

# CHILDREN'S PRIVACY RIGHTS, SOCIAL NETWORKING, AND THE MEDIA: POSSIBILITIES AND LIMITATIONS OF (CRIMINAL LAW) PROTECTION

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## ABSTRACT

*Living in modern times has various advantages, but the protection of privacy is not one of them. Today, we are surrounded by technologies that make our lives easier in everyday task management and entertainment; however, they also increase the risk of privacy violation, by collecting and potentially sharing our personal data. Parents and family very often post photos, videos, and stories of their children online. This is called 'sharenting'. By doing so, especially in the absence of consent from the children, they violate children's privacy. It does not necessarily mean they will be legally responsible for such behavior, though indeed, their—right to—privacy is protected from violation by other people, media and press. However, if parents violate the privacy of their—underage—children, as with 'sharenting', in Croatia, the children do not have the right to protect themselves, unless it constitutes a criminal offense. Whereas they do have the right to privacy and its protection, it is not from their parents. This problem of media violation of privacy rights is juxtaposed with the freedom of expression. Therefore, this study aims to reveal the legislative and practical implications of this issue in everyday life, addressing: 1. the violation of children's privacy rights by media and press; and 2. the violation of children's privacy rights by their parents or family through 'sharenting' on social networking sites.*

## KEYWORDS

*right to privacy  
privacy of children  
protection of children's right to privacy  
ECtHR case-law on privacy*

## 1. Introduction remarks about privacy issues

With the expansion of technology and it becoming indispensable to our lives, it can safely be said that our normal<sup>2</sup> way of life has ended. We have a new technology normal. Almost everything today is instantly available and accessible on the internet. Nevertheless,

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2 | In this case normal means everyday life without the interference and addiction to technology.



whether we are aware of it or not, this has a price—our privacy. The right to privacy, especially children’s—who are a vulnerable group—is a recognized right. International and national regulations, as well as some softer regulations, try to protect it.<sup>3</sup> However, very often, we voluntarily breach our privacy by leaving traces of information everywhere on the internet.

There is one unified definition of privacy and various countries define it differently, according to the context and circumstances prevailing in a particular society.<sup>4</sup> The right to privacy refers to the concept of one’s personal information enjoying legal protection from public scrutiny and access; otherwise, it would not constitute a right. Haydel writes, ‘privacy generally refers to an individual’s right to seclusion, or right to be free from public interference.’<sup>5</sup> In the late 1870s, Judge Thomas Cooley argued that people had the right to be left alone.<sup>6</sup> Warren and Brandeis further elaborated on this concept in their famous paper, ‘The Right to Privacy.’<sup>7</sup> They made a significant impact on the right to privacy issue, saying that the violation of privacy can expose a person to psychological pain, which is the same as, or perhaps even greater than, physical injuries.<sup>8</sup> Sharp emphasizes that ‘the right to privacy refers to the concept that one’s personal information is protected from public scrutiny.’<sup>9</sup> In addition, Prosser significantly contributed to the field; in his article, he referred to Warren and Brandeis’s conclusion by organizing the torts in ‘four distinct kinds of invasion.’<sup>10</sup> As Richards and Solove noted, Prosser studied torts for decades, devoting a significant part of his career to the tort of breach of privacy.<sup>11</sup>

However, Solove, believes that researchers are lost in trying to find privacy, and are therefore, in a conceptual jungle and mess.<sup>12</sup> Thompson, meanwhile, simply claims that ‘nobody seems to have any clear vision of what privacy is’,<sup>13</sup> nor, by extension, the right to privacy.

Nevertheless, Archard and Moor attempted to found their way into a privacy mess and tried to define it, or at least determine what it should comprise. Accordingly, Archard defines privacy as having ‘limited access to personal information’,<sup>14</sup> which includes someone’s age, address, phone number, income, race, purchasing habits, ethnic origin, fingerprints, DNA, medical history, blood type, sexual orientation, religion, education, and political assimilation. The right to privacy was defined by Moor as the ‘right to limit public access to oneself and to information about oneself’<sup>15</sup> It refers to limiting public access to information about someone with guarantees of legal protection. Privacy can take different forms; for example,

3 | See Nissim and Wood, 2018, pp. 1–17.

4 | Dragičević Prtenjača, 2014, p. 166.

5 | Haydel, 2009; Other articles in Issues Related to Speech, Press, Assembly, or Petition, Media, General Legal Concepts and Theories, in *The First Amendment Encyclopedia* presented by the John Seigenthaler Chair of Excellence in First Amendment Studies [Online]. Available at: <https://www.mtsu.edu/first-amendment/article/1141/privacy> (Accessed: 8 August 2022).

6 | Haydel, 2009; also see Cooley, 1879, p. 29.

7 | See Warren and Brandeis, 1890, pp. 193–220.

8 | *Ibid.*

9 | Sharp, 2013.

10 | Prosser, 1960, p. 389.

11 | From 1940, when he began studying torts of invasion of privacy, he spent the next thirty years trying to understand and categorize the hundreds of court cases that represented some form of invasion of privacy. Richards and Solove, 2010, p. 1888.

12 | Solove, 2006, pp. 477–478.

13 | Thompson, 2017.

14 | Moor in Archard, 2006, p. 16. See also Moor, 2003, p. 218.

15 | See Archard, 2006, p. 17.

right to personal and family life, dignity, correspondence, home, secrecy of the personal data, photographs and IP addresses internet subscriber information associated with specific dynamic IP addresses assigned at certain times (case *Benedik v. Slovenia*).<sup>16</sup> Often, this right conflicts with the freedom of expression. Thus, as Majnarić notes, it is necessary to weigh competing interests to achieve a fair balance.<sup>17</sup> Analyzing conflicting interests, freedom, and rights, especially between media freedom and personal rights, Radolović states that the right to privacy is really the right to non-disclosure of information about a person's private life—e.g., about health, illness and feelings.<sup>18</sup>

The right to privacy of famous people has proven to be particularly controversial. Badrov believes that privacy protection of such people has narrowed. She believes there is no precise definition of the concept of a public figure; nevertheless, she concludes that there are three basic groups of public figures, two of which are absolute public figures and the third is relative public figures.<sup>19</sup> Such comprehension is in accordance with Haydel's theory, when she states that 'in public, there is little or no First Amendment protection of privacy',<sup>20</sup> because

In *Cohen v. California* (1971), the Court held that the privacy concerns of individuals in a public place were outweighed by the First Amendment's protection of speech, even when the speech included profanity in a political statement written on a man's jacket.<sup>21</sup>

However, freedom of expression (freedom of speech) in common law, especially in the United States, has a special and primary position, and is protected by the First Amendment.<sup>22</sup>

A slightly different situation exists on the European continent: the European Court of Human Rights (hereafter: ECtHR or the Court) stated in the case *Von Hannover v. Germany* (no. 2) (2012) that even public icons can have the right to privacy. If they are filmed in a public place, it can be considered a violation of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedom (hereafter: Convention), especially if the recording was not done in public interest, but only for entertainment.<sup>23</sup> However, in that concrete case, the Court concluded that Article 8 of the Convention had not been violated.<sup>24</sup>

16 | ECtHR case *Benedik v. Slovenia*, (Appl. No. 62357/14), from 24.4.2018 (final 24.07.2018), paras. 108–109.

17 | Majnarić, 2020, p. 1308.

18 | Radolović, 2007, p. 20.

19 | Badrov, 2007, pp. 80–81.

20 | Haydel, 2009.

21 | Haydel, 2009.

22 | More information about freedom of speech in general are: History.com, Freedom of Speech [Online]. Available at: <https://www.history.com/topics/united-states-constitution/freedom-of-speech> (Accessed: 4 October 2022).

23 | See ECtHR Judgment *Von Hannover v. Germany* (No. 2) (2012), (Appl. Nos. 40660/08 and 60641/08), 7 February 2012; paras. 31, 32.

24 | *Von Hannover v. Germany* (No. 2), paras. 118, 125, 126.

It considered that the Federal Court of Justice upheld the applicants' request to ban the publication of two photographs that it considered not to contribute to matters of general interest. However, he rejected the applicants' request to ban the publication of a third photo showing the application walking during a skiing holiday in St. Moritz and which was accompanied by an article on, among other things, the deteriorating health of Prince Rainer. – ECtHR case *Von Hannover v. Germany* (No. 2), para. 117. See also Guide to the Case-Law of the of the European Court of Human Rights - Data protection (last updated on 31 December 2021), p. 20, para. 67.

When it comes to privacy and the right to privacy, special protection should be guaranteed to children. This is the rise of a new area: the protection of children's privacy rights. Livingstone, Stoilova, and Nandagiri emphasized that 'children are perceived as more vulnerable than adults to privacy online threats, such as re-identification, due to their lack of digital skills or awareness of privacy risks'.<sup>25</sup> In addition, when the data is monetized, children can face far more serious threats, regarding their personal data being used for online marketing and commercial activities.<sup>26</sup> Heirman, Walrave, Ponnet, and Van Gool, note that 'commercial websites are increasingly soliciting people' to disclose personal information<sup>27</sup> and urging 'underage visitors to disclose personal information for a variety of data processing activities', by first requiring them to fill in a registration form that records personal information.<sup>28</sup> Without this, they are not given full access to the web content.<sup>29</sup> The possibility of such information disclosure being used for commercial incentives has concerned public, scientists, politicians, and parents.<sup>30</sup> However, adolescents are 'less concerned about possible privacy-related risks, including identity theft and loss of control over personal data'.<sup>31</sup> Accordingly, there is a 'growing concern around the collection, use, and sale of children's information' by private companies to the highest bidder.<sup>32</sup> Parents themselves make some of this information accessible by posting their children's photos, videos, and other personal information on social networking sites. This behavior is called 'sharenting'.<sup>33</sup> Amon, Kartvelishvili, Bertenthal, Hugenberg, and Kapadia note that 'according to the 5Rights Foundation, a London-based non-profit organization focused on creating a safer and more beneficial Internet experience for children and teenagers, extensive datasets containing children's information are being increasingly used for commercial purposes online.'<sup>34</sup>

In most cases, children cannot seek to protect their privacy directly. They cannot fight for their rights on their own, but require their legal guardians' help. In some cases, the interests of the legal guardians—parents—can conflict with the—best—interests of the child, as can be seen in 'sharenting'.<sup>35</sup> Such a violation can also occur when media infringes on children's rights when reporting. With public figures, the media often takes some information from their social network, and publishes the same in the wider media or press. This can also happen with non-famous people when they post on social networking sites, and the media takes over some interesting information or story. Milas Klarić stated that most people do not hear the 'warnings and recommendations of experts, that pictures of children and personal information should not be published on social networks' and in media.<sup>36</sup> In that regard, the media as well as parents and guardians should note

25 | Livingstone et al., 2018, p. 28.

26 | Ibid., p. 28.

27 | Heirman et al., 2013, p. 1.

28 | Ibid.

29 | Ibid.

30 | Ibid.

31 | Ibid.

32 | Amon et al., 2022, p. 5.

33 | 'Sharenting' comprehends posting photos, videos, or stories of their children, by parents. Amon et al., 2022, p. 2.

34 | Ibid., p. 5.

35 | Ibid., p. 2.

36 | Milas Klarić, 2017.

that almost every piece of information published on the internet remains on the internet.<sup>37</sup> Indeed, it can be said that the right to be forgotten, stipulated in the General Data Protection Regulation (GDPR), no longer exists.

## 2. Children's privacy rights

A famous reality star<sup>38</sup> publishes photos of her children on most occasions, often combining family and business, promoting both. According to Bilan's research, between January 1, 2015 and February 22, 2015, this person posted 440 posts on Twitter and Facebook, 27 of which were with their children. They use Twitter to expand their business and use their children—deliberately or unintentionally—for that purpose.<sup>39</sup> This is only one example amongst others in the celebrity world.

However, such cases are also common among people who are not public figures. By 'sharenting' and posting photos in which the child's identity is not protected, Bilan believes that parents endanger their children's right to privacy. Amon, Kartvelishvili, Bertenthal, Hugenberg, and Kapadia note that 'parents enjoy posting blogs about their children as a way to establish their new identity as a parent, earn extra income, and receive further support.'<sup>40</sup> This observation is in line with the aforementioned case of the famous reality star.

Although public personalities have less privacy than others, Bilan states that this does not mean their children should be exposed to even greater media pressure by publishing their photos on numerous profiles, sometimes even against their will.<sup>41</sup> The media very often takes over some photos and posts on social networking sites—e.g., Instagram and Facebook. Unfortunately, children of public figures cannot choose whether they want to appear in the media. Indeed, they are sometimes insulted in the media, when their parents are being criticized. Negative articles about the children of famous people are accompanied by readers' insults in the comments, which are published online. Many such comments are not removed by administrators; indeed, they are not even recognized as being against children's welfare.<sup>42</sup> Nevertheless, such articles impact children's lives in their social surroundings. They can lose their friends and be exposed to embarrassment and insults. Milas Klarić notes how 'children are much more sensitive than adults and have a harder time dealing with possible problems brought by fame and numerous fans and often cannot cope with the burden that fame carries.'<sup>43</sup>

37 | Amon et al., 2022, p. 2.

The time has change and it is not the same situation that was in past days with the press. Although the information was published, after a while it was going to be forgotten. With today's technology, this is not the case anymore. Everything that is published stays somewhere and can be reached again.

38 | Banner, 2022.

39 | Bilan, 2017, pp. 1763–1765.

40 | Amon et al., 2022, p. 2.

41 | Bilan, 2017, pp. 1763, 1765.

42 | Milas Klarić, 2017.

43 | Ibid.

All children have the right to be left alone. As Milas Klarić notes, ‘media should always keep this in mind’.<sup>44</sup> Ironically, the media also plays a major role in promoting children’s rights. There are different types of media coverage: one that has a positive effect and one that has a negative effect. Emphasizing the intellectual, artistic, and sport achievements of children encourage other children as well, which is a positive effect of the media coverage.<sup>45</sup>

### | **2.1. International regulation and ECtHR case law in child privacy protection**

New technology and the internet enables rapid communication among large number of users, and the exchange of large amount of data in various formats, globally. There are an increasing number of online services, systems, and social networking sites which users use, often unaware of the data traces they are leaving.<sup>46</sup> Most people, especially children, are unaware that such data can be abused and constitute a violation of their rights. Livingstone, Stoilova, and Nandagiri highlight the online risks that children face depending on technological affordances, as well as their own online practices.<sup>47</sup> Amon, Kartvelishvili, Bertenthal, Hugenberg, and Kapadia, argue that

Potential risks include identity theft resulting from the leaking of private, identifiable information; bullying from the child’s peers; possession and misuse of photographs by strangers, including for sexual or political motives; and even kidnapping by sexual predators. In addition to overtly malicious actions and intentions, the nature of today’s Internet economy allows private corporations to liberally collect vast amounts of information from online users, including children, in the name of marketing.<sup>48</sup>

Because of these concerns and their impact on human rights, the General Assembly of the United Nations adopted resolution 68/167 in December 2013. Special focus was on practices and legislation related to the monitoring of communication, interception, collection of personal data, and protection of human rights.<sup>49</sup> Since 2015, a Special Rapporteur for the right to privacy has been operating within the UN. His /hers, the mandate includes, among other things, collecting data for the purpose of reporting on the right to privacy and compiling recommendations for the protection and promotion of this right; monitoring violations of the right to privacy; and keeping track of challenges to new technologies.<sup>50</sup>

The resolution emphasizes that every state should:

- (a) To respect and protect the right to privacy, including in the context of digital communication;

44 | Ibid.

45 | Ibid.

46 | For more see Nyst and Falchetta, 2017, pp. 104–118.

47 | Livingstone et al., 2018, p. 28.

48 | Amon et al., 2022, p. 2.

49 | Resolution adopted by the General Assembly on 18 December 2013 [on the report of the Third Committee (A/68/456/Add.2)] 68/167. The right to privacy in the digital age.

50 | United Nations (no date) Special Rapporteur on the right to privacy [Online]. Available at: <https://www.ohchr.org/en/special-procedures/sr-privacy> (Accessed: 10 August 2022).

- (b) To take measures to put an end to violations of those rights and to create the conditions to prevent such violations, including by ensuring that relevant national legislation complies with their obligations under international human rights law;
- (c) To review their procedures, practices and legislation regarding the surveillance of communications, their interception and the collection of personal data, including mass surveillance, interception and collection, with a view to upholding the right to privacy by ensuring the full and effective implementation of all their obligations under international human rights law;
- (d) To establish or maintain existing independent, effective domestic oversight mechanisms capable of ensuring transparency, as appropriate, and accountability for State surveillance of communications, their interception and the collection of personal data.<sup>51</sup>

In addition to the Resolution, privacy today is guaranteed by many international, national, and regional documents, some of which are mandatory whereas others represent soft law. The most famous are the Universal Declaration of Human Rights (1948)<sup>52</sup>, the Covenant on Civil and Political Rights (1966; subsequently: Covenant)<sup>53</sup>, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950; Convention),<sup>54</sup> and others such as the Declaration on mass communication media and Human Rights (hereinafter: Declaration on mass communication),<sup>55</sup> the Charter of Fundamental Rights of the European Union (subsequently: EU Charter)<sup>56</sup>, the Treaty on the Functioning of the European Union (hereinafter: TFEU)<sup>57</sup>, the Treaty on the European Union (hereinafter: TEU)<sup>58</sup>, Directive 95/46/EC<sup>59</sup> on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (hereinafter: Directive on privacy and electronic communications)<sup>60</sup> and General Data Protection Regulation (GDPR), all of which also apply to children.

51 | Dot 4 p. 2 of the Resolution.

52 | Art. 12 privacy protection and Art. 26 para. 3 the right of choice of education of children—Universal Declaration of Human Rights 1948 (OG-MC-12/09).

53 | Art. 17 of the International Covenant on Civil and Political Rights, 1966.

54 | Privacy protection is guaranteed by Art. 8 (the right to privacy) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Besides Art. 8 in Art. 2 of the (First) Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the right to education to everybody especially the children in line with personal convictions of their parents which also may constitute privacy issue.

55 | Council of Europe Declaration on mass communication media and Human Rights, Resolution 428 (1970).

56 | Charter of Fundamental Rights of the European Union (2012/C 326/02) OJ C 326.

57 | Art. 16 of the Consolidated Version of The Treaty on the Functioning of the European Union OJ C 326/2012, 26.10.2012.

58 | Art. 39 of the Treaty on the European Union, OJ C 326/2012, 26.10.2012.

59 | Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, On the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995.

60 | Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002.

Some documents emphasize the protection of children's privacy. The Universal Declaration of Human Rights, in addition to Article 12, also protects the privacy of children through the right to education and choice of education in Article 26 paragraph 3.

The Covenant on Civil and Political Rights protects the privacy of children not only through Article 17 but also Article 14 paragraph 1, regarding 'proceedings [that] concern matrimonial disputes or the guardianship of children'; Article 18 paragraph 4 to 'ensure the religious and moral education of their children in conformity with their own convictions'; Article 23 paragraph 4 that protects the child's rights in the matrimonial merits, specifically dissolution; and Article 24 that generally stipulates the rights of the child to 'measures of protection as are required by his status as a minor',<sup>61</sup> and the right to have a name and nationality.<sup>62</sup>

Some relevant soft law documents regarding children's rights include the Geneva Declaration of the Rights of the Child (1924)<sup>63</sup> and Declaration of the Rights of the Child (1959).<sup>64</sup> However, none of these specifically mention children's right to privacy, although the Declaration does state children's rights to name and nationality.<sup>65</sup>

The Convention on the Rights of the Child (1989) is a special document that protects children's rights, including privacy, and obliges states to respect these rights.<sup>66</sup> Kopic and Korajac state that this convention was the first document in which the child is approached as a subject with rights, and not only as a person who needs special protection.<sup>67</sup> It obligates all states that ratified the Convention to comply with its provisions.<sup>68</sup> Hrabar considers this Convention to be the most important and fundamental international global document protecting children's rights.<sup>69</sup> The *spiritus movens* of this Convention are to act in accordance with the child's best interest. Article 16 of this Convention guarantees every child the right to legal protection against interference with his privacy, family, home, or correspondence, as well as protection against unlawful attacks on his honor and reputation.<sup>70</sup> Some additional rights protected by the Convention reflects the privacy dimension of the child. Therefore, Article 12 stipulates the right to express their views freely in line with their age and maturity in all matters affecting them, if capable of forming their own views. This is of special importance regarding children's right to consent when taking and publishing their photos, as with all other issues in connection with their privacy. Article 13 regulates the child's right to freedom of expression, and Article 14 regulates the child's freedom of thought, conscience, and religion.

The EU Charter guarantees the right to privacy in Article 7 (Respect for private and family life), Article 8 (Protection of personal data), Article 9 (Right to marry and right to found a family), and Article 10 (Freedom of thought, conscience, and religion), and Article 14 (the right to education of all populations, especially children). Article 24 emphasizes

61 | Art. 24 para. 1 of the Covenant.

62 | Art. 24 paras. 2–3 of the Covenant.

63 | Geneva Declaration of the Rights of the Child, Adopted 26 September, 1924, League of Nations.

64 | Declaration of the Rights of the Child, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).

65 | Principle 3 of the Declaration.

66 | Convention on the Rights of the Child (1989).

67 | Kopic and Korajac, 2010, p. 46.

68 | *Ibid.*

69 | Hrabar, 2016, p. 27.

70 | Art. 16 paras. 1–2 of the Convention on the Rights of the Child.

children's protection and care which is necessary for their well-being, the right to express their views freely which shall be taken into consideration on matters which concern them in accordance with their age and maturity.<sup>71</sup> As for Article 12 of the Convention on the Rights of the Child, this norm can have significant legal importance regarding children's right to provide consent when taking and publishing their photos. Additionally, by Article 32, the child is protected from labor exploitation.

The GDPR regulates children's rights and age of lawful consent in relation to information society services,<sup>72</sup> and also emphasizes the importance and sensitivities of the child's rights and interests, which the controller must bear in mind when processing data. If they conclude that the interest of the child overrides the legitimate interest, they must pursue in that direction (the best interest of the child).<sup>73</sup>

Article 8 regulates that the member states can set the consent age limit to 13 years, but only by law and not by other regulations. The age limit can not be lower than 13 years of age.

Otherwise, the consent age limit for processing of personal information is 16 years, and if the child is under 16 years there has to be consent for the processing of personal information of the parents or the holder of parental responsibility over the child.

In Article 19 of the Implementation of the General Data Protection Regulation Act (IGDPRA), it<sup>74</sup> is defined that when applying Article 6 paragraph 1 dot. a) of the GDPR, the processing of a child's personal data in Croatia is legal if the child is at least 16 years old.<sup>75</sup> In all other senses, the GDPR applies in the same scope as for an adult.

Directive (EU) 2016/800 safeguards children who are suspects in criminal proceedings<sup>76</sup> and guarantees their right to privacy in Article 14 regarding hearings involving children, which should primarily be held in the absence of the public.

The accessibility of personal data of minors who commit illegal activities becomes a special issue. Therefore, in the case of *Rigas satiksme (C-13/16, EU:C:2017:336)* the Court of the European Union (Curia) decided that police or other authorized bodies would forward

71 | Art. 24 para. 1 of the EU Charter.

72 | Art. 8 Conditions applicable to child's consent in relation to information society services.

1. Where point (a) of Art. 6(1) applies, in relation to the offer of information society services directly to a child, the processing of the personal data of a child shall be lawful where the child is at least 16 years old. Where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorized by the holder of parental responsibility over the child. Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years.

73 | Art. 6 para. 1 al. (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

74 | Implementation of the General Data Protection Regulation Act, Official Gazette, 42/18.

75 | For more see Annual Report on the Work of the Personal Data Protection Agency for the period from January 1, 2020 to December 31, 2020, p. 66 [Online]. Available at: [https://www.sabor.hr/sites/default/files/uploads/sabor/2021-04-01/134202/GODISNJE\\_IZVJESCE\\_AZOP\\_2020.pdf](https://www.sabor.hr/sites/default/files/uploads/sabor/2021-04-01/134202/GODISNJE_IZVJESCE_AZOP_2020.pdf) (Accessed: 10 August 2022).

76 | Directive (EU) 2016/800 of the European Parliament and of the Council, of 11 May 2016, on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21.5.2016.

the personal data of the perpetrator of the offense or for tort proceedings, even if the person is minor.<sup>77</sup>

### 2.1.1. ECtHR case-law

The European Court of Human Rights (ECtHR) has a rich case law in the protection of the right to privacy guaranteed under Article 8 of the Convention (Right to respect for private and family life). This paper aims to focus on key and relevant cases, primarily connected to the violation of children's privacy rights; additionally, it will also address some key cases regarding the right to privacy.

The Court in the *Case of Axel Springer AG v. Germany*,<sup>78</sup> states how the right to privacy is a broad concept that cannot be exhaustively defined and which encompasses the physical and psychological integrity of a person; therefore, it can include multiple aspects of a person's identity, such as gender identification, sexual orientation, name, or elements that refer to a person's right to his own image.<sup>79</sup> Furthermore, it notes how this term includes personal information that individuals can legitimately expect not to be disclosed without their consent.<sup>80</sup> Accordingly, the European Court establishes the concept of private life,<sup>81</sup> setting some conditions or key factors that need to be considered when balancing the right to privacy and reputation under Article 8 and freedom of expression under Article 10. These include: (a) contribution to a debate of general interest; (b) how famous the person concerned and the subject of the report is; (c) previous behavior of the person concerned; (d) method of obtaining the information and its veracity; (e) content, form, and consequences of publication; and (f) severity of the imposed sanction.<sup>82</sup>

The court also states that the concept of private life is not limited to the inner circle in which an individual lives as they wish and exclude the outside world, as elaborated in the case of *Niemietz v. Germany*.<sup>83</sup> This right implies protection from taking photographs of others, through which the identity of a person can be uncovered. Therefore, the European Court has a firm standpoint regarding this matter. In the *Case of López Ribalda and Others v. Spain*,<sup>84</sup> the Court stated that a person's image represents one of the main characteristics of their personality because it reveals their unique features. The right to protect one's image is, therefore, one of the 'essential elements of personal development.'<sup>85</sup>

Everyone, including public figures, has a legitimate expectation that their private life will be protected,<sup>86</sup> along with their right to control the use of their images. Therefore,

77 | ...or personal data of the persons exercising parental authority on the ground that the person who caused the damage was a minor. *Judgment of 4 May 2017, Rigas satiksme (C-13/16, EU:C:2017:336)*, para. 33.

78 | ECtHR *Case of Axel Springer AG v. Germany* (Appl. No. 39954/08), 7.2.2012.

79 | *Case of Axel Springer AG v. Germany*, para. 83.

80 | *Case of Axel Springer AG v. Germany*, para. 83.

81 | *Case of Axel Springer AG v. Germany*, para. 83.

82 | *Case of Axel Springer AG v. Germany*, paras. 89–95.

83 | ECtHR *Case of Niemietz v. Germany* (Appl. No. 13710/88), 16 December 1992, para. 29.

84 | ECtHR *Case of López Ribalda and Others v. Spain* (Appl. Nos. 1874/13 and 8567/13), 17 October 2019, para. 89.

85 | *Case of López Ribalda and Others v. Spain*, para. 89.

86 | ECtHR *Case Alkaya v. Tukey* (Appl. No. 42811/06), 9.10.2012 (final 09.01.2013.), paras. 31–33, 40–41. A well-known Turkish actress was the victim of a burglary. One newspaper published that news, citing among other information, her address. After that publication in the newspaper, people, strange people were waiting her in front of her house, so she no longer felt safe.

the Court found the violation of Article 8 in the *Case of Reklos and Davourlis v. Greece*<sup>87</sup>, because the applicants had not consented to their newborn's photograph being taken at the private clinic.<sup>88</sup> In another famous case, *Von Hannover v. Germany* (No. 2), the Court proclaimed that the protection of the rights and reputation has particular importance in this area, 'as photographs may contain very personal or even intimate information about a person or his family'.<sup>89</sup> Therefore 'a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers.'<sup>90</sup> The case of *Rodina v. Latvia*<sup>91</sup> concluded that even a neutral photo accompanied by a story that portrays an individual in a negative light is a serious violation of their privacy, if they are not seeking publicity.<sup>92</sup> The Court understood how individuals can legitimately expect that their personal information would not be disclosed without their consent in the cases of *Flinkkilä and Others v. Finland*<sup>93</sup> and *Saaristo and Others v. Finland*.<sup>94</sup>

The Court showed special care toward protecting children's privacy rights, especially concerning their photos. Therefore, in the case *N. Š. v. Croatia*,<sup>95</sup> the Court stated that due to children's vulnerability, the protection of their personal data was essential<sup>96</sup> because of their 'identity, well-being and dignity, personality development, psychological integrity, and relations with other human beings'.<sup>97</sup> Hence, in *Bogomolova v. Russia*,<sup>98</sup> which concerned the publication of a child's photograph on the cover page of a booklet entitled *Children need a family* published by a Center for Psychological, Medical, and Social Support, ECtHR found the case to be in violation of Article 8 of the Convention.<sup>99</sup> In the case, the mother consented to a photo of her son being taken by one person who was traveling with them; however, she was unaware of the purpose for which the picture would be used.

87 | ECtHR *Case of Reklos and Davourlis v. Greece* (Appl. No. 1234/05), 15 January 2009 (final 15.04.2009).

88 | *Case of Reklos and Davourlis v. Greece*, paras. 41–43.

89 | *Von Hannover v. Germany* (No. 2), para. 103.

90 | *Von Hannover v. Germany* (No. 2), para. 96.

91 | ECtHR *Case Rodina v. Latvia* (Appl. Nos. 48534/10 and 19532/15), 14 May 2020 (final 14.08.2020); The applicant, together with her husband and son, brought proceedings against the publisher, the applicant's sister N.L. and her niece's husband J.K. (who had made some of the contested statements) before the Riga City Centre District Court (Rīgas pilsētas Centra rajona tiesa). The applicant requested that fourteen statements in the article be declared false and that the publication of her family's photograph be declared unlawful. para. 12.

92 | *Case Rodina v. Latvia*, para. 131.

93 | ECtHR *Case of Flinkkilä and Others v. Finland* (Appl. No. 25576/04), 6 April 2010 (final 06.07.2010.), para. 75.

94 | ECtHR *Case of Saaristo and Others v. Finland* (Appl. No. 184/06), 12 October 2010 (final 12.01.2011.), para. 61.

95 | ECtHR *Case of N. Š. v. Croatia* (Application No. 36908/13) 10 September 2020 (final 10.12.2020), paras. 92–117.

96 | Guide, p. 71.

97 | *Case of N. Š. v. Croatia*, para. 99.

98 | ECtHR *Case Bogomolova v. Russia* (Appl. No. 13812/09) 20 June 2017 (final 13.11.2017), paras. 54–58.

99 | Guide to the Case-Law of the of the European Court of Human Rights- Data protection (last updated on 31 December 2021; hereinafter: Guide), p. 52, para. 229.

Similarly, in the case of *Söderman v. Sweden*, the court ruled that there was a violation of the right to private life<sup>100</sup> due to the absence of clear legal provisions that criminalize the act of secretly filming a naked child (minor).<sup>101</sup> In addition, in the case of *K.U. v. Finland*,<sup>102</sup> the Court found a violation of Article 8 on account of the lack of a legal basis; this was to enable authorities to oblige an internet access provider to disclose the identity of a person wanted for placing an indecent advertisement of a minor on a homosexual dating site, making the minor a target for pedophiles. This action disabled the identification of the said person to bring him to justice.<sup>103</sup>

Notably, the privacy protection of telecommunications and internet service users must be put in perspective. Sometimes, privacy protection is outweighed by other legitimate interests. However, in this case, there were two conflicting interests regarding the right to privacy: the right to privacy of the perpetrator and that of the minor, plus the legitimate interest to investigate and initiate criminal proceedings. Therefore, privacy protection must not present an obstacle in criminal investigation, as noted:

An overriding requirement of confidentiality of connection data may, in some circumstances, prove incompatible with Article 8 if it impedes an effective criminal investigation with the aim of identifying and prosecuting the perpetrator of an offense committed via the Internet.<sup>104</sup>

The case of *Gaskin v. the United Kingdom*<sup>105</sup> is a well-known case representing the importance of right to privacy, in which the Court found a violation of Article 8.<sup>106</sup> Although the applicant was not a child when he addressed the court, the case dealt with his personal data when he was a child. Gaskin was placed in public care in the UK as a baby, where he stayed until he reached his maturity. According to his statement, he was abused during that time, and he requested access to his records kept by Liverpool Social Services.<sup>107</sup> Partial access was permitted to him, due to the claims of confidentiality owed to third-party contributors, which prohibited disclosure of his records on the whole. In this case, the national system failed to provide for an appeal because of the refusal by the social services to grant access to all the documents that refer to him. Hence, every system

must protect the interests of anyone seeking to consult documents relating to his private and family life, and is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent.<sup>108</sup>

100 | Art. 8.

101 | ECtHR *Case Söderman v. Sweden* (Appl. No. 5786/08); 12 November 2013.

102 | ECtHR *Case of K.U. v. Finland* (Appl. No. 2872/02), 2 December 2008 (final 02.03.2009), paras. 49–50.

103 | Guide, p. 66, para. 300; Guide, p. 22, para. 80.

104 | Guide, p. 17, para. 49.

105 | ECtHR *Case of Gaskin v. the United Kingdom* (Appl. No. 10454/83), 7 July 1989.

106 | *Case of Gaskin v. the United Kingdom*, para. 49.

107 | *Case of Gaskin v. the United Kingdom*, para. 49.

108 | Guide, p. 60, para. 272.

In the case of *Kurier Zeitungsverlag und Druckerei GmbH v. Austria*,<sup>109</sup> the Court found no violation of Article 10 and prioritized Article 8. The applicant indicated that their freedom of expression had been violated by German courts when they ruled in favor of the minor whose identity and personal data were published by the applicant during his parents' marital disputes.<sup>110</sup> In another case, *Couderc and Hachette Filipacchi Associés v. France*,<sup>111</sup> referring to privacy rights through opposite Prisma or the other side of the coin, of violation of Article 10, the Court ruled in favor of the applicant and its freedom of expression. The Court found how the national 'court ruling against the publication director and the publisher of a weekly magazine for publishing an article and photographs revealing the existence of a monarch's secret child'<sup>112</sup> which would otherwise present an invasion of the Prince's private life,<sup>113</sup> was in line with the ECHR. Following the criteria settled in the *Case of Axel Springer AG v. Germany*,<sup>114</sup> the Court found a violation of Article 10, stating that

Domestic courts did not give due consideration to the principles and criteria laid down by the Court's case law for balancing the right to respect for private life and the right to freedom of expression, and they exceeded the margin of appreciation afforded to them and failed to strike a reasonable balance of proportionality between the measures restricting the applicants' right to freedom of expression, imposed by them, and the legitimate aim pursued.<sup>115</sup>

According to the Court's view, the press must not exceed certain limits, especially with regard to the protection of the privacy rights, reputation, and rights of others, as in the *Case of Kaboğlu and Oran v. Turkey*,<sup>116</sup> in which the Court found a violation of Article 8. However, the Court emphasized the importance of the press and its role of a 'public watchdog'<sup>117</sup> in providing information on all matters of public interest, especially those that can lead to useful discussion in society.<sup>118</sup> Hence, it highlights the importance of the press following the criteria when reporting certain events, simultaneously indicating the journalists' duty to show prudence and caution,<sup>119</sup> especially when children and their rights are in question.

## | 2.2. Situation in Croatia

Despite regulations that stipulate the protection of children's privacy in the media, journalists continue to frequently violate children's rights. The Child's Ombudsman,

109 | ECtHR *Case of Kurier Zeitungsverlag und Druckerei GmbH v. Austria* (Appl. No. 1593/06), 19 June 2012 (final 19.09.2012).

110 | *Case of Kurier Zeitungsverlag und Druckerei GmbH v. Austria*, paras. 47–51; 52–62.

111 | ECtHR *Case of Couderc and Hachette Filipacchi Associés v. France* (Appl. No. 40454/07), 10 November 2015, paras. 94–153.

112 | Guide, p. 72, para. 315.

113 | *Case of Couderc and Hachette Filipacchi Associés v. France*, paras. 71, 104.

114 | *Case of Axel Springer AG v. Germany*, paras. 89–95.

115 | *Case of Couderc and Hachette Filipacchi Associés v. France*, para. 153.

116 | ECtHR *Case of Kaboğlu and Oran v. Turkey* (Applications No.1759/08,50766/10 and 50782/10), 30 October 2018 (final 18.03.2019), para. 79.

117 | *Case of Kaboğlu and Oran v. Turkey*, para. 79.

118 | *Case of Couderc and Hachette Filipacchi Associés v. France*, para. 114.

119 | *Case of Couderc and Hachette Filipacchi Associés v. France*, para. 140.

therefore, issued a recommendation to the media that specifically concerned the protection of the children's well-being.<sup>120</sup>

In addition, the Report on the work of the Child's Ombudsman in 2021 (hereinafter: Report)<sup>121</sup> stated that there were complaints "in which parents are accused of publishing children's videos – 'sharenting'."<sup>122</sup> The Child's Ombudsman further emphasizes that a child's right to privacy is often threatened by family members, for which they often receive complaints from the children.<sup>123</sup> In such cases, parents neglect the welfare of their children and recklessly expose them to the public.<sup>124</sup> When it comes to people known to the public, such as celebrities or public figures, there are claims that they use their children or other people's children for self-promotion and material benefit.<sup>125</sup> There are also cases where some parents complained that the child's relatives (grandparents, uncle) publicly exhibit photos of the child without their consent, or that one parent does this against the wishes of the other parent, which happens quite often in situations of matrimonial disputes and divorce.<sup>126</sup>

Croatian Child's Ombudsman further states in her Report how

Unfortunately, many parents recklessly publish numerous photos of their own and other people's children in a wide variety of situations on their publicly available profiles. Children of people who are known to the public are additionally exposed because there is a greater possibility that the media will download and publish their photos, considering that parents agree with such publications.<sup>127</sup>

The Child's Ombudsman points to an interesting case that has been going on for three years. It is a case of the violation of the privacy of children filmed during a diving sports competition, whose parents gave consent for the children to be filmed as part of information about the competition. However, the parents subsequently found that a large number of individual pictures of their children in bathing suits were being offered abroad to online sports stores.<sup>128</sup>

### 2.2.1. Factual context – some cases in media and on social networking sites

After a fifteen-year-old girl from Zagreb was first seriously injured, and then died because of an earthquake, she became the subject of many Croatian portals, which revealed her identity in their reports. Her photos, last homework assignment, the

120 | Preporuke pravobraniteljice za djecu o zaštiti privatnosti djece u medijima (Recommendations of the Child's Ombudsman on the protection of children's privacy in the media) [Online]. Available at: <https://www.medijskapismenost.hr/preporuke-pravobraniteljice-za-djecu-o-zastiti-privatnosti-djece-umedijima/> (Accessed: 9 August 2022).

121 | Izvješće o radu pravobraniteljice za djecu za 2021 (Report on the work of the Child's Ombudsman for 2021), Zagreb, 2022 [Online]. Available at: [https://www.sabor.hr/sites/default/files/uploads/sabor/2022-04-01/154306/IZVJ\\_PRAVOBRANITELJ\\_DJECA\\_2021.pdf](https://www.sabor.hr/sites/default/files/uploads/sabor/2022-04-01/154306/IZVJ_PRAVOBRANITELJ_DJECA_2021.pdf) (Accessed: 7 August 2022). (hereinafter: Report, 2021).

122 | Report, 2021, p. 20.

123 | Ibid., p. 19.

124 | Ibid., p. 19; also see Amon et al., 2022, p. 2.

125 | Report, 2021, p. 19.

126 | Ibid.

127 | Ibid., p. 20.

128 | Report, 2021, p. 17.

statements of her best friend and her principal, were published.<sup>129</sup> This is a clear case of violation of the girl's privacy. Another case of privacy violation can be seen in a report on a child as a victim of criminal offenses. The media coverage of a 15-year-old girl who was repeatedly raped, filmed, blackmailed, and abused by a group of young men was extreme. The whole case resonated widely in the media and caused conflicting reactions after it was reported to the police by the school psychologist. The coverage of the protesting people after the suspects were brought to the police was also reported. The media recorded a group of parents and relatives 'who allegedly loudly protested such a procedure by the police, accusing the victim that her behavior gave their sons a reason for a series of mass rapes over the course of a year.'<sup>130</sup> This is an example of the violation of a child's rights with a negative impact. A lot of data were made accessible to the public, from which the identity of that young girl could be revealed. In addition, it must be noted that even if the name, photos, or other personal data were not published and presented to the public, all data by which these children or minors could be identified are considered to be personal data, and the publication of such data would constitute a violation of the privacy right of the child. Gabelica Šupljika emphasized how

Changing the name in the media, stating the initials, blurring the image, or covering the eyes of the child in the picture does not always mean respecting the child's privacy because his identity is indirectly revealed by numerous other [pieces of] information, noting how often it can be just the way the editor and publisher want to formally protect themselves from a possible lawsuit.<sup>131</sup>

There were several types of research conducted regarding the media coverage and violation of children's privacy in Croatia, by Ciboci, Jakopović Opačak, Raguž and Skelin, (2011),<sup>132</sup> Vlainić (2012),<sup>133</sup> Ciboci (2014),<sup>134</sup> and Ivanuš (2017),<sup>135</sup> and they arrived at a similar conclusion: that the media does not respect professional principles in cases where they report on children.

129 | Hrvatska tuguje za AM: Njena ulica najteže je stradala u potresu Djevojčica (15) je stradala u Đ., gdje je živjela u stanu u suterenu, na nju je pala greda. See Rimac Lesički and Šobak, 2020.

130 | Neveščanin, 2019.

131 | Gabelica Šupljika, 2009, p. 31.

132 | Ciboci et al., 2010, pp. 103–166.

133 | Vlainić conducted research analysing two most circulated daily newspapers in Croatia in period 1.1.-28.2.2011. analysing 404 articles regarding respect of children's privacy rights by media. She concluded how child's right to privacy is violated when individually reporting on children, which is the case in 13% of articles. Cf. Vlainić, 2012, pp. 43, 54.

134 | Ciboci analysed all articles using the method of quantitative content analysis about children, which were published in all editions of two most circulated daily newspapers in Croatia (the newspapers a) for period January, 1st to June, 30th 2013. and came to the conclusion how both newspapers still often reveal the identity of children in cases where it should be protected, primarily in photographs. Cf. Ciboci, 2014, p. 12.

135 | Ivanuš has concluded in her research study which deals with the issue of mechanisms of media self-regulation regarding the protecting child's rights and interests in the media, how inspite the thorough regulation of the childrens right in media stipulated in the Code of Honor of the Croatian Journalists' Association, that journalists and editors often do not comply with its provisions. Cf. Ivanuš, 2017, p. 86.

Yet another issue, as mentioned in the synopsis, is when parents or people close to the children, publish their photos most often on social networking sites. Bilan emphasizes that children in that context are reduced to objects on social media; thus, violating and infringing their right to privacy.<sup>136</sup>

In one Croatian magazine, a famous pop singer shared a moment with her son, making him famous before he was one year old. Most Croatian people are now acquainted with the little boy's name and his appearance, and a lot of things he does, because the pop singer continues to publish his pictures on online platforms and magazines.<sup>137</sup> A very similar case was that of another famous Croatian singer who appeared in a magazine with his son, who was only a few months old.<sup>138</sup> We can easily follow the lives of these children.<sup>139</sup> They may be the children of famous parents and celebrities, but what are their best interests? They are not (yet) able to give consent regarding having their photos taken or posted. The question is, what will they think about these photos in the future? Most of these pictures are neutral, showing the children in their parents' arms, and it is quite likely that they will be glad they have these pictures published in some magazine; however, it is also possible that they may not be happy. There are children who like to be photographed and others who do not; some may be embarrassed.<sup>140</sup> Parents should protect their children until they are mature enough to decide whether they would like to be photographed and become a part of their parent's public life. Interestingly, and unexpectedly, from research conducted by Amon, Kartvelishvili, Bertenthal, Hugenberg, and Kapadia, it was found that fathers posted more of their children's photos than mothers did.<sup>141</sup>

It is possible that the behavior of grownups, especially parents, can later be transferred to the children, according to the research of Amon, Kartvelishvili, Bertenthal, Hugenberg, and Kapadia.<sup>142</sup> This also follows from the research conducted in Croatia by Kušić,<sup>143</sup> which shows 'how users aged 13–15 years (primary school students) make one-third of the population that uses Facebook in Croatia',<sup>144</sup> posting intimate and confidential details and photos on Facebook that their parents do not know about.<sup>145</sup> Hence,

136 | Bilan, 2017, p. 1752.

137 | '100 posto Š...': M. objavila fotke nasmijanog B., zbog frizure je pravi bombončić, *Story magazine*, 21 July 2022; 'Zadnja fotka ovog ljeta': Maja Šuput otkrila da je došao kraj dvomjesečnog odmora, B. frizura ponovno oduševila, *Story magazine*, 27 August 2022. Magazines very often take photos from peoples Instagram or Facebook accounts (as in this case), forgetting that they should not transmit pictures of children at all without the express consent of their parents. Even when the parents agree, the editors need to carefully weigh whether the publication will harm the child. The Personal Data Protection Agency, presented an expert opinion that posts from someone's Facebook profile or other social networks cannot be further transmitted without the consent of that person. They pointed out that posting on one's own FB profile cannot automatically be considered a person's consent to the publication of the same content in public media. Cf. Milas Klarić, 2017. (It was the old Agency; before GDPR-a.)

138 | Tolić, 2022.

139 | Tolić, 2021; A. M. C., 2021.

140 | Amon et al., 2022, p. 2.

141 | *Ibid.*, p. 19.

142 | *Ibid.*, p. 7.

143 | Kušić, 2010.

144 | *Ibid.*, p. 106. It must be noted how this was before GDPR.

145 | *Ibid.*, pp. 115, 122.

Livingstone, Stoilova, and Nandagiri argue that 'children's own online practices have been under substantial scrutiny for privacy risks', and very often children's privacy is considered and viewed from the perspective of adults, especially when talking about the potential risks on the internet, forgetting that they are only children.<sup>146</sup> Children are vulnerable to physical and emotional pain. Therefore, there must be special regulations for their safety and the protection of their privacy.<sup>147</sup>

In addition, Livingstone, Stoilova, and Nandagiri note that children should have basic media literacy, which should include the

Understanding of their data worlds, digital traces and data flows, as well as the analytical skills needed for personal data management involved in the curating and obfuscating digital data, as well as the ability to demand one's right to privacy.<sup>148</sup>

Grumuša, Marguerite Tomulić, and Anđelić, conducted a research in 2019 on the violation of children's privacy on Facebook by their parents, where parents were mostly unaware of their actions being wrong, if not illegal. Research showed that more than half of the respondents posted photos of their own children on Facebook, and most of them did not ask their children for permission (80%),<sup>149</sup> while only 20% asked for the children's permission.<sup>150</sup> More troublesome is that the majority of parents were revealing their children's identities, showing them in full profile, totally oblivious of the violations to the children's rights and possible danger. Parents and other related people should ask the children if they want their photos to be published on their Facebook accounts, and such actions would be in accordance with Article 24 of the EU Charter and Article 12 of the Convention on the Rights of the Child. On the other hand, if the parents decide that is not in the child's best interest to post the picture on social media, even if their child is asking for it, they should not. The reason lies in the fact that the (Croatian) law gives full confidence to the parents, and it is up to them to decide what is in the best interest of their child. The same opinion is held by Gabelica Šupljika, who notes how

Revealing the child's privacy can harm the child in many ways. Its can threaten their development, satisfaction of their needs, self-image, and relationship with the social environment. Unfortunately, parental consent and/or the child's consent to media exposure are not always in the child's best interest. Therefore, until every parental decision is in the interest of the child and until media 'workers' in the dilemma between the interests of the public and the rights of the child decide for the public, both parents and media workers are needed to raise additional awareness of the threat to the child's well-being through media coverage.<sup>151</sup>

146 | Livingstone et al., 2018, p. 29.

147 | Ibid., p. 29.

148 | Ibid., p. 24.

149 | Grumuša et al., 2019, p. 90.

150 | Ibid., p. 90.

151 | Gabelica Šupljika, 2009, p. 31.

### 2.2.2. Legal context

In Croatia, there is no singular definition of privacy or right to privacy. However, the Constitution,<sup>152</sup> provisions of ratified conventions, GDPR, and many national laws, guarantee the right to privacy—for example, the Media Act (subsequently: MA),<sup>153</sup> Electronic Media Act (subsequently: EMA),<sup>154</sup> Electronic Communications Act (subsequently: ECA),<sup>155</sup> and Consumer Protection Act (subsequently: CPA).<sup>156</sup> Therefore, the Consumer Protection Act explicitly forbids merchants from transferring personal data to any third person, contrary to the acts that regulate the protection of personal data—GDPR (Article 11),<sup>157</sup> and obliges merchants to process data in accordance with the GDPR (Article 83 paragraphs 5 and 6), while the Electronic Communications Act protects privacy and personal data explicitly in Articles 5 and 42 paragraph 1, 43, 44, and 99a.

Furthermore, the Media Act defines privacy as family, personal life, and the right to live according to one's own choices.<sup>158</sup> Article 7 of the Act regulates the right to privacy of each individual (and of course children) as a right which is enjoyed by every person,<sup>159</sup> including those performing a public service or duty 'except in cases related to public service or duty performed by a person.'<sup>160</sup> Such regulation is in line with the ECtHR case law, which provides protection to the public and 'relatively' public figures from an invasion of privacy, if the recordings are not related to the function they perform.<sup>161</sup> There are also provisions that regulate special cases where a person attracts public attention with their statements, behavior, and other acts from personal or family life. Therefore, the Act stipulates that in such cases these people cannot 'demand the same level of privacy as other citizens.'<sup>162</sup> Their right to privacy is narrower.

In cases where legitimate public interest prevails over privacy protection, there is no protection of privacy.<sup>163</sup> These provisions are often used to shield the media and press

152 | Constitution of the Republic of Croatia, Official Gazette, 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

The right to privacy, takes several forms and different Constitutional provisions guarantee its protection, e.g. Art. 34 guarantees the inviolability of the home, as a form of privacy. Art. 35 guarantees everyone the right to personal and family life, dignity, honour and reputation, while Art. 36 prescribes the freedom and secrecy of correspondence and all other forms of communication. Art. 37 guarantees the security and confidentiality of personal data and Art. 40 the right to religion and religious beliefs. All the above articles of the Constitution guarantee various forms of privacy, and point to the need to protect them by law. Interpretation of the above provisions of the Convention and the Constitution of the Republic of Croatia leads to the interpretation that no one (government or other persons) may take actions that would limit the rights of others largely than provided by the relevant provisions of these documents.

153 | The Media Act, Official Gazette, 59/04, 84/11, 81/13.

154 | The Electronic Media Act, Official Gazette, 111/21.

155 | The Electronic Communications Act, Official Gazette, 73/08, 90/11, 133/12, 80/13, 71/14, 72/17.

156 | The Consumer Protection Act, Official Gazette, 19/22.

157 | It also regulates the protection of personal data in cases of determination of the contract (Art. 83).

158 | Art. 2 of the MA.

159 | Art. 7 para. 1 of the MA.

160 | Art. 7 para. 2 of the MA.

161 | See case *Von Hannover v. Germany* (No. 2) paras. 31, 32; *Case of Axel Springer AG v. Germany*, paras. 89–95.

162 | Art. 7 para. 3 of the MA.

163 | Art. 8 of the MA.

from lawsuits. Further on, Electronic Media Act forbids the publication of information that reveals:

The identity of a child under the age of 18 involved in cases of any form of violence, regardless of whether the witness, victim or perpetrator, or the child attempted or committed suicide, nor disclose details of the child's family relationships and private life,<sup>164</sup> and personal data of minors collected or otherwise obtained by media service providers within the framework of technical measures for the protection of minors may not be processed for commercial purposes, such as direct marketing, profiling, and targeted behavioral advertising.<sup>165</sup>

However, such a stipulation does not explicitly exist in the MA, but the publisher can be held liable for damage, if the damage is caused by the publication of the personal data of the minor.<sup>166</sup>

GDPR is part of the Croatian internal national legal system,<sup>167</sup> as stated by the Implementation of the General Data Protection Regulation Act (IGDPRA).<sup>168</sup> Therefore, violations of the privacy of the child are to be reported to the Croatian Personal Data Protection Agency (hereinafter: Agency or PDPA).<sup>169</sup> There were such cases in Croatia, as can be seen from the Report on the work of the Child's Ombudsman in 2021.<sup>170</sup>

However, besides the GDPR and mentioned regulations, special provisions which regulate the protection of child privacy can be found in the Family Act (subsequently: FA),<sup>171</sup> in Youth Courts Act (subsequently: YCA)<sup>172</sup> which is a child-friendly act<sup>173</sup> and Penal Code (hereinafter: PC)<sup>174</sup> which applies *ultima ratio*.

164 | Art. 24 para. 5 of the EMA.

(5) It is not allowed to publish information revealing the identity of a child under the age of 18 involved in cases of any form of violence, regardless of whether the witness, victim or perpetrator or the child attempted or committed suicide, nor disclose details of the child's family relationships and private life.

165 | Art. 24 para. 6 of the EMA.

(6) Personal data of minors collected or otherwise obtained by media service providers within the framework of technical measures for the protection of minors may not be processed for commercial purposes, such as direct marketing, profiling and targeted behavioural advertising.

166 | Art. 6 para. 5 of the MA.

167 | 'Consequently, on 27 April 2018, the Republic of Croatia adopted the Act on the Implementation of the General Data Protection Regulation which entered into force on 25 May 2018 (OG 42/18)' and the Agency as a supervisory body is founded by that Act – information [Online]. Available at: <https://azop.hr/rights-of-individuals/> (Accessed: 28 March 2022).

Personal data protection in Croatia, before GDPR, was regulated by the Personal Data Protection Act (Official Gazette, 103/03, 118/06, 41/08, 130/11, 106/12), which was in force until the end of May 2018.

168 | Implementation of the General Data Protection Regulation Act, Official Gazette, 42/2018.

169 | For more information see Croatian Personal Data Protection Agency [Online]. Available at: <https://azop.hr/naslovna-english/> (Accessed: 15 March 2022).

170 | Report, 2021, p. 14.

171 | Family Act, Official Gazette, 103/15, 98/19.

172 | Youth Courts Act, Official Gazette, 84/11, 143/12, 148/13, 56/15, 126/19.

173 | Special protection of the privacy of minors regarding actions taken in the proceeding e.g. the proceeding is secret, etc. and other actions which can have a detrimental effect on the development of minors and there are a lot of provision which protect minor's identity. Therefore, for example it is prohibited to publish the course of the proceedings, as well as the decisions made without the approval of the court. Art. 60 of the YCA.

174 | The Penal Code, Official Gazette, 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21.

Consequently, the Penal Code protects the privacy right of the child with criminal offense Violation of the Privacy of the Child—Article 178 PC, which is placed in offenses against Marriage, Family, and Children. Criminal prosecution can be instituted against persons who

Disclose or transmit something from the child's personal or family life, publish a child's photograph, or reveal the child's identity contrary to regulations, which caused the child anxiety, ridicule of peers or other persons, or otherwise endangered the child's welfare.<sup>175</sup>

This person can be anyone. Even the parents of the child. When it comes to the victims, a person under the age of 18 is considered a child. Perpetrators can be sanctioned for the basic offense, with imprisonment for a term not exceeding one year.<sup>176</sup> There are also aggravated forms of offense. When the offense is perpetrated in public, or in such a manner that the private details of the child become available to a larger number of people, the stipulated sentence is imprisonment for up to two years.<sup>177</sup> When it is perpetrated by an official person or in the performance of a professional activity, then the stipulated sentence is imprisonment for a term not exceeding three years.<sup>178</sup> Taking this into consideration, it must be noted how not every publication of the child's photo will constitute a criminal offense, but only those that lead to the abovementioned consequences of the criminal offense. In other words, publishing photos that are 'contrary to regulations, which caused the child anxiety, ridicule of peers or other persons, or otherwise endangered the child's welfare',<sup>179</sup> will lead to a criminal offense.

However, the field of protection of children's privacy rights in Croatia is not devoid of problems. Although the Family Law protects the rights and well-being of the child, and by its provision, parents are obliged to and responsible for protecting the rights and well-being of their children—and in certain cases also other close family members—,<sup>180</sup> it seems that parents often do exactly the opposite, as shown by the Child's Ombudsman's Report.<sup>181</sup> Furthermore, in the report, it is stated that the media and press have still not found their way into this field.<sup>182</sup> However, they are in contact with the Child's Ombudsman more often, asking for advice on how to act in these situations.<sup>183</sup>

Currently, the legal regulation of child privacy protection in Croatia is almost entirely in the hands of parents. Therefore, the publication of information about the child is up to the consent of the parents.<sup>184</sup> Currently, there is no regulation in accordance with Article

175 | Art. 178 para. 1 of the PC.

176 | Art. 178 para. 1 of the PC.

177 | 'Whoever commits the act referred to in para. 1 of this Art. through the press, radio, television, computer system or network, at a public gathering or in any other way due to which it has become accessible to a larger number of persons, shall be punished by imprisonment for up to two years.' Cf. Art. 178 para. 2 of the PC.

178 | 'Whoever commits the act referred to in paras. 1 and 2 of this Art. as an official person or in the performance of a professional activity, shall be punished by imprisonment for a term not exceeding three years.' Cf. Art. 178 para. 3 of the PC.

179 | Art. 178 para. 1 of the PC.

180 | Art. 127 para. 1 of the FA.

181 | Report, 2021, pp. 19–20.

182 | *Ibid.*, p. 14.

183 | *Ibid.*, p. 17.

184 | See *Ibid.*, p. 20.

24 of the Charter of Fundamental Rights of the European Union, which stipulates the right to express their views freely, which 'shall be taken into consideration on matters which concern them in accordance with their age and maturity' and Article 12 of the Convention on the Rights of the Child which has similar content, but it should be seriously considered. Of course, when children, as a vulnerable population, are in question, in the context of their inability to fully consent to sharing their information online, there is always the question of age. When can children give their full consent to publishing their photos and other personal information on the internet, or give permission to their parents or others for 'sharing' or collecting their data? Most parents do not receive children's consent prior to posting,<sup>185</sup> and rarely ask for their consent before posting information about them, mostly because the child is too young to provide permission.<sup>186</sup>

Amon, Kartvelishvili, Bertenthal, Hugenberg, and Kapadia, raise the question of the suitable age for consent. They noted how *Ouvrein and Verswijvel*,<sup>187</sup> who conducted the research based on a focus group study, provided a solution to this problem. The solution was created by the adolescents in the focus group. When 'the adolescents were asked about the child's age at which parents should ask for permission before posting online, they agreed on the age of 13 as their general consensus.'<sup>188</sup>

Interestingly,<sup>189</sup> as Amon, Kartvelishvili, Bertenthal, Hugenberg, and Kapadia note, France granted children the legal right to ask their parents to remove or not publish their photos. Therefore, they conclude that 'sharing private photos of children without their consent could cost parents up to 45,000 euros in fines or imprisonment for up to one year.'<sup>190</sup>

This is not only a situation when children's rights are in question, but anyone whose personal information was published without their consent.<sup>191</sup>

In addition, France has a law aimed at strengthening parental control over the means and ways of access to the internet.<sup>192</sup>

Croatia should also consider the possibility of a more comprehensive approach to this problem and seek a solution through additional regulation, either in civil law or even in misdemeanor or criminal law.

### 2.2.3. Statistics – statistical context

#### 2.2.3.1. CBS data

Croatian Bureau of Statistics (CBS) data for criminal offenses against privacy of the child. Violation of privacy of the child<sup>193</sup> will be observed and analyzed for the period 2016-2020.

185 | Amon et al., 2022, p. 12.

186 | Ibid., 2022, p. 21.

187 | See Ouvrein and Verswijvel, 2019, pp. 319–327.

188 | Amon et al., 2022, p. 21.

189 | See also media coverage, Staufenberg, 2016.

190 | Amon et al., 2022, p. 5.

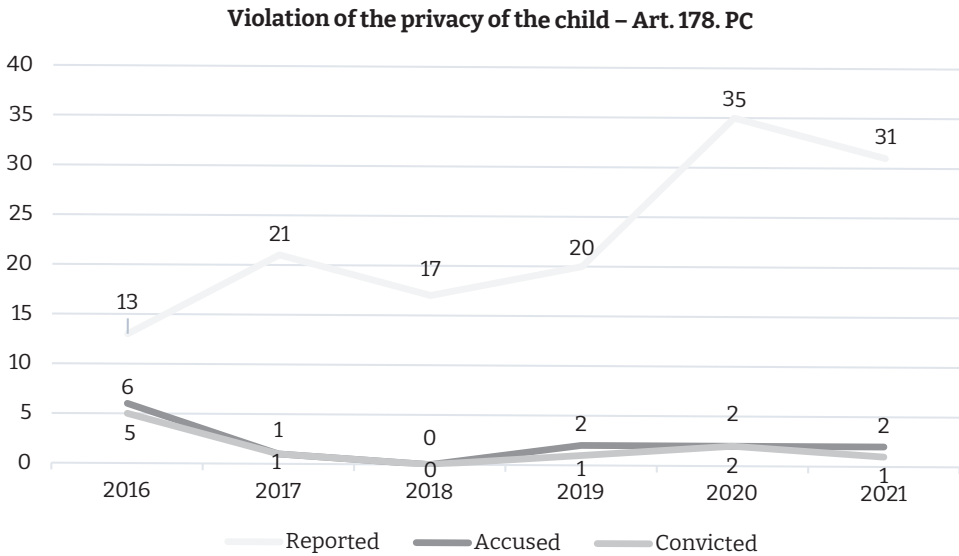
191 | See also media coverage, Fraser, 2012.

192 | The Law is available in France (*LOI n° 2022-300 du 2 mars 2022 visant à renforcer le contrôle parental sur les moyens d'accès à internet*) [Online]. Available at: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000045287677> (Accessed: 4 October 2022).

193 | Art. 178 of the PC.

**Table 1.** Violation of privacy of the child<sup>194</sup>—adult perpetrators  
(reported, accused, and convicted) in period 2016-2021

Year	Reported	Accused	Convicted
2016	13	6	5
2017	21	1	1
2018	17	0	0
2019	20	2	1
2020	35	2	2
2021	31	2	1
<b>Total</b>	<b>137</b>	<b>13</b>	<b>10</b>

**Graph 1.** Violation of the privacy of the child<sup>195</sup>—adult perpetrators  
(reported, accused, and convicted) in period 2016-2021

Analyzing the data, most of these offenses were found to be reported in 2020 (35), and 2021 (31). The highest number of accusations and convictions were in 2016 (6/5). However, we must bear in mind that criminal proceedings last, on average, for about three years. Therefore, this is not a real indicator of the situation. From the presented data, it can be said that the reports are in ascending order, with fluctuations. The worrying figures are with regard to the convictions. There were very few convictions in relation to the reported

194 | Art. 178 of the PC.

195 | Art. 178 of the PC.

persons, 10 in total for the observed period (2016–2021). There was a decrease in convictions until 2018, after which the line is flat and near the X-axis. The reasons for such a situation can only be speculated upon until some qualitative research is conducted.

#### 2.2.3.2. The Office of Child's Ombudsman data

In 2021, the Office of Child's Ombudsman acted on 83 individual cases related to the child's right to privacy. Most reports were in connection with the privacy of children in the media—including all social media—, institutions—schools, kindergartens, social welfare institutions, and hospitals—, sports clubs, family, and in other places.<sup>196</sup> In many cases, the Child's Ombudsman forwarded their complaints to the Personal Data Protection Agency (hereinafter: Agency or PDPA)<sup>197</sup> or referred the plaintiff to the contact agency directly as a body authorized to supervise<sup>198</sup> the processing of personal data in accordance with the Implementation of the General Data Protection Regulation Act (IGDPRA).<sup>199</sup> Most reports of violations of children's privacy in the media were related to using their photos or videos during the campaign for local elections, which was usually interpreted as an exploitation of children for propaganda, in order to achieve political goals.<sup>200</sup>

### 3. Concluding remarks and discussion

Child privacy protection in the Croatian legal system is not entirely covered. Children and their privacy rights do not enjoy suitable protection, despite the existing norms of different international and regional documents and national laws. National laws do not cover or regulate the situation of the child's privacy violation by their parents, as could be seen from the Child's Ombudsman Report. According to the Report of the Office of Child's Ombudsman in 2021, there have been 83 individual cases related to children's right to privacy. Among these, not all are related to the violation of the privacy rights of the children by their parents. In the Report, different types of violations of a child's privacy rights are mentioned.

In extremely difficult cases, some violations can ultimately constitute criminal offenses of Violation of the privacy of the child,<sup>201</sup> by the parents, and even in cases of 'sharenting' mentioned in the paper, but it may be assumed that such situations will be rare. In Croatia, after consulting the CBS data, it was found that there have been only 10 convictions for criminal offenses violating the privacy of the child<sup>202</sup> in the 2016–2021 period.

196 | Report, 2021, p. 14.

197 | More information about the Agency see [Online]. Available at: <https://azop.hr/about-the-agency/> (Accessed: 8 August 2022).

198 | Report, 2021, p. 14.

199 | Agency can initiate some administrative proceedings and impose some administrative sanctions, but also can forward the case to the State Attorney's Office if misdemeanor criminal offense is committed. When Agency decide to conduct the proceeding and to act then its decision constitutes the administrative act on which can be file a lawsuit to the administrative court. (Arts. 33–35 of the IGDPRA.)

200 | Report, 2021, p. 15.

201 | Art. 178 of the PC.

202 | Art. 178 of the PC.

For further discussion, the situation must be divided into two groups. The first is when the existing legislation is suitable for child privacy protection rights, but in some cases is not obeyed (media and press coverage). The more worrisome situation when there is no suitable legislation for the protection of the privacy of the children. There is a lack of legislation, *lacuna legis*, considering privacy protection rights in relation to (underage) child parents. In such situations, today in Croatia, children do not enjoy privacy protection from the violations of their parents. Everything concerning publishing photos or videos of children on social in the hands of parents. They are responsible for their children.

Interestingly, the GDPR and IGDPA note how 16 is the age limit to give consent to the collection and processing of the child's personal data in Croatia. In that regard, it should also be the limit for children to give their consent regarding publishing and posting photos, and disposal of their privacy rights.

However, this limit may seem too high. Perhaps 13 should be age the limit for valid consent on publishing or posting their photos, as arrived at in the study on focus groups consisting of adolescents, which was conducted by *Ouvrein and Verswijvel*,<sup>203</sup> (or 12 or maybe even 10). In any case, it is up to the legislator to decide; but before determining the age limit, it is advisable to conduct additional research regarding the maturity of children to provide fully valid consent.

Therefore, while thinking about which approach and age limit to take, the legislator must bear in mind that the internet is a dangerous place for privacy. Such an environment is fertile ground for abuse. The right to privacy (especially for children) is threatened by potentially unauthorized collection, storage, sharing, etc. of their data. Children are a vulnerable group, and very often are not aware of the menace on the internet. They can be easily manipulated, endangered, and hurt on the internet. The benefits of modern society offered by today's technology attract an increasing number of users, including children. These users leave a (personal) trace, that is, information, which can be further disseminated, or even sold. Information today, as can be understood from some of the research presented in the paper, is money.<sup>204</sup> Therefore, it can be stated that information these days information 'makes the world go'.

There are different types of information on the internet. The most interesting are the personal kind, which we leave all over the web. Thus, this information can remain there for a long time. The time of the printed press is in the past. There should be a new phrase: 'once on the internet, always on the internet.'

The responsibility to secure the child's privacy in all spheres, prevent unlawful behavior, and reduce risks, does not only rest on the legislators, but also the media and press, society, schools, and most importantly, parents.

Therefore, awareness should be raised among young people about online privacy, policies of media, platforms, and willingness to provide personal information online. In addition, children should be educated regarding possible risks and 'the effects of privacy disclosures (including reputational damage, blackmailing, stalking or identity theft), issues related to participation on social networking sites', as noted by Livingstone, Stoilova, and Nandagiri.<sup>205</sup>

203 | Amon et al., 2022, p. 21.

204 | Gleick, 2011, pp. 14–15; see also Stephenson, 2021; Goldstein, 2011.

205 | Livingstone et al., 2018, p. 28.

The media and parents should be especially cautious and vigilant, and journalists and editors must constantly upgrade and nurture their knowledge of children's rights, because their role in reporting on children is decisive.

The people who should protect children and their rights and interests are definitely their parents. It is presumed that they will know what is in their child's best interests and promote it. Unfortunately, as this paper shows, this is not always the case. This phenomenon is not local in nature. It is global, and from the research of Amon, Kartvelishvili, Bertenthal, Hugenberg, and Kapadia,<sup>206</sup> it seems to be spreading like a virus, which must be stopped, or at least reduced. The question is, in whose interest is this? This model satisfies everybody's interests, except those of the children. It satisfies the celebrities (they get more popular), the newspapers (they have more profit), and the public (it quenches their curiosity). Children have the right to privacy, but currently in Croatia, protection of children's right to privacy is totally under the control of their parents. The children in Croatia, as stated earlier, do not actually enjoy the right to protect their privacy from their parents (unless a criminal offense is committed). Therefore, it can be said that they have the right to privacy, but not from their parents. This seems wrong. As stated at the beginning of the paper, everyone has the right to privacy and protection.

Therefore, it can be concluded that there should be new, additional regulations to provide better and more comprehensive protection of privacy rights of the children (as in France), and maybe even a new incrimination (criminal offense), regulating situations when parents and other closed relatives or people are 'sharenting' without the children's consent.

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