectively with a cell phone and access to the internet with social networking sites.²²²

Globally, the legal complications of the parent-child relationship have increased due to the improvement and development of the children's rights and the affirmation that

²¹⁸ A 13 of the CRC; 1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice. 2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (order public), or of public health or morals.

²¹⁹ A 17 of the CRC provides that: States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

²²⁰ Veerman 2010 *IJCR* 585.

²²¹ Veerman 2010 *IJCR* 586.

²²² Veerman 2010 *IJCR* 593 & 612.

children have free rights and privileges against both their parents and the state.²²³ This new era has raised complications in law were parents now want to have access to their children's online social life whilst children claim that their right to privacy is being infringed. The law of privacy, which has for quite some time been viewed as entrenched, is currently confronting new requests on its limits in view of the interesting features of social networking in the online age.²²⁴

The relationship between parents and children is increasingly getting problematic; it absolutely needs no elaboration that the relationship might be a noteworthy wellspring of litigation as it has in fact shown itself to be.²²⁵ It is regularly said that parents have a right to act positively towards their children when in reality they are imbued with power (to follow up for the benefit of their kids, to practice control over them).²²⁶ The power parents have over the children may be abused because children depend on their parents for all their physical and financial needs including the phones and computers they use for social media.

3.7 Conclusion

The international and regional framework provides for the child's right to privacy and also that this ought to be protected and respected by other right holders. Children are also accorded the right to impart and seek information through any media of their choice and this right is afforded by the CRC. On the other hand, parents as primary care-givers of the children have rights and responsibilities over their children and amongst those responsibilities is the duty to protect the child.

The international and regional frameworks have always dealt with the parent to child relationship but because of the advancement of technology and rapid growth of social media, the relationship between parents and children has become complex. Children have

²²³ Bertus de Villiers 'The rights of children in international law: guidelines for South Africa' (1993) *Stellenbosch Law Review* 289.

²²⁴ Singh 2014 *Obiter* 616.

²²⁵ Robinson 2013 *THRHR* 400-401.

²²⁶ Carpenter 2008 *TSAR* 397.

the right for their social media platforms to be private from everyone including parents. On the other hand, parents have an obligation to know what their children will be doing on those sites, the duty arising from parental care. Parents can infringe upon their child's privacy if they are exercising their parental duty to care as long as they are acting in the best interests of the child at all times. The extent to which parents can infringe upon the child's privacy when exercising the duty to care in international legal framework is not dealt with, which means there is a need for improvement.

The balancing of the right to privacy of a child and the duty of the parent to care is a difficult issue in this technological era where there is an extensive use of social networks.²²⁷ South Africa is a democratic country with the *Constitution* as the supreme law of the country,²²⁸ and the *Constitution* is found in the provisions of human dignity, equality, and advancement of human rights and freedoms.²²⁹ As part of an international community, South Africa has signed and ratified several international and regional instruments that deal with children's rights. Section 231 of the *Constitution* states that the Republic is bound by international agreements after being approved by resolution,²³⁰ and if the international law does not need ratification or accession the Republic is bound without approval.²³¹ The international instruments have to be enacted into law by the national assembly,²³² and when courts, tribunals or forums interpret the Bill of Rights, they must consider international law.²³³ South Africa has owned up to its obligations of

²²⁷ Roos 2012 *South African Law Journal* 375.

²²⁸ Section 2 of the *Constitution of the Republic of South Africa*, 1996 states that this Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

²²⁹ Section 1 of the *Constitution of the Republic of South Africa*, 1996.

²³⁰ Section 231(2) of the *Constitution of the Republic of South Africa*, 1996. An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

²³¹ Section 231 (3) of the *Constitution of the Republic of South Africa*, 1996. An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

²³² Section 231(4) of the *Constitution of the Republic of South Africa*, 1996.

²³³ Section 39(1)(b) of the *Constitution of the Republic of South Africa*, 1996.

enacting laws which are consistent to international standards, these are going to be discussed in the following chapter.

Chapter 4 South African legal framework

4.1 Introduction

As has been established in the previous chapters, the main focus of this dissertation is to strike a balance between the child's right to privacy and the parental duty to care (parental responsibilities and rights). This chapter discusses the right to privacy of the child as well as the parental duty to care in the South African context. The first part of the chapter will discuss the application of the Bill of Rights in determining the parties that are bound by the Bill of Rights.

In addition, this chapter will deal with the general right to privacy from a common law perspective up to the constitutional right to privacy. Furthermore, the chapter will also discuss the parental responsibilities and rights dating back to the era of parental authority up to the constitutional era of parental care. A discussion of the different caregivers recognised in South Africa will also be unpacked briefly. In conclusion, the limitations or the balancing of the two rights will be critically discussed, giving preference to the parent-child relationship.

4.2 Application of the Bill of Rights

A clear understanding of the right to privacy and child's right to parental care in the Bill of Rights is well understood against the background of how these rights are applied in the South African context. Section 7 of the *Constitution* provides that the Bill of Rights is the cornerstone of democracy in South Africa.²³⁴ The section further states the Bill of Rights enshrines the rights of all the people in the country, affirming the democratic values of human dignity, equality and freedom. The *Constitution* in section 8 provides that the Bill Rights applies to all law and binds the legislature, the executive and the judiciary and all the organs of state. The section goes on to state that natural and juristic

²³⁴ Section 7 of the *Constitution* states that: This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

persons are also bound by the Bill of Rights but only to the extent that it is applicable, taking into account the nature of the right and the duty imposed by the right.²³⁵

Different from other constitutional democracies most of the rights in the Bill of Rights do not only apply directly but they also apply indirectly, in both the horizontal and vertical spheres.²³⁶ In ascertaining the parties that are bound by the Bill of Rights it is very important to look at the application of the Bill of Rights. The level of application that the research is mainly focusing on is the horizontal application of the Bill of Rights. Horizontal application entails that private persons are bound by the Bill of Rights and they have obligations to respect the rights, at least in certain circumstances.²³⁷ The relationship between a parent and a child is of a private nature which means that there is a direct horizontal application of the Bill of Rights and both parents and children are bound by the rights in the Bill of Rights.

4.3 General right to privacy

In addition to being one of the rights addressed in international and regional instruments, the right to privacy is also found in constitutions and general laws of different states in the world.²³⁸ In South Africa, the right to privacy is protected in both the common law and section 14 of the *Constitution*. The right to privacy is frequently linked to the right to dignity, and the right to dignity is protected under section 10 of the *Constitution*.²³⁹ The link between the two rights is that when a person's privacy is breached the person is likely to be treated with less appreciation and disrespect.²⁴⁰ Lack or an insufficient degree of privacy may have a negative influence on a person's whole physical-mental well-being.²⁴¹

²³⁵ Section 8(3) of the *Constitution*.

²³⁶ Freedman *Understanding the Constitution of the Republic of South Africa* 308.

²³⁷ Freedman *Understanding the Constitution of the Republic of South Africa* 309.

²³⁸ Edwards 2001 *Yale Journal of International Law* 327.

²³⁹ Section 10 of the *Constitution*. Everyone has inherent dignity and the right to have their dignity respected and protected. The link between privacy and dignity will be discussed later in the chapter under the common law right to privacy.

²⁴⁰ Freedman et al *South African constitutional law in context* 463.

²⁴¹ Neethling et al *Neethling's Law of Personality* 28.

Factual disturbance of the right to privacy occurs when a personal peace or existence is disturbed by disclosure or intrusion.²⁴² The basic need for privacy at a personal level and for society as a whole comes from the expectation that the legislatures and the judiciary will assist in protecting privacy from unwanted intrusions.²⁴³

4.3.1 Common law position

As mentioned above the right to privacy in South Africa is protected under both the common law and the *Constitution*. The *Constitution* in section 8(3) states that when giving effect to the rights in the Bill, common law must be applied or if necessary developed to an extent that legislation does not give effect to that right.²⁴⁴ The basis of section 8(3) is to require courts to mould and infuse the common law with progressive human rights thinking.²⁴⁵ Section 8(3)(a) of the *Constitution*, requires courts to develop rules of common law and to give effect to rights in the Bill of Rights where there is no legislation. Section 8(3)(b) gives courts permission to develop the rules of common law, to limit the rights, provided that the limitation is in accordance with section 36(1).²⁴⁶ Section 39(3) goes on further to state that the Bill of Rights does not deny the existence of common law as long as they are consistent with the Bill.²⁴⁷ The courts in section s39(2)

²⁴² Loubser et al *The Law of Delict* 54.

²⁴³ Rengel 2014 *Groningen Journal of International Law* 38.

²⁴⁴ Section 8(3) of the *Constitution*. When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

- a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
- b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

²⁴⁵ Motala & Ramaphosa *Constitutional law: Analysis and Cases* 40.

²⁴⁶ Motala & Ramaphosa *Constitutional law: Analysis and Cases* 40. Section 36(1) of the *Constitution* states that, The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

²⁴⁷ Section 39(3) of the *Constitution* states that The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

of the *Constitution* were given an inherent power to develop the common law taking into account the interest of justice.²⁴⁸

The right to privacy under common law is recognised as an independent personality right protected under the law of delict and an invasion of privacy was based on *actio iniuriarum*.²⁴⁹ Personality rights are those rights that are closely tied up with the legal subject as a person; examples include the right to a good name, the right to dignity and honour as well as the right to privacy.²⁵⁰ The courts under common law have regarded invading a person's private sphere as an impairment to the person's dignity (*dignitas*) under the *actio iniuriarum*.²⁵¹ This was because the right to privacy was not specifically recognised in the *actio iniuriarum* and attempts to protect one's privacy had to be located through the dignity concept.²⁵² The case of *O'Keeffe v Argus Printing and Publishing Co Ltd* is regarded as the landmark decision in privacy matters because it is the first case that the court considered the right to privacy but under the umbrella term of *actio iniuriarum*.²⁵³

Under common law, there are four forms of the invasion of privacy, which are intrusions, publication of private facts, appropriation and placing someone in a false light.²⁵⁴ The concept was also developed in *S v A*, where the court held that invasion of privacy includes an unlawful intrusion on the property, searching and seizing documents, watching someone secretly or using surveillance equipment to gather information on someone.²⁵⁵

²⁴⁸ S173 of the Constitution as amended by the *Constitution Seventeenth Amendment Act, 2012*. The Constitutional Court, the Supreme Court of Appeal and the High [Courts have] Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

²⁴⁹ Goodburn & Ngoye "Privacy and the Internet" 172.

²⁵⁰ Burns *Media law* 139.

²⁵¹ *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244 (C). This was the first case upon which the *actio iniuriarum* was recognized as an independent right after so many years.

²⁵² Loubser et al *The Law of Delict* 54.

²⁵³ *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244 (C). In this case a woman agreed to have her picture printed in an article, but the picture was then used to advertise guns. The picture was not used as per the agreement. The court found that she was able to use the *actio iniuriarum*

²⁵⁴ McQuoid-Mason 2000 *Acta Juridica* 229-231.

²⁵⁵ *S v A* 1971 2 SA 293 (T).

4.3.1.1 Elements of invasion of privacy

As stated above, privacy was regarded as a delict and an invasion of privacy was based on *actio iniuriarum* and for an applicant to succeed, he or she had to prove availability of certain elements.²⁵⁶ The elements that had to be proved are wrongfulness, intention and impairment of the plaintiff's personality right.²⁵⁷ Wrongfulness entails that the conduct or the act performed by a perpetrator is in conflict with the law, and this is determined using the reasonableness criterion or the *boni more* test.²⁵⁸

Apart from wrongfulness of the infringement, the general rule is that intention or *animus iniuriandi* elements needed to be established.²⁵⁹ Intention means that the perpetrator must have directed his will towards violating the privacy of the prejudiced party, whilst having the knowledge that such violation is wrongful.²⁶⁰ This means that the action or the conduct by the wrongdoer was committed with the intention of infringing the personality rights of the prejudiced person.²⁶¹ To determine whether there was an impairment of the plaintiff's personality right, the invasion should have impaired the person's *dignitas*.²⁶²

When a right to privacy was infringed it could be rebutted by a justification.²⁶³ The traditional grounds of justification include necessity, private defence, and consent to injury as well as performance in an official capacity.²⁶⁴

4.3.2 Constitutional law framework

South Africa is a democratic country and the *Constitution* is the supreme law of the country.²⁶⁵ The right to privacy is a fundamentally protected right in South Africa and is

²⁵⁶ McQuoid-Mason 1998 *Revision Service* 2.

²⁵⁷ McQuoid-Mason 1998 *Revision Service* 2.

²⁵⁸ Marx 2010 *Obiter* 153.

²⁵⁹ Neethling J et al *Neethling's Law of Personality* 240.

²⁶⁰ Neethling J et al *Neethling's Law of Personality* 57-59,252-253. There should be direction of will by the perpetrator whilst conscious of the wrongfulness. See also *Van Vuuren and Another NNO v Kruger* 1993 4 SA 842 (SCA) para 849.

²⁶¹ Marx 2010 *Obiter* 153.

²⁶² Neethling J et al *Neethling's Law of Personality* 239.

²⁶³ Roos 2012 *South African Law Journal* 398.

²⁶⁴ Neethling et al *Neethling's Law of Personality* 240.

²⁶⁵ Section 2 of the *Constitution*.

entrenched in section 14 of the *Constitution* and this proved that it is an interest worthy of protection.²⁶⁶ The right is laid out as follows:

- Everyone has the right to privacy, which includes the right not to have;-
- a) their person or home searched;
 - b) their property searched;
 - c) their possessions seized, or
 - d) the privacy of their communications infringed.²⁶⁷

The section entails that a person must have a subjective expectation of privacy that society will recognise as objectively reasonable.²⁶⁸ This section provides for the protection of one's right to privacy with specific reference to protection against searches and seizures as well as infringements on communication privacy.²⁶⁹ The right to privacy is therefore divided into two sectors, which is the substantive privacy rights and the information privacy rights.²⁷⁰ Information privacy restricts an individual from publishing, disclosing, or gaining information about others without their consent and substantive rights give a person the right to make personal decisions about certain interests including relationships, personal life, *et cetera*.²⁷¹

Section 14(a)-(c) prohibits searches and seizures of the person's home, property, possessions and communications. Protection of private information is impliedly protected in section 14(d) which states that the privacy of a person's communication must not be infringed. For searches and seizures to be lawful they must comply with strict requirements.²⁷² There are three requirements which afford a search and seizure to be lawful: firstly, it should be conducted in terms of legislation which clearly states the powers to search and seize.²⁷³ Secondly, there is a need for prior authorisation by an

²⁶⁶ Neethling et al *Neethling's Law of Personality* 219.

²⁶⁷ Section 14 of the *Constitution*.

²⁶⁸ Currie & De Waal *The new Constitutional and Administrative Law* 368. The society is more likely to recognise an expectation of privacy to be reasonable when it comes to an individual's body, home and family life, the reason being that state and other people should have nothing to do with an individual's intimate life.

²⁶⁹ Roos 2012 *South African Law Journal* 394.

²⁷⁰ McQuoid-Mason 2000 *Acta Juridica* 248.

²⁷¹ Roos 2012 *South African Law Journal* 395.

²⁷² Currie & De Waal *The new Constitutional and Administrative Law* 369.

²⁷³ *Criminal Procedure Act* 51 of 1977, *Special Investigating Units and Special Tribunal Act* 74 of 1996; the *Customs and Excise Act* 91 of 1964.

independent and competent authority before the search is conducted (examples include warrants of arrest from the police).²⁷⁴ The third requirement is that there should be reasonable grounds for conducting the search.²⁷⁵

Section 14(d) deals with the privacy of communications. The *Interception and Monitoring Prohibition Act* states that no person may, unless with the directive of a judge, intentionally and without the knowledge and permission of the other, monitor a conversation by means of a monitoring device to gather private and confidential information of the other party.²⁷⁶ This Act is usually used in cases where there will be an attempt to get information for civil or criminal proceedings, but in the context of the current research, the Act is interpreted to show that gathering information of another without permission is unlawful and an invasion of privacy.

The importance of legal protection of information privacy has also increased because of the advancement of technology and interception of information in electronic forms.²⁷⁷ In order for a plaintiff to establish an infringement of the constitutional right to privacy, he or she should show that there was a subjective expectation of privacy which was objectively reasonable.²⁷⁸ The right to privacy is not an absolute right in as much as it is a fundamental right, it is also limited by law of general application and has to be balanced against other rights which are in the *Constitution*.²⁷⁹ The right should also be weighed

²⁷⁴ Currie & De Waal *The new Constitutional and Administrative Law* 369. At times warrants are not necessary when there is a regulatory inspection for instance when the object of search is for routine control over potentially dangerous activities. See also *Mistry v Interim National Medical and Dental of South Africa* 1998 4 SA 1127 (CC).

²⁷⁵ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2000 10 BCLR 1079 (CC) para 28.

²⁷⁶ Section 2 of the *Interception and Monitoring Prohibition Act* 127 of 1992. Also see Currie & De Waal *The Bill of Rights handbook* 312.

²⁷⁷ Currie & De Waal *The Bill of Rights handbook* 303.

²⁷⁸ Neethling et al *Neethling's Law of Personality* 221.

²⁷⁹ Section 36(1) of the *Constitution*. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

against other conflicting rights in the Bill of Rights and the community, such rights include freedom of expression or the right of access to information.²⁸⁰

With the advancement of technology, computers have also been used to invade privacy; the court in *Klein v Attorney General, WLD* held that restoring information that has been deleted from a computer amounts to an invasion of privacy.²⁸¹ In the case of *National Media Ltd v Jooste*,²⁸² the court expressed the right to privacy as follows:

The individual concerned is entitled to dictate the ambit of disclosure for example to a circle of friends, a professional adviser or the public... He may prescribe the purpose and method of the disclosure... Similarly, I am of the view that a person is entitled to decide when and under what conditions private facts may be made public.²⁸³

In the case of *Bernstein and Others v Bester and Others*, Ackermann J held that:

The law recognises a very high level of protection of the individual's intimate personal sphere of life and the maintenance of its basic preconditions and that 'there is a final untouchable sphere of human freedom that is beyond interference from any public authority'; with regard to this most intimate core of privacy 'no justifiable limitation thereof can take place.'²⁸⁴

In *National Coalition for Gay and Lesbian Equality v Minister of Justice* the Constitutional Court held that the right to privacy makes a recognition that we all have a right to a certain sphere of private intimacy and autonomy which allows us without interference from the outside community to nurture human relationships.²⁸⁵ In the case of *NM and others v Smith and others (Freedom of Expression Institute as Amicus Curiae)* the HIV+ statuses of three women were published in a book and the court held that there had been a breach of privacy.²⁸⁶

The above-discussed case law shows that not only did the courts develop the right to privacy over time but they also attempted to define what the right entails. The case law has also shown that privacy is a very valued right and invasion of privacy can result in

²⁸⁰ McQuoid-Mason 2000 *Acta Juridica* 247.

²⁸¹ *Klein v Attorney General, WLD* 1995 3 SA 848 (W).

²⁸² *National Media Ltd v Jooste* 1996 3 SA 262 (SCA).

²⁸³ *National Media Ltd v Jooste* 1996 3 SA 262 (SCA).

²⁸⁴ *Bernstein and Others v Bester and Others*, 1996 2 SA 751 (CC) para 77.

²⁸⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 32.

²⁸⁶ *NM and others v Smith and others (Freedom of Expression Institute as Amicus Curiae)* 2007 5 SA 250 (CC).

paying for damages or making a public apology depending on the circumstances of each case.

4.3.3 Legislation

The legislation which governs the protection of private information is the *Protection of Personal Information Act* (PoPI), this act was enacted to give effect to the constitutional right to privacy.²⁸⁷ This Act protects individuals from the interference of their privacy by third parties and balances the right to privacy and other competing rights in the *Constitution*.²⁸⁸ In its preamble, the *PoPI Act* states that processing of personal information by public or private bodies should give effect to the right to privacy subjected to justifiable limitations aimed at protecting other important rights and interests.²⁸⁹ Section 2(a)(i) of the Act mentions that the aim of the Act is to effect a balance between privacy and other rights especially the right to access to information.²⁹⁰ The Act also aims at regulating the manner in which personal information may be processed as well as giving persons rights and remedies to protect their personal information.²⁹¹ The *PoPI Act* is an attempt by legislatures to regulate the way in which information should be handled especially the privacy of the information.

4.4 Right to privacy: Children

Children are given protection by the Constitution in section 28. This section is a protection in addition to the other rights already given to children in the Bill of Rights.²⁹² A child enjoys all the rights entrenched in the Bill of Rights the same as the adults apart from a few restrictions, like the right to vote and to hold a public office.²⁹³ In *Bhe and Others v Magistrate, Khayelitsha, and Others*²⁹⁴ the court held that:

²⁸⁷ *Protection of Personal Information Act* 4 of 2013.

²⁸⁸ Nyoni & Velepini *South African Journal of Information Management* 636.

²⁸⁹ Preamble of the *Protection of Personal Information Act* 4 of 2013, this should be in harmony with international standards.

²⁹⁰ Section 2(a)(i) of *Protection of Personal Information Act* 4 of 2013.

²⁹¹ Section 2(c) of *Protection of Personal Information Act* 4 of 2013.

²⁹² Currie & De Waal *The Bill of Rights handbook* 599.

²⁹³ *Bhe and others v Magistrate, Khayelitsha and Others* 2005 1 SA 580 (CC) para 52.

²⁹⁴ *Bhe and others v Magistrate, Khayelitsha and Others* 2005 1 SA 580 (CC).

Section 28 of the Constitution provides specific protection for the rights of children. Our constitutional obligations in relation to children are particularly important for we vest in our children our hopes for a better life for all. The inclusion of this provision in the Constitution marks the constitutional importance of protecting the rights of children, not only those rights expressly conferred by section 28 but also all the other rights in the Constitution which, appropriately construed, are also conferred upon children.²⁹⁵

Against this background it is argued that children must be accorded protection of their right to privacy in terms of section 14. In the case of *Johncom Media Investments Limited v M*²⁹⁶ the court considered section 14 as aimed at also protecting the privacy of children.²⁹⁷ An interesting and complex issue is the extent to which children have the right to individual self-determination and that includes choices of own lifestyles, religions, and relationships *et cetera*.²⁹⁸ In the case of *Limited v M (Media Monitoring Project as amicus curiae)*,²⁹⁹ the Constitutional Court confirmed that the child is entitled to the right to privacy and dignity like any other human being.³⁰⁰

An important section in the section 28 of the *Constitution* is subsection 2 which states that in every matter that concerns a child, the child's best interests are of paramount importance.³⁰¹ The right to privacy can be infringed, for instance, by reading private information which discloses private and confidential information whilst breaching a duty not to do so.³⁰² There is a need of balancing between respecting one's private sphere and involving others in our lives as we are human beings not by engagement only but also because others respect our private dominion and that also applies to children.³⁰³ Parents also owe children an opportunity to have their private spheres undisturbed and not

²⁹⁵ Bhe and others v Magistrate, Khayelitsha and Others 2005 1 SA 580 (CC) para 52.

²⁹⁶ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC).

²⁹⁷ *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) para 29.

²⁹⁸ Currie & De Waal *The Bill of Rights handbook* 601. This also makes a need for a balance to be struck between rights of children, parents as well as the state.

²⁹⁹ *Limited v M (Media Monitoring Project as amicus curiae)* 2009 4 SA 7 (CC). The court declared the ban on publication of divorce information unconstitutional, except for the ban on publication of information that could possibly identify the child involved in a divorce matter as such prohibition aims to protect the child's right to privacy and dignity.

³⁰⁰ *Limited v M (Media Monitoring Project as amicus curiae)* 2009 4 SA 7 (CC).

³⁰¹ Section 28(2) of the *Constitution of the Republic of South Africa*, 1996. A child's best interests are of paramount importance in every matter concerning the child.

³⁰² Goodburn & Ngoye "Privacy and the Internet" 172-173.

³⁰³ Burchell 2009 *Electronic Journal of Comparative Law* 2.

violated. A discussion of parents' duties according to the law will be discussed below; the duties might justify their actions when they invade children's privacy.

4.5 Brief background of parental responsibilities and rights

According to common law, the relationship between the child and the parent has been guided by the parental authority.³⁰⁴ The authority gave parents rights, powers and duties and responsibilities in respect of their minor children and the children's property.³⁰⁵ Parental authority comprised guardianship, custody, and access.³⁰⁶ For a child born in wedlock, the parental authority was vested in the father.³⁰⁷ For a child born out of wedlock the authority vested with the mother, and this meant that the unmarried father did not have any authority over their child.³⁰⁸ Fathers of extra-marital children also have rights as dealt with in the Children's Act,³⁰⁹ they were also dealt with for the first time by Constitutional Court in the case of *Fraser v Children's Court, Pretoria North & others*.³¹⁰

The *Constitution* developed the common law position, and it states in s28(1)(b) that children have a right to family or parental care; this shows that the authority of the parent lost its harshness as the best interests of the child now serve as the guiding principle.³¹¹ To give effect to the rights contained in the *Constitution* and to deal with other issues relating to children, the *Children's Act*³¹² was enacted. The *Children's Act* uses the term parental responsibilities and rights instead of parental authority and it gives a comprehensive and non-exhaustive overview of parental rights and responsibilities.³¹³ The shift from "parental authority" to "parental responsibilities and rights" gives recognition

³⁰⁴ Skelton "Parental Responsibilities and Rights" 63. Parental authority comprised of all rights and duties and parents had in respect of a child born within a marriage, and unmarried mother would enjoy parental authority but an unmarried father could not do the same. This included guardianship, custody and access.

³⁰⁵ Heaton *South African Family Law* 283.

³⁰⁶ Heaton "Parental responsibilities and rights" 3.

³⁰⁷ Boberg *The Law of Person and the Family* 315, 458

³⁰⁸ Boberg *The Law of Person and the Family* 315, 458.

³⁰⁹ Section 21 of the *Children's Act*.

³¹⁰ *Fraser v Children's Court, Pretoria North & others* 1997 2 SA 261 (CC), 1997 2 BCLR 153 (CC).

³¹¹ Robinson 2003 *PER/PELJ* 25-26.

³¹² *Children's Act* 38 Of 2005.

³¹³ Section 1(1) of the *Children's Act*. See also Heaton *South African Family Law* 283 on the substitution of the word parental authority with parental responsibilities and rights.

to the fact that a child is a human being who enjoys all the human rights from which a parent derives a responsibility to uphold and protect.³¹⁴ The parents' rights over a child are derived from the parental responsibilities and rights and they start to diminish as the child grows older.³¹⁵ Parental responsibilities and rights were defined by the *Children's Act* as:

The responsibility and the right-

- a) to care for the child;
- b) to maintain contact with the child
- c) to act as guardian of the child;
- d) and to contribute to the maintenance of the child.³¹⁶

Four main elements emanate from the concept *parental responsibilities and rights* and these elements are care, contact, guardianship and duty to maintain the child.³¹⁷ Of the four elements mentioned above the paper is focusing on the responsibility and right to care as mentioned in section 18(2)(a) of the *Children's Act* and it will be referred to as a "duty to care". The discussion below will discuss the parental duty to care in detail.

4.6 Parental duty to care

The duty of the parent to care for a child is a constitutionally entrenched right and it, therefore, deserves constitutional protection and enforcement.³¹⁸ The rights protected in section 28(1)(b) vest in the child and not in the parents or other family members.³¹⁹ The definition of care is given in section 1³²⁰ of the *Children's Act* and it encompasses much

³¹⁴ Skelton & Proudlock "Interpretation, objects, application and implementation of the Children's Act" 29.

³¹⁵ *Gillick v West Norfolk* (1986) 1 AC (HL) 112 para 184. Mrs Gillick was a mother with five daughters under the age of 16. She sought a declaration that it would be unlawful for a doctor to prescribe contraceptives to girls under 16 without the knowledge or consent of the parent. The declaration was refused and the court went further on to state that parental duty would only exist so long as they are needed for the protection of the person and property of the child.

³¹⁶ Section 1(1) of the *Children's Act* 38 Of 2005 read with s18(1).

³¹⁷ Schafer *Child Law in South Africa* 219-227.

³¹⁸ Robinson and Prinsloo 2015 *PER/PELJ* 1674.

³¹⁹ Schafer *Child Law in South Africa* 128.

³²⁰ Section 1 of the *Children's Act* 38 Of 2005 states that care in relation to a child includes, where appropriate,

- a) within available means, providing the child with-
 - (i) a suitable place to live;
 - (ii) living conditions that are conducive to the child's health, well-being and development; and
 - (iii) the necessary financial support
- b) safeguarding and promoting the well-being of the child;

more than just providing a child with a suitable place to live.³²¹ When it comes to care it should be noted that a child has a right to receive care from parents, meaning parents derive their duty to care for the child from the right they have to care of the child.³²² Care is what was previously known as custody³²³ and clearly, from the definition, care does not fall solely on the parent who will be living with the child but against the background of parental responsibilities and rights care needs to be shared.³²⁴ For the purpose of the discussion not all elements of care are going to be discussed; reference will be given derived from the following elements;

....safeguarding and promoting the well-being of the child, respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act, guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development, guiding the behaviour of the child in a humane manner, and maintaining a sound relationship with the child, generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child.³²⁵

It is submitted that in exercising the duty to care parents are governed by the best interests of the child³²⁶ as well as the advancement of the child's wellbeing although the discretion lies with them.³²⁷ The discretion of the parents is acknowledged as far as it

-
- c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
 - d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
 - e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
 - f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
 - g) guiding the behaviour of the child in a humane manner;
 - h) maintaining a sound relationship with the child;
 - i) accommodating any special needs that the child may have; and
 - j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child;

³²¹ Skelton "Parental Responsibilities and Rights" 65.

³²² Skelton & Proudlock "Interpretation, objects, application and implementation of the Children's Act" 29.

³²³ Custody referred to a person's capacity physically to have the child with him or her and to control and supervise the child's life, which is basically monitoring the day-to-day life of the child.

³²⁴ Schafer *Child Law in South Africa* 222.

³²⁵ Section 1(b), (d), (f), (g), and (h) of the *Children's Act*.

³²⁶ Section 28(2) of the *Constitution*.

³²⁷ Gilmore "The limits of Parental Responsibility" 82.

does not conflict with the parental duty, or exceeds the boundaries of acceptable behaviour drawn by the criteria upon which the state might then intervene in the family life to protect children.³²⁸

The Act and the *Constitution* recognise that there are diverse forms of families and that different kinds of care arrangements can be made for the child.³²⁹ Family care is argued to also include care that may be provided by members of the child's extended family.³³⁰ Parental care or family care also includes the care that can be given by an adoptive parent or a foster parent as stated in the case of *SW v F*.³³¹ To have a clearer understanding of the duty to care it is important to briefly discuss the different caregivers according to South African law.

4.6.1 Parental care

The Children's Act makes a distinction between mothers, married fathers, and unmarried fathers.³³² Section 19 of the Act gives a mother full parental responsibilities and rights whether they are married or not except if the mother is a minor. Section 20 gives full parental rights and responsibilities to the biological fathers of a child who is married to the mother or was married to the mother at the time of the child's conception, birth or any time between the two. An unmarried father can now acquire parental responsibilities and rights if they comply with requirements sets out in section 21(1).

The care set out in section 1(a) of the *Children's Act* is qualified by love in the parent or family child relationship.³³³ Parents are the primary caregivers and the relationship between the child and the parent is of a delicate and interwoven nature.³³⁴ Robinson and Prinsloo describe the nature of the relationship between the child and the parent as follows:

³²⁸ Gilmore "The limits of Parental Responsibility" 82.

³²⁹ Skelton "Parental Responsibilities and Rights" 63.

³³⁰ *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC) para 18.

³³¹ *SW v F* 1997 1 SA 198 (CC).

³³² Dhever & Ngwenya 2015 *Without Prejudice* 35.

³³³ Robinson 2015 *PER/PELJ* 1677.

³³⁴ Robinson 2015 *PER/PELJ* 1677.

The delicate nature of the relationship would accordingly be disturbed if it were to be seen as a legal relationship characterized by reciprocal rights and duties or as one determined by statutory provisions, the primary remedy for infringement of which is of a legal nature.³³⁵

The nature of the care given by the parent should always be in accordance with the best interests of the child. The Act makes it clear that parental responsibilities can be shared between both parents regardless of marital status.³³⁶ In the case of *Allsop v McCann*, the court held that section 28(1)(b) of the Children's Act does not only give a father the duty to provide parental care to the child, but the child has a right to receive that parental care.³³⁷

4.6.2 Care-givers

The court in *Heystek v Heystek* reached a conclusion that parental care according to section 28(1)(b) is not only confined to natural parents but it also extends to step-parents, adoptive parents and foster parents.³³⁸ The *Children's Act* in s1 gives a description of a care-giver and it is provided as;

Care-giver means any person other than a parent or guardian, who factually cares for a child and includes- a foster parent; a person who cares for a child with the implied or express consent of a parent or guardian of the child; a person who cares for a child whilst the child is in temporary safe care; the person at the head of a child and youth care centre where a child has been placed; the person at the head of a shelter; a child and youth care worker who cares for a child who is without appropriate family care in the community; and the child at the head of a child-headed household.³³⁹

The above categories of people given by the Act show that the Act also recognises the people who care for the children even though they might not be parents of the child. Section 22 of the *Children's Act* gives a parent or any other person who has parental responsibilities and rights to enter into an agreement for the acquisition of such responsibilities and rights to another person.³⁴⁰ Duty to care for the child can also be

³³⁵ Robinson & Prinsloo 2015 *PER* 1679.

³³⁶ Skelton "Parental Responsibilities and Rights" 64.

³³⁷ *Allsop v McCann* 2001 2 SA 706 (CC).

³³⁸ *Heystek v Heystek* 2002 2 SA 754 (T) para 757.

³³⁹ S1 of the *Children's Act*.

³⁴⁰ S22 of the *Children's Act*

assigned to an interested person by order of a court according to section 23 of the Act.³⁴¹ According to section 27 of the Act, a parent who has sole care for the child can appoint a proper and fit person to be vested with care of a child in the event of the death of the parent.³⁴²

4.6.3 State as caregiver

When it comes to parental care, courts are reluctant to get involved.³⁴³ In other international jurisdictions the courts are also reluctant; in *Martin v Mason* where the court was asked to select an appropriate school for the child as parents were not agreeing, the court refused to be involved.³⁴⁴ The court held that:

..unless a good cause was shown, [the court] did not arrogate to itself functions which ought normally to be performed by one or other of the parents. The duty to care for the child devolved in the first instance upon the custodian parent [that is the caregiving parent], and it was only where that duty was not properly performed that the court would interfere.³⁴⁵

In South Africa the state only interferes when there is an absence of parent-provided care, meaning that the role of the state is an accessory in nature.³⁴⁶ Parental or family care is exercised in the family institution and it is mostly qualified by love, state organs provide appropriate alternative care in terms of section 28(1)(b).³⁴⁷ The State has a duty to protect as well as to respect the parent-child relationship and they should provide measures and means in assisting parents to fulfil their responsibilities towards their children.³⁴⁸ Yaccob J interpreted section 28(1)(b) in the case of the *Government of the Republic of South Africa v Grootboom* as follows:

Aspects of care follow from subsection 1(b) that the Constitution contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking. Through legislation and the common law,

³⁴¹ S23 of the *Children's Act*.

³⁴² S27 of the *Children's Act*.

³⁴³ Heaton *South African Family Law* 285.

³⁴⁴ *Martin v Mason* 1949 1 PH B9 (N).

³⁴⁵ *Martin v Mason* 1949 1 PH B9 (N) para 24.

³⁴⁶ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

³⁴⁷ Robinson 2015 *PER/PELJ* 1678.

³⁴⁸ Robinson 2015 *PER/PELJ* 1678

the obligation to provide shelter in subsection (1)(c) is imposed primarily on the parents or family and only alternatively on the state... *emphasis added*.³⁴⁹

The state only interferes in the decisions of parents only when it is necessary for the protection of the child and in some instances to secure more autonomy for older children.³⁵⁰ Since the rights in section 28(1)(b) vest in the child and not the parent, the section cannot be used to shield parents' discretion from being interfered with by the state.³⁵¹ The section also gives the state a rights-based justification of removing a child who appears to be in need of care from his/her family environment.³⁵² When the state assumes the role of parental care-giver it must make sure that a constitutionally acceptable minimum level of care is provided.³⁵³ There are instances when the duty of the state can arise on a temporary basis for example during a school camping excursion.³⁵⁴ The state's duty may arise even if there is no evidence that there was a lack of parental care.³⁵⁵

4.7 Social media: Parental duty to care v child's privacy

As discussed in the preceding chapters, social media allow a person to have a profile which has personal information and the person is able to add contacts and then most importantly social media is used for communication purposes.³⁵⁶ The use of social media was also argued to be associated with various human rights entrenched in the Bill of Rights. The rights involved include the right to privacy,³⁵⁷ freedom of expression,³⁵⁸

³⁴⁹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 77.

³⁵⁰ Currie & De Waal *The Bill of Rights handbook* 601. Examples includes states interfering in parents making decisions about their children with a motive to further their own personal political or religious convictions and agendas.

³⁵¹ Schafer *Child Law in South Africa* 128.

³⁵² Schafer *Child Law in South Africa* 128.

³⁵³ *Centre for Child Law v MEC for Education, Gauteng* 2008 1 SA 223 (T).

³⁵⁴ Schafer *Child Law in South Africa* 129. *Byrne v Jeugterrein* Unreported 7244/06 (2008, C).

³⁵⁵ *Minister of Education and Culture (House of Delegates) v Azel and Another* 1995 (1) SA 30 (A).

³⁵⁶ Roos 2012 *South African Law Journal* 385.

³⁵⁷ Section 14 of the *Constitution of the Republic of South Africa*, 1996

³⁵⁸ Section 16 of the *Constitution of the Republic of South Africa*, 1996.

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

freedom of association, the right to property, right of access to information, right to human dignity and right to equality and non-discrimination.³⁵⁹

It was also contended in Chapter 2 that in South Africa there is no current legislation dealing explicitly with social media and reference was made to other statutes, common law as well as case law to determine the interface between law and social media. Of importance to the discussion is the use of social media by children, and as seen in chapter 2 social media are associated with serious violations of human rights as well as serious crimes.³⁶⁰

It is important to note that a significant portion of children's friendships are now being carried out partly on social media, thus, respecting children's privacy when they are on social media gives them an opportunity to develop relationships with their peers.³⁶¹ However, because parents and other care-givers are invested with the duty to care for the child, they are bound to monitor their children's use of social media.³⁶² When parents monitor the activities of the children on social media, they are prone to invade the child's right to privacy. The discussion below will give an outline of how children's rights can be limited in South Africa and also the extent to which they can be limited.

Childhood is a process of development from when the child lacks the capacity to when the child can attain capacity, and there is a need for a balance between a child's need for autonomy and also the need to protection.³⁶³ Parents do not have independent rights or interests because everything they do is derived from the responsibilities and rights they have over their children.³⁶⁴ However, parents have a certain degree of latitude in making

-
2. The right in subsection (1) does not extend to -
 - (a) propaganda for war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

³⁵⁹ Section 18 of the *Constitution of the Republic of South Africa*, 1996. Everyone has the right to freedom of association.

³⁶⁰ Chapter 2 discusses this issue in detail.

³⁶¹ Mathiesen 2013 *Ethics Information Technology* 271.

³⁶² Mathiesen 2013 *Ethics Information Technology* 271.

³⁶³ Currie & De Waal *The Bill of Rights handbook* 601.

³⁶⁴ Probert et al "Introduction: Parental Responsibility- Law, Issues and Themes" 26.

a decision as to how to raise their children. This is because children's autonomy develops through maturing naturally as well as parental socialisation and guidance.³⁶⁵ When it comes to the limitation of the rights of children there are two basic for the limitations, the first one is section 36 and the second is section 28(2) of the *Constitution*.

4.7.1 Limitation clause: Section 36

The balancing of the interests of parents and other care-givers *vis-à-vis* children in their relationship is progressively becoming complicated.³⁶⁶ The general point of departure involving the limitation of rights entrenched in the Bill of Rights is section 36 of the *Constitution*. What remains unclear is whether this section is also applicable in private relationships between individuals particularly the relationship between the child and the parent.³⁶⁷ According to section 36:

The limitation must be sanctioned by law of general application; be reasonable and must be justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and also less restrictive means to achieve the purpose.³⁶⁸

The two general requirements of section 36 are that the limitation must be sanctioned by the law of general application and that it should be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In *Dawood v Minister of Home Affairs* the Court held that the law of general application practically means that law must be clear, accessible and precise so that people may know their rights and obligations and also be prospective in operation.³⁶⁹ The law of general application includes legislation, common law (private and public), customary law and policy plus practice of organs of state which are not law.³⁷⁰

³⁶⁵ Human "The theory of children's Rights" 243-249.

³⁶⁶ Robinson 2013 *THRHR* 400.

³⁶⁷ Robinson 2006 *De Jure* 615.

³⁶⁸ Section 36 of the *Constitution*.

³⁶⁹ *Dawood v Minister of Home Affairs* 2000 3 SA 47 (CC).

³⁷⁰ Rautenbach 2014 *PER* 2256.

Since parental responsibilities and rights are governed by the *Constitution*, the *Children's Act* as well as common law and customary law it is submitted that they fall under the law of general application. The submission is also derived from the argument submitted in the case of *S v Makwanyane* that section 277 of the *Criminal Procedure Act* was not law of general application since it did not apply to the whole of South Africa.³⁷¹ The Constitutional Court rejected the argument on the basis that the fact that the section did not apply to the whole country did not mean that it was not law of general application.³⁷² However, the Court did not reject the view that a provision of a legislation cannot be a law of general application. On the basis of the fact that parental responsibilities are entrenched in section 1(1) and 18(1) of the *Children's Act* it is argued that they also amount to the law of general application.

In the case of *S v Makwanyane* the Court gave an exposition of the law of general application:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality . . . The fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of section 33 and the underlying values of the Constitution, bearing in mind that . . . the role of the court is not to second-guess the wisdom of policy choices made by legislators.³⁷³

What courts simply do when dealing with section 36 is that they ascertain whether there had been an infringement and where an infringement exists the courts will then do what

³⁷¹ *S v Makwanyane* 1995 3 SA 391 (CC) para 30.

³⁷² *S v Makwanyane* 1995 3 SA 391 (CC) para 338.

³⁷³ *S v Makwanyane* 1995 3 SA 391 (CC) para 104.

is called a limitation analysis which involves applying all the factors that are listed in section 36 of the *Constitution*.³⁷⁴ The list of factors taken into account when determining the limitation of rights is governed by the proportionality principle. Proportionality principle weighs the harm done by the actions with the benefits that it was designed to achieve.³⁷⁵

One of the factors is the nature of the right, as there are some rights which carry more weight than others, for instance the right to life is more important than the right of access to information.³⁷⁶ The other factor is the importance of the limitation, and this is assessed from a reasonableness approach; this factor is assessed against an open democratic society based on human dignity, equality and freedom.³⁷⁷ The nature and extent of the limitation is also another factor, in the case of *S v Makwanyane* it was held that the extent of the infringement ought not to be more extensive than warranted by the purpose sought.³⁷⁸ Also to be considered is the relationship between the limitation and the purpose for the limitation³⁷⁹ and lastly if there were no restrictive measures which would have achieved the purpose of the limitation.³⁸⁰

In the context of the parent-child relationship and parental duties, the child's right to privacy to use social media can be limited by parental duties. It is significant to note that when parental duties limit the child's right to privacy the limitation should be reasonable and must be justifiable in an open and democratic society based on human dignity, equality and freedom.³⁸¹ Taking into account the factors of limitation, the purpose of the infringement should be important and also if there is a good reason for the infringement. Parents and caregivers should also assess and see whether there are no other less

³⁷⁴ James Constitutional Courts approach to the limitations analysis in Socio-economic rights cases 10.

³⁷⁵ *S v Makwanyane* 1995 3 SA 391 (CC) para 104.

³⁷⁶ Section 36(1)(a) of the *Constitution*. See also Section 37 of the *Constitution*.

³⁷⁷ Section 36(1)(b) of the *Constitution*. See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC).

³⁷⁸ Section 36(1)(c) of the *Constitution*. See also *S v Makwanyane* 1995 3 SA 391 (CC).

³⁷⁹ Section 36(1)(d) of the *Constitution*.

³⁸⁰ Section 36(1)(e) of the *Constitution*.

³⁸¹ Section 31(1) of the *Constitution*.

restrictive measures that could have been used which do not include the infringement of the child's privacy.

4.7.2 *Best interest principle: Section 28(2)*

The only indication in the *Constitution* of how the parent-child relationship and other family members are to be regulated is the best interest principle.³⁸² It is argued that in determining whether the limitation of the rights of the child is reasonable and justifiable in an open and democratic society, it should be proved beyond reasonable doubt that the intervention intends to be in the best interests of the child.³⁸³ On the other hand, the parents are loving and caring and they do not want their children to fall prey to social media predators. However, parents should exercise their duties in a reasonable and justifiable manner.

The best interest principle is entrenched in section 28(2) of the *Constitution* and it states that in all matters concerning a child the child's best interests should be of paramount importance. The best interest principle is also discussed in section 9 of the *Children's Act*.³⁸⁴ On top of abiding by the standards of the international instruments,³⁸⁵ section 28(2) has expanded the meaning to all the aspects of the law that may affect the children.³⁸⁶ Section 28(2) has helped in the determination of the scope and limitation of other competing rights, and the section is both a principle and a right.³⁸⁷ In *Minister for Welfare and Population Development v Fitzpatrick* and others the court held that

Section 28(1) is not exhaustive of children's rights. Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted

³⁸² Currie and De Waal *The Bill of Rights handbook* 620.

³⁸³ Robinson 2006 *De Jure* 617.

³⁸⁴ Section 9 of the *Children's Act* states that; in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.

³⁸⁵ Article 4 of the African Charter on the Rights and Welfare (1999), Article 3 of the Convention on the Rights of the Child (1989).

³⁸⁶ Currie & De Waal *The Bill of Rights handbook* 619.

³⁸⁷ Currie & De Waal *The Bill of Rights handbook* 619.

to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1).³⁸⁸

The court's perspective shows that the section is a right and not merely a guiding principle, and it also strengthens other rights in addition to being a self-standing right.³⁸⁹

The question of the best interests of the child is a question of fact that has to be determined depending with the circumstances of each case.³⁹⁰ Section 7 of the Children's Act provides the factors that must be taken into consideration when trying to determine the best interest standard. Amongst others the factors include:

The nature of the personal relationship between the child and the parent or care-giver; attitude of the parent towards the child; capacity for provision of the parent; the needs of the child; child's age, maturity, background; the child's emotional, intellectual, social and cultural development; the need for protection of the child, any family violence involving the child or a family member of the child; the practical difficulty and expense of a child having contact with the parents, *et cetera* ...³⁹¹

The fact that the child's best interest is of paramount importance does not mean that all the other rights are not important.³⁹² In *MS v M*³⁹³ the court held that:

the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights ... their operation has to take into account their relationship to other rights, which might require that their ambit be limited.³⁹⁴

When balancing the rights of the child and the parent or care-giver the guiding principle is therefore the best interest principle. It is also submitted that the best interest is also limited in terms of section 36 of the *Constitution*, and this also needs to be balanced with the other rights in the Bill of Rights.

4.8 Conclusion

The discussion above outlined the right to privacy of the child in the South African context. The position of the right to privacy in common law and constitutional law was outlined.

³⁸⁸ *Minister for Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 17.

³⁸⁹ Currie & De Waal *The Bill of Rights handbook* 620.

³⁹⁰ Robinson 2011 *TSAR* 126.

³⁹¹ Section 7 of the *Children's Act*.

³⁹² Moyo 2012 *AHRLJ* 148.

³⁹³ *MS v M* 2008 3 SA 232 CC.

³⁹⁴ *MS v M* para 26.

As noted above, children like any other legal subjects in South Africa, are entitled to the protection of their right to privacy. A discussion of the parental responsibilities and rights was also provided. Parents derive their rights from the responsibilities that are vested in them by law. Amongst the responsibilities and the rights is the duty of parents to care for their children. The duty to care does not lie only on the parents, but it also lies within the state as well as other care-givers. When parents exercise the duty to care they should do so in a manner which gives recognition to the paramountcy of the best interests of the child. The extensive use of social media as well as the problems associated with social media has led parents into invading the privacy of their children whilst in the scope of exercising their duty to care for the child. In conclusion the child's right to privacy is limited by the best interest principle as well as the law of general application and parents have to take that into account when they are exercising the duty to care. A more comprehensive discussion of the findings will be made in the chapter to follow.

Chapter 5 Conclusion

The main objective of the dissertation was to ascertain the extent to which parental responsibilities and rights include a right to interfere with a child's right to privacy in using social media. To achieve this goal the research embarked on an extensive and comprehensive discussion of the concept of social media, parental rights and responsibilities as well as the child's right to privacy. This part of the research will conclude the dissertation by reviewing and summarising the dissertation and identifying the findings made in the chapters.

The use of social media was contended to have undesirable effects on children as stated in chapter 2; the effects include child pornography, online sexual harassment, child abduction, stalking and much more. Because of the negative factors associated with social media, parents would want to monitor the activities of their children in the use of social media and this results in parents interfering with the privacy of the child. Chapter 2 gave a comprehensive discussion of social media with much emphasis being put on the interface between social media and the law. The discussion in chapter 2 concluded that the expansion in the use of social media is having an imposing effect in the relationship between the parent-child. This led to the need to have a comprehensive discussion of the parental responsibilities and rights as they form part of the parent-child relationship.

The dissertation embarked on a discussion of parental responsibilities and rights and the child's right to privacy in an international and regional law perspective in chapter 3, while chapter 4 dealt with the South African legal framework. Chapters 3 and 4 affirmed that children are bearers of the right to privacy like any other legal subjects, and the right is protected in international and regional law as well as in South African law. The chapters stated that parents are vested with parental responsibilities and rights and these duties are protected by international, regional as well as national law. It has also been argued that the child's right to privacy can be interfered with by parents and care-givers when fulfilling their parental duties. It is submitted that parents should be guided by the *Constitution* when they are exercising parental duties as discussed in chapter 4. In

addition, the research asserted that biological parents are not the only ones vested with the duty to care but the state and other care-givers can be granted the duty. Also to be noted is that when parents exercise the parental care they are guided by factors outlined in section 1 of the *Children's Act* and the discussion was extensively made in chapter 4.

The major findings of the dissertation were that there are two limitations that limit the child's right to privacy in using social media. The two limitations are the best interests of the child (section 28(2)) and the law of general application (section 36) of the *Constitution*. Section 28(2) states that in all matters concerning a child, the child's best interests should be of paramount importance. It is reasoned that when interfering with the child's right to privacy, it should be done in the framework of the best interests of the child which means the interference should be done for the benefit of the child or for the protection of the child. When referring to parental duties as an interference with the child's right to privacy, the research argues that parental duties as discussed in chapter 4 should be exercised for the protection of the child from social media predators as mentioned in chapter 2. This will mean that the limitation of the best interest principle also extends to the context of parental duties and responsibilities.

Section 36 states that all the rights in the Bill of Rights (including the right to privacy) are limited by the law of general application subject to certain factors. The factors include the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and also less restrictive means to achieve the purpose. As stated in chapter 4, the law of general application includes legislation, common law and customary law and other policies which might not be law. The parental responsibilities and rights are supported by legislation like the *Children's Act* as well as common law and customary law as stated in chapter 4. From that viewpoint, it is submitted that parental responsibilities and rights are laws of general application. If they become laws of general application then factors of limiting rights outlined in section 36 will become applicable when parental duties infringe the child's right to privacy.

In conclusion, the extent to which parental responsibilities and rights include interfering with the child's right to privacy social media and this is guided by the best interest of the child and the law of general application. Lastly, it is submitted that parents also ought to respect, protect and promote the child's privacy as they are the primary care-givers unless there is a justification to invade the right in order to fulfil their parental duties.

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