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The child's right to privacy in the family context.

La privacy del minore di età nell'ambito familiare.

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Abstract

After a brief introduction on the origins, foundation and evolution of the right to privacy in Italian legal system, the article examines the issue of children's right to privacy in the context of family relations. In particular, the study dwells on the powers/duties of protection, or rather, of vigilance, connected to the correct exercise of the educational function of parents in the digital context, which may also allow/require access to the digital data of minor children. The paper then addresses other topics related to parental responsibility: the civil liability of parents for online offences committed by their minor children; the qualification of the behavior of parents who inappropriately or carelessly dispose of their children's personal data (so-called sharenting); and the privacy of minors in relation to health decisions that minors are entitled to take independently.

Dopo una breve introduzione sulle origini, il fondamento e l'evoluzione del diritto alla riservatezza nell'ordinamento giuridico italiano, l'articolo esamina il tema del diritto alla privacy dei minori nel contesto delle relazioni familiari. In particolare, lo studio si sofferma sui poteri/doveri di vigilanza relativi al corretto esercizio della funzione educativa dei genitori nel contesto digitale, che può anche consentire/richiedere l'accesso ai dati digitali dei figli. L'articolo affronta inoltre altri temi legati alla responsabilità genitoriale: la responsabilità civile dei genitori per gli illeciti online commessi dai figli minorenni; la qualificazione del comportamento dei genitori che dispongono in modo improprio o incauto dei dati personali dei figli (il cosiddetto sharenting); la privacy dei minori in relazione alle decisioni sulla salute che i minori hanno diritto di prendere in autonomia.

Keywords: minor, privacy, self-determination, parental liability, sharenting, health data.

1. Introduction*

Among the many challenges the law faces in the digital age is that of protecting the child's right to privacy in relation to the opposing demands of autonomy and protection. The digital space, on the one hand, represents an indispensable place of social interaction, where it is possible to express one's personality and exercise one's fundamental rights and freedoms; on the other hand, it exposes, in particular, the most vulnerable subjects to numerous risks of violation of the same fundamental rights and freedoms. Increased exposure to these risks may therefore lead to accentuating the supervisory powers associated with the proper exercise of parental responsibility, even if this may entail a limitation of the privacy (vis-à-vis the parents) of the child concerned.

In investigating the role of parents, as the main educational actors, this contribution intends to focus, specifically, on the recognition of the child's privacy within his or her family unit, as well as the various issues that this recognition raises. In particular, the following issues will be examined: the question of the limits of parents' supervisory duties/powers and that of their civil liability for any wrongdoing by their children; the issue of the qualification of the behavior of parents who inappropriately dispose of their children's personal data (so-called sharenting); and finally, the issue of the privacy of minors' health data with respect to their family members.

2. Evolution of the right to privacy in the Italian legal system

The concept of *privacy* has undergone a change in meaning over time. In its original connotation, it is understood as a simple 'right to be let alone',[1] a prerogative typical of the bourgeois class,[2] in relation to the intrusions carried out by the mass media. This right, which arose from the need to protect, in particular, famous people against the dissemination of news relating to the intimate sphere, which have no reason to be divulged, is mainly the result of jurisprudential elaboration, carried out through the

* This paper is intended for the book edited by Natalia Margarita Rueda Vallejo, *Problemas del derecho de familia, infancia y adolescencia. Reflexiones desde distintas experiencias jurídicas*, (2023 Universidad Externado de Colombia, Bogotà).

[1] The definition dates back to 1890 and was the work of two young American lawyers who, in a well-known essay, conceived of privacy as "the right to be let alone" against the "too enterprising" encroachments of the press. See S. D. Warren - L.D. Brandeis, 'Right to Privacy' (1890), 4, Harv. Law Rev., 193-220.

[2] S. Rodotà, '*Riservatezza*' (Treccanti Libri 2021), 58.

broader definition of personality rights based on the extensive reading of Article 2 of the Constitution.[3] In fact, we owe to a well-known judgment of the Court of Cassation[4] the recognition in Italy of an autonomous right to privacy, hitherto denied,[5] which is, in particular, derived from the norms of the legal system, from constitutional principles and from various international deliberations.[6] The Court, in particular, states that this right consists 'in the protection of those strictly family and personal situations and events, which, even if occurring outside the home, are not of socially appreciable interest to third parties, against interference which, even if carried out by lawful means, for purposes that are not exclusively speculative and without offending honour, reputation or decorum, are not justified by overriding public interests'.

The changes brought about by the development of technology have subsequently led to a broadening of the concept of *privacy*, no longer limited to the static and defensive dimension (of the individual with respect to intrusions into one's private and family life), but, in a dynamic and proactive perspective, including the right to informational self-determination, i.e. the right to exercise control over the use that others make of one's personal data, on the circulation of which today's information society is founded and nourished. Indeed, the ease with which citizens' personal data are collected and managed, the risks associated with mass storage, and the possibilities of discrimination lead to the invocation of privacy not as an instrument to protect the bourgeois class alone, but as a means to promote equality and equal treatment of all citizens.[7]

The right to the protection of personal data, already on a supranational level considered as an autonomous fundamental right, distinct from the right to respect for private life,[8] is in the Italian legal system made the subject of specific regulation, first with Law No. 675 of 1996, then replaced by Legislative Decree No. 196 of 2003, which established the Personal Data Code, subsequently with EU Regulation 2016/679 of 27 April 2016 (GDPR) in the light of which the 2003 Privacy Code was amended and supplemented in 2018. The protection of personal data takes place within the framework of a broader perspective, which takes into account the needs of the digital economy and therefore aims to achieve a balance between the demands for the protection of the individual and those proper to the market. In fact, the regulation

[3] G. Giacobbe*, '*Riservatezza (diritto alla*)',* (1989), Enc. dir.*,* 1246.

[4] Civil Cass., 27 May 1975, no. 2129, (1976), I, Foro it*.,* 2895. The case concerned the publication of photos showing Iranian princess Soraya Esfandiary in intimate moments with the man with whom she had started a relationship after she had been repudiated by the Shah of Persia.

[5] Civil Cass., 22 December 1956, no. 4487, (1957), I, Foro it., 4 ff. The issue had arisen because of the making of a film that portrayed the life of the famous tenor Enrico Caruso. For the heirs, the films would have caused injury to the privacy and honour of the tenor, who was described as a quarrelsome person, addicted to alcohol and coming from a very humble background; see also Court of Cassation, 20 April 1963, no. 990, (1963), I, Giust. Civ*.,* 1280 ff.

[6] The right to respect for private life is affirmed normatively for the first time in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, ratified in Italy by Law No. 848 of 4 August 1955.

[7] S. Rodotà, '*Riservatezza*' (Treccani Libri 2021), 67.

[8] Article 8 of the Charter of Fundamental Rights of the European Union states that: "everyone has the right to the protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data collected concerning him or her and the right to have it rectified'. Where Article 8 of the European Convention on Human Rights states: 'Everyone has the right to respect for his private and family life, his home and his correspondence', also setting out the conditions under which a public authority may interfere with this right.

allows, as well as promotes, the circulation of (non-sensitive) personal data, while circumscribing this circulation with precautions.[9]

3. Privacy and self-determination of the child in the family context

Social transformations have led scholars and courts to deduce from the general principles that can be presumed from the Constitution, ordinary national laws and international sources, an extension of the sphere of rights that can be legally protected within family relations.[10] Having overcome the publicist conception of the family[11] for which the 'family interest' is autonomous and superior to that of the individual family members,[12] we have gradually come to recognise the infringement of many rights protected by the Constitution even within family relations.

The transition from the hierarchical and patriarchal model of the family to the model based on the principle of democracy, for which the family is a privileged place for the development of the person, has thus led, albeit rather recently, to the protection of the family and its members under tort law,[13] i.e. to the applicability of the rules of protection of fundamental rights also to individual family members, in order to protect the weakest individuals.

The interpretative process has therefore come to derive, through a combination of domestic and European norms, as well as international sources, the existence of the child's right to privacy[14] also within the family, which is the first social formation in which the personality of individuals develops.

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[9] In the vast literature, see: M G Stanzione, 'Il regolamento europeo sulla privacy: origini e ambito di applicazione' [2016], Eur. dir. priv., 1249 ff.; F Piraino, 'Il regolamento generale sulla protezione dei dati personali e i diritti dell'interessato' (2017) 2 NLCC, 369 ff..; A Thiene, 'Segretezza e riappropriazione di informazioni di carattere personale: riserbo e oblio nel nuovo Regolamento europeo', (2017) 2 NLCC, 410 ff..; G Finocchiaro, (ed.) *Il nuovo regolamento europeo sulla privacy e sulla protezione dei dati personali* (Zanichelli, 2017); A Mantelero – D Poletti (ed.), *Regolare la tecnologia: il Reg. UE 2016/679 e la protezione dei dati personali. Un dialogo fra Italia e Spagna*, (Pisa University Press, 2018); V Cuffaro, R D'Orazio, V Ricciuto (eds.), *I dati personali nel diritto europeo,* (Giappichelli, 2019); R Senigaglia, 'La dimensione patrimoniale del diritto alla protezione dei dati personali', [2020], Contr. impr., 760 ff.; C Irti, *Consenso "negoziato" e circolazione dei dati personali* (Giappichelli, 2021).

[10] R De Meo, 'I principi generali nel diritto di famiglia e la tutela delle persone nelle relazioni familiari (a proposito di un convegno romano)'[2003] Rass. dir. civ., 518 ff.

[11] A C Jemolo, *La famiglia e il diritto, Annuali del seminario giuridico dell'Università di Catania* (Jovene editore 1948) 40.

[12] P Perlingieri, *Il diritto civile nella legalità costituzionale* (ESI 2006), 921.

[13] Among the various contributions that have examined the subject of civil liability in the family sphere are: P Rescigno, 'Immunity and privilege', (1961), I, Riv. dir. civ., 415 ff; F Giardina, *Per un'indagine sulla responsabilità civile nella famiglia. L'articolo 129-bis del codice civile,* (Edizioni ETS 1999); S Patti, *Famiglia e responsabilità civile* (Giuffré 1984); P Morozzo Della Rocca, 'Violazione dei doveri coniugali: immunità o responsabilità?' [1988] Riv. crit. dir. priv, 605 ff.; M Sesta, *La responsabilità nelle relazioni familiari,* (Giappichelli 2008); A Nicolussi, 'Obblighi familiari di protezione e responsabilità civile', [2009] Pers. e danno, available at https://www.personaedanno.it/articolo/obblighi-familiari-di-protezione-e-responsabilita-civile-andrea-nicolussi; C Favilli, 'I danni da illecito endofamiliare', in E. Navaretta (ed.) *I danni non patrimoniali. Lineamenti sistematici e guida alla liquidazione* (Giuffré 2004), 369 ff..

[14] Article 16 of the United Nations Convention on the Rights of the Child (UNCRC), adopted on 20 November 1989 and ratified by Italy with Law No. 176 of 27 May 1991, states: "1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks upon his or her honour and reputation. 2. The child shall be entitled to the protection of the law against such interference or affront."

However, the protection of this right, which appears increasingly effective vis-à-vis third parties outside the family, is more vague in the parent-child relationship. This is essentially due to ideological conditioning, linked to the idea of the family[15], and to the conflict that can arise within it between the needs for autonomy of minors, who have the capacity for discernment, and the needs to protect them, which are functional to the proper exercise of parental responsibility.

The issue of the child's privacy in the family context is linked precisely to that of identifying the correct margin of autonomy to be granted to the child, functional to the realisation of his or her 'best interest'.[16] To this end, account must be taken, on the one hand, of the new dialogic family model[17], which must favour the gradual development of the minor's autonomy according to his or her evolutionary capacities;[18] on the other hand, of the greater exposure to the risks determined by the wider spaces of autonomy granted to the minor (or at any rate tolerated by our legal system) especially in the online environment.[19]

In fact, one of the most significant innovations introduced by the GDPR concerns the provision of a minimum age threshold (between 13 and 16) for minors to autonomously express their consent to the processing of personal data, which is necessary to access

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[15] C Camardi, 'Minori e privacy nel contesto delle relazioni familiari', in R Senigaglia (ed.), *Autodeterminazione e minore età. Itinerari di diritto minorile* (Pacini Giuridica 2019), 127. It should also be borne in mind how the same international documents, including the UNCRC itself, stress the importance, where possible, of preserving family harmony, unity and autonomy.

[16] The well-known phrase "best interest of the child" summarises a fundamental principle of our legal system: "the best interests of the child must be safeguarded with preference when balancing any conflicting interests" L. Lenti, *Diritto della famiglia* (Giuffré, 2021) 73. The principle, enshrined in family law, has taken on a general scope (as a guiding criterion for the judge and the legislator) in all matters concerning children.. The doctrine has not failed to highlight the critical issues underlying the widespread use of this principle and the ambiguity and vagueness of the notion. See L. Lenti, *Diritto della famiglia* (Giuffré 2021) 74; Id., 'L'interesse del minore nella giurisprudenza della Corte europea delle diritti dell'uomo: espansione e trasformismo', (2016) 1 NGCC, 148 ff.; Id., 'Note critiche in tema di interesse del minore', [2016] Riv. dir. civ., 87 ff. ; E. Lamarque, *Prima i bambini. Il principio del best interest of the child in the constitutional perspective* (Giuffré 2016).

[17] The new family model, in antithesis to the authoritarian one of the past, is developed around the promotion of the child's personal identity, in its becoming. See F Giardina, "Morte della 'potestà' e 'capacità' del figlio", [2016] Riv. dir. civ.,1620 ff.; F. Ruscello, Autonomia dei genitori, responsabilità genitoriale e intervento pubblico [2015] NGCC 717 ff.

[18] At the international level, the minor's capacity for self-determination in relation to the choices that affect his or her personal sphere finds its first official consecration in the text of the UNCRC, which affirms the right of the minor, capable of discernment, to freely express his or her opinion, as well as to be heard, on matters that concern him or her. From being an undifferentiated "object of protection" (F D Busnelli, 'Capacità e incapacità di agire del minore' [1982] Fam. pers. succ., 56), the minor is thus considered an autonomous person with rights not only of protection, but also of performance and promotion (V. Scalisi, 'Il superiore interesse del minore ovvero il fatto come diritto'[2018] Riv. dir. civ., 405). At the national level, although the family law reform of 1975 had initiated an important transformation of the authoritarian family model, the concrete change of perspective actually takes place only with the filiation reform, implemented in 2012 and 2013, with which the principle of the direct participation of the child, capable of discernment, is generalised in the Italian system. In fact, Article *315-bis* of the Civil Code enshrines the right of the child to be heard and thus to express his or her opinion in all matters that concern him or her, and this also regardless of whether he or she has reached the age of 12, provided that he or she has reached the capacity of discernment.

[19] The child, especially in the *online* world, has become a precocious consumer who in fact makes purchases - albeit of modest value - of a patrimonial nature, which are tolerated by our legal system (insofar as they are never challenged), but also permitted by certain rules of our legal system: art. 26 of the consumer code, in qualifying as unfair commercial practices "that include in advertising messages an exhortation directed at children to buy or persuade their parents or other persons to buy the advertised products", recognises that a minor may also be a party to the consumer relationship. On the extension of the minor's capacity of self-determination to the patrimonial sphere see more recently: R Senigaglia, *Minore età e contratto. Contributo alla teoria della capacità* (Giappichelli, 2020), 31, 84 ff. and passim.

digital services. Article 8 of the GDPR, in particular, provides that 'with regard to the direct offer of information society services to minors', processing is lawful if they are 16 years of age or older, whereas for minors under 16, consent is only valid if given by those exercising parental responsibility. The Italian legislator, following an extensive debate, taking advantage of the derogation specified by the GDPR itself to provide for a different age (not less than 13 in any case) has chosen to set the threshold at 14 years, assuming that the capacity of discernment has been reached at that age (article *2-quinquies* - *Privacy* Code, as amended by Legislative Decree 2018, n.101). Below this threshold, processing is lawful provided that it is carried out by the person exercising parental responsibility. The legislator, in order to counterbalance this openness - which takes the form of a sort of anticipated 'digital capacity' [20] - provides for information and transparency obligations[21] in the head of the data controller and the data processor, which, however, do not prove to be adequate[22] to guarantee effective protection to the minor [23] , and in general to the most vulnerable persons[24] , who, in handing over their personal data, nevertheless increase the possibility of exploitation of their weaknesses[25] . Although functional to the realisation of the child's personality, the greater autonomy granted to the child in the digital environment certainly contributes to exacerbating the conflict between the instances of protection that belong to the educational actors and institutions responsible for mitigating the risks deriving from the dissemination of the child's personal data on the network and the instances of autonomy of the child, who has the right to take advantage of the opportunities for interaction and personal expression offered by social media, to build his or her own online identity and therefore to manage his or her *privacy*.

[20] On this point, allow me to refer to I Garaci, 'La "capacità digitale" del minore nella società dell'informazione. Riflessioni sul corretto esercizio della responsabilità genitoriale fra esigenze di autonomia e di protezione' (2019) 2 NDC, 59 ff.

[21] The consent given by the child to the processing of personal data must always be understood to be specific, informed, unambiguous, knowing, free and revocable (see Articles 4, 7, 17 GDPR). Furthermore, the data controller addressing the child is required to use language that is 'particularly clear and simple, concise and exhaustive, easily accessible and understandable by the child, in order to make the consent given by the child meaningful' (cons 58 GDPR- art. *2-quinquies Privacy* Code).

[22] On the inadequacy, in general, of the consent-based model of protection see: S Rodotà, *Tecnologie e diritti* (Il Mulino, 1995), 82; G Finocchiaro, 'Il quadro di insieme sul Regolamento europeo', in Id, (ed.), *Il nuovo regolamento europeo sulla privacy e sulla protezione dei dati personali* (Zanichelli 2017), 3 ff; A. Mantelero, 'Responsabilità e rischio nel Reg. UE 2016/679' (2017) 1 NLCC, 148; I A Caggiano, 'Il consenso al trattamento dei dati personali tra Nuovo Regolamento Europeo (GDPR) e analisi comportamentale. Initial insights', [2017] DIMT, available at https://www.dimt.it/la-rivista/articoli/il-consenso-al-trattamento-dei-dati-personali-tra-nuovo-regolamento-europeo-gdpr-e-analisi-comportamentale-iniziali-spunti-di-riflessione; A M. Gambino, 'Big data e fairness. Il ruolo delle authorities' (2020) 1 NDC, 298.

[23] Suffice it to say that the legislative provision of an age threshold for registration in the various social networks (not accompanied by effective indications for ascertaining the minor's age) is rarely taken into account by parents and in fact does not prevent access by younger minors who easily circumvent the limits by declaring a false age. In this way they access social networking tools, for the use of which they are not sufficiently prepared, not so much from a technological point of view, but rather from an emotional and value-related one. Reference is made to I. Garaci, 'Il 'superiore interesse del minore' nel quadro di uno sviluppo sostenibile dell'ambiente digitale' (2021) 4 NLCC., 804.

[24] See C Perlingieri, 'La tutela dei minori di età nei social networks' (2016) 4 Rass. dir. civ., 1331 ff.

[25] V V Cuocci, *La protezione dei dati personali dei soggetti vulnerabili nella dimensione digitale* (Cacucci Editore 2022), who in particular highlights the concrete difficulty of vulnerable persons in exercising those powers of which privacy is composed today (to develop, maintain or even change their identity in the digital reality).

4. Limits to parents' supervisory duties/powers

In the past, the immunity enjoyed by the family unit vis-à-vis the outside world, as a guarantee of family unity and stability, did not allow the minor to sue for breach of privacy by the parent.[26] Moreover, the concept of 'family *privacy*', understood in a unitary sense, was often used as an ideological tool to make the strongest members of the family immune in relation to abuses committed against the weaker ones.

This perspective began to change with the 1975 Italian reform of family law. In fact, Article 147 of the Civil Code, in implementing the obligation to maintain, educate and bring up children under Article 30 of the Constitution, provides that their capacities, natural inclinations and aspirations must be taken into account.[27] The obligation to respect the child's intimate personal sphere was also deduced from this provision. The latter, in fact, as the holder of fundamental rights, considered capable of exercising them, irrespective of having reached the age of majority, must also be considered the holder of the right to privacy - as a right that has its basis in the Constitution, in the general provision for the protection of the person considered in its unity[28] - even within the family nucleus[29], which is the privileged place for the promotion and development of his personality. The exercise of this right will be recognised at the outcome of a correct balancing of interests that may come into conflict, which in any case takes into account the 'best interests of the child'. [30]

Moreover, this perspective has been endorsed by the recent 2013 Italian reform on filiation, which outlines a parental responsibility geared to the best interests of the child.[31] and respect for his or her personality and will[32] and is confirmed by the most recent regulatory provisions affecting the delicate medical-health sector, which emphasise the principle of direct participation of the child in health care choices that affect him or her.[33]

However, the pervasiveness and danger of the web, together with the various opportunities for disseminating personal data, call for reflection on how to strike a proper balance between the obligations imposed on parents and the autonomy of minor, in the light of the many risks underlying the use of digital space. To name but a few: the risk of being exposed to inappropriate content (from pornographic or violent images, to material - including advertising - that incites racism, discrimination or hatred,

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[26] V Corriero, 'Privacy del minore e potestà dei genitori, (2004) 4 Rass.dir.civ.,1000.

[27] See E Quadri, *L'interesse del minore nel sistema della legge civile* [1999] Fam. e dir., 84, who emphasises the new role of children as "protagonists of the family experience".

[28] P Perlingieri, *La personalità umana nell'ordinamento giuridico* (Jovene editore1972), 44-45.

[29] V Corriero, Privacy del minore e potestà dei genitori, (2004) 4 Rass.dir.civ., 1004; A Thiene, 'Riservatezza e autodeterminazione del minore nelle scelte esistenziali' [2017], Fam. dir., 172 ff..; M Dogliotti, 'Capacità, incapacità, diritti degli incapaci. Le misure di protezione', in L Mengoni, P Schlesinger, V Roppo, FAnelli (ed.) *Trattato di diritto civile e commerciale* (Giuffré 2019), 345, which in particular emphasises how a parent's violation of the right to privacy may lead to the intervention of the judge pursuant to Art. 333 of the Civil Code or (in more serious cases) to the termination of parental responsibility pursuant to Art. 330 of the Civil Code.

[30] F Ruscello, 'La potestà dei genitori. Rapporti personali, Artt. 315-319,' in P Schlesinger, F D Busnelli (ed.) *Codice civile. Commentario* (Giuffré 1996), 10.

[31] F Giardina, Morte della 'potestà' e 'capacità' del figlio", [2016] Riv. dir. civ., 1615 ff.

[32] A Thiene, 'Riservatezza e autodeterminazione del minore nelle scelte esistenziali' [2017], Fam. dir.,. 178

[33] *See* in particular Law No 219 of 2017 on advance treatment provisions.

to websites promoting self-harm, suicide, anorexia); the so-called contact risk, i.e. being contacted by malicious adults; the risk of contributing through one's own behaviour to generating risky content or contacts or in any case making oneself the author of conduct that is harmful to oneself or to third parties (es. passive and active cyberbullying): the risk arising from the profiling of personal data (impairment of one's capacity for self-determination, possibility of being influenced and manipulated);[34] finally, the risk of developing more or less serious forms of addiction, in view of the characteristics of digital products and services, endowed with 'persuasive technology', capable of increasingly attracting the attention of users.[35]

How, then, can the need to protect minors during their education and development process from the serious risks described above be reconciled with the minors' demands for autonomy, particularly in the use of social networks? In particular, the question arises as to the extent to which parents can exercise their power of control over their children in order to safeguard them from external dangers and also to avoid the commission of offences by which they may cause harm to third parties.

It should be borne in mind that the new family model, based on the dialogic relationship between parents and children, assigns a central role to trust and rejects any form of intrusion into the latter's personal life, unless justified by the need to concretely guarantee their own security. Once the child's capacity for discernment has been ascertained (which may vary according to age, but also according to specific personal conditions of the child), parents should refrain from invading the spaces of freedom granted to the latter, aimed essentially at establishing relations with his or her peers, sheltered from the curiosity of members of their own household. Surveillance activity, whether it takes traditional forms, such as searching rucksacks, reading diaries, intercepting telephone calls, or is technological in nature, such as monitoring browsing history, connecting to one's children's mobile phone archives to download conversations, photos, videos, etc., infringes the right to privacy of one's own children, as well as of third parties involved (children's friends).

Undoubtedly, there are 'serious' cases in which there is a duty/power to exercise more incisive control over the personal sphere of one's children, in order to make it possible for the parents to fulfil their parental duties in their best interest.[36] This is the case, for example, in situations where the child, although having reached an age at

[34] Today, profiling algorithms not only infer the user's tastes and interests, but are also able to deduce the user's emotional and psychological states through voice and facial imprints, capturing their weaknesses, in order to allow increasingly personalised and effective targeted advertising, which also manages to guide the user's behaviour. This has an enormous impact on their freedom of thought, choice and thus self-determination; such manipulation is not limited to economic choices, however, as it can also extend to social, cultural and political choices. See S Zuboff, 'Il capitalismo della sorveglianza' (2019), 1306, Internazionale, 40 ff.; Id, *Il capitalismo della sorveglianza. The future of humanity in the age of new powers* (Luiss University Press 2019).

[35] In this regard, see the opinion of the Surgeon General of the United States, published on 23 May 2023 , "Social Media and Youth Mental Health", in which, after an experiment conducted on young university students, evidence is given of the very close correlation between the use of social media and the onset or worsening in adolescents of important emotional states such as anxiety, depression, body dissatisfaction, disordered eating behaviour, low self-esteem, etc.. The document also contains a call for all stakeholders in civil society (legislators, technology companies, the scientific community, families and young people themselves) to take action with measures, precautions, actions and initiatives to safeguard the physical and mental health of minors.

[36] G De Cristofaro, 'Dalla potesta` alla responsabilità genitoriale: profili problematici di una innovazione discutibile' (2014) 4 NLCC,796.

which it is assumed to have acquired the capacity for discernment, manifests abnormal behaviour or presents disturbances or imbalances. In such circumstances, monitoring, which may therefore also lead to access to the child's personal information, is justified, but it must be carried out in a manner that does not offend the child's identity or dignity; it must also be appropriate to the child's age and capacity for discernment, respecting the child's right to be heard. Unmotivated, sudden or clandestine monitoring[37] betrays the current meaning of education and care, which must rather include actions aimed at strengthening the child's/young person's confidence and self-esteem.

However, one notices, in the judicial decisions, which particularly concerned the online activity of the child, a tendency to consider the supervisory duties deriving from parental responsibility as broadened and to emphasise the educational task of parents in view of the expansion of the child's spheres of freedom.[38]

Our legal system does not actually interfere with educational choices, leaving private individuals free to educate their children, according to their own convictions and values, respecting their capacities, natural inclinations and aspirations (according to article 147 of the Civil Code). However, it requires the correct exercise of the educational function, suitable for raising the child as a free and responsible person, capable of integrating into the society in which he or she lives. This implies the transmission of an essential core of rules based on the values and principles of Italian Constitution.[39] Among the main and most important rights of the child emerges precisely that to the "educational relationship with his or her parents, which is respectful of the over-utilitarian value of the person".[40] Digital education must also find a place in this sphere, given the inescapable interpenetration between virtual and real space, considering the damaging potentialities that digital environment presents, as well as the greater emancipation (de facto and de jure) of the minor *online*, which inevitably exposes him or her to greater risks.

5. Parental liability under Article 2048 of the Italian Civil Code for the torts committed by minors on the Internet.

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[37] C Camardi, 'Minori e privacy nel contesto delle relazioni familiari', in R Senigaglia (ed.), *Autodeterminazione e minore età. Itinerari di diritto minorile* (Pacini Giuridica, 2019), 134 . In identifying the criteria in relation to parents' access to their children's personal data, the author refers precisely to the principles of necessity and purpose, relevance, proportionality, limitation or non-surplus of data, which are moreover the same as those referred to by the GDPR (in Articles 5 and 6) in relation to the processing of personal data by the data controller and processor.

[38] See: Court of Teramo 6 January 2012; Court of Caltanissetta 8 October 2019. In particular, it is stated that 'parents are required not only to impart to their children an education appropriate to their socio-economic conditions, but also to carry out an activity of verification and control on the actual acquisition of those values by the minor'. And again: 'The duty of parental supervision must take the form of a quantitative and qualitative limitation of such access, in order to prevent that powerful medium, strongly relational and informative, from being used inappropriately by the minor'; see Court of Parma 5 August 2020 for which 'the contents present on minors' mobile phones must be constantly supervised by both parents, avoiding the appearance of materials that are not appropriate to the age and education of minors. The same rule applies to the possible use of computers, to which the necessary filtering devices must be applied'.

[39] B Agostinelli, 'L'educazione della prole tra antiche prerogative genitoriali e nuovo interesse del minore', (2021) 1 Riv. dir.civ.,178.

[40] In this sense E Bilotti, 'Diritti e interesse del minore', in R Senigaglia (ed.), *Autodeterminazione e minore età. Itinerari di diritto minorile,* (Pacini Giuridica 2019), 17.

The system of parental liability, in the Italian legal system, for torts committed by minors is governed by Articles 2046, 2047 and 2048 of the Civil Code. The minor's age does not exclude the imputability of the fact: the minor, capable of understanding and willing, as can be inferred from Article 2046, can be called upon to answer personally for damage caused to third parties, according to the general rule of Article 2043 of the Civil Code. In the event of damage caused by a minor who is incapable of understanding, Art. 2047 states, the person responsible for the supervision of the incapacitated person shall be exclusively liable.

Without prejudice to the direct liability of the child capable of understanding, the law also provides for the liability of the parents (or guardian), jointly and severally with that of the child cohabiting with them. This liability, according to the literal wording of Article 2048, can be eliminated by proving that they were unable to prevent the fact.

The basis of this liability is much debated. According to the traditional orientation[41] the basis is to be found in the fault (*in educando* and/or *in vigilando)*, which is presumed, but can be overcome with the liberating proof of not having been able to prevent the fact. Jurisprudence, however, has creatively interpreted[42] the rule by holding that the required liberating proof is not the predetermined (negative proof) of not having been able to prevent the act, but the (positive) proof of having imparted a good upbringing to the child and of having exercised adequate supervision over him.[43] This is a very difficult proof to provide. Several decisions, moreover, state that the inadequate upbringing is inferred from the child's own wrongful act.[44]

According to some scholars such a strictness would be justified by the need to guarantee compensation to the injured third party.[45] It has been said that this reference to guilt actually gives rise to a 'fictitious model of guilt' characterised by the 'only nominal presence of exculpatory evidence'.[46] It was also emphasised that this approach does not take into account the fact that sometimes even the most careful education may not be sufficient to prevent unlawful behaviour, given the influence of the external environment[47] and (today, we would say) of the digital environment, over which it is increasingly difficult to exercise control, especially in the case of individuals capable of discernment who have been granted a certain amount of autonomy in navigating. A large part of the doctrine is therefore led to qualify the aforementioned liability in objective terms.[48]

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[41] L Corsaro, 'Funzioni e ragioni della responsabilità del genitore per il fatto illecito del figlio minore' (1988) IV Giur. it., 225.

[42] U Majello, 'Responsabilità dei genitori per il fatto illecito dei figli minori e valutazione del comportamento del danneggiato ai fini della determinazione del contenuto della prova liberatoria' [1961] Dir. giur., 45, who in particular defines this jurisprudential orientation as a "free creation of law". See S Rodotà, *Il problema della responsabilità civile*, (Giuffré 1964), 153, who also notes the misrepresentation by jurisprudence of the criterion of liability.

[43] Cass. 7 August 2000, no. 10357 in De Jure database.

[44] Cass. judgment 6 December 2011, no. 26200, in De Jure database; Cass. judgment 22 April 2009, no. 9556, in De Jure database.

[45] F D Busnelli, Capacità e incapacità di agire del minore' [1982] Fam. pers. succ., 63.

[46] F Esposito, 'Autonomia del minore e responsabilità dei genitori' (2009) 1 NGCC., 1141.

[47] P Trimarchi, *La responsabilità civile: atti illeciti, rischio, danno,* (Giuffré 2017), 116.

[48] G M D Arnone, 'Responsabilità civile dei genitori per fatto illecito del figlio quasi maggiorenne' [2010], Danno e resp., 367 ; A. Venchiarutti, Il minore e il danno. Riflessioni sulla responsabilità dei genitori in Francia e in Italia [2005] Riv. dir. civ., 239 ; R Pardolesi, 'Danni cagionati dai minori: pagano sempre i genitori?', [1997] Fam. e dir., 224; A

Case law, however, tends, precisely because of the complexity of releasing evidence, to continue basing the parent's liability on culpa (in educando and/or in vigilando). Significant in this regard is a well-known decision of the Court of Sulmona[49] that, in relation to the unlawful conduct of some teenagers involved in the publication and dissemination (both on social networks and through the use of the WhatsApp application) of an intimate image of one of their peers, condemned the parents of the minors involved to pay damages pursuant to Article 2048 of the Civil Code, basing the relevant liability on culpa in vigilando and in educando. In the decision, particular emphasis is placed on culpa in educando, thus in line with the stricter jurisprudential direction according to which the educational deficiency of the minor can be inferred from the very manner in which the crime was committed.

This kind of decision may undoubtedly raise some concerns from the point of view of system coherence. Under the previous authoritarian family model, where the parent-child relationship was set up in terms of parental authority, the offence committed by the children could more easily be considered an expression of an omission on the part of the parents to fulfil their educational and supervisory duties.

The new family model oriented towards favouring the child's self-determination should at the same time lead to greater empowerment of the child, who should for instance necessarily be called upon in court proceedings.

However, one cannot fail to agree with the rationale behind the aforementioned decisions: the need to further empower parents by inviting them to continue with constancy in their educational function towards adolescents, especially in relation to the correct use of the web.

6. The improper exposure of children's personal data online: the phenomenon of 'sharenting'.

Connected to the recognition of a child's right to privacy within family relations is the question that arises regarding so-called sharenting,[50] a term used to indicate the tendency of parents to share their children's personal data (pictures, videos, details of personal life, etc.) online, without their consent and sometimes even against their will. Through 'sharenting', parents build and shape the digital identity of their children even before they are born. It is often parents who leave the first 'digital footprints'[51] of their children on the net, particularly when they share their prenatal ultrasounds, first feedings, first baths, first steps, etc. on social media. They are not concerned about making the child whose images or personal stories they publish unidentifiable, nor about the fact that such sharing may reach a much wider audience than the one they presume to have selected; they also perceive such sharing as a 'natural gesture', entirely legitimate and harmless, and do not seem to be aware of the consequences, even in the

Solinas, 'Responsabilità dei genitori per culpa in educando ed in vigilando. Criteri di determinazione' (2002), 1, NGCC, 330.

[49] Court of Sulmona, 9 April 2018. For a critical and analytical commentary on the decision, see A Thiene, Ragazzi perduti on line: illeciti dei minori e responsabilità dei genitori (2018) 11 NGCC 1618 ss.

[50] S B Steinberg, 'Sharenting: Children's Privacy in The Age Of Social Media' (2017) 66 Emory Law Journal, 839-1007.

[51] Ibidem, 849-850.

long term, that such activity entails for their children . In addition to the risks linked to the safety[52] and privacy *of* the minor, consider the risk of injury to the personal identity of the minor[53] or to his or her reputation;[54] the risk in general of exposing the minor to constant profiling for marketing purposes, with consequent injury to his or her capacity for self-determination, since the 'manipulative' effects that behavioural advertising entails, especially in the most vulnerable subjects, such as minors, are well known. It also happens that the publication of images and videos of one's children takes place for purely economic reasons. The activity of so-called 'baby influencers' is increasingly widespread on online platforms, which poses problems not only of security and privacy, but also of (child) labour exploitation.[55]

The new provisions on privacy do not provide us with any specific indications in this regard. They merely establish an age threshold, above which it is possible to give consent to the processing of one's personal data independently and below which parental consent is instead required, and provide for certain precautions - both in terms of information and in terms of remedies[56] - to reconcile the extension of the child's sphere of self-determination. Moreover, recital 18 of the GDPR excludes the applicability of the regulation to the processing of personal data carried out by a natural person in the context of an activity of an exclusively personal or domestic nature and therefore without any connection with a professional or commercial activity. This would suggest that the processing of personal data for 'family' and non-commercial purposes is permitted, even when such data relate to minors. The GDPR, moreover, is based on the assumption that parents act as responsible subjects, guarantors and guardians of their children's privacy[57] and that all their actions are carried out in the latter's interest. What is not taken into account, however, is that the same parents may not be digitally literate enough to protect the interests of their underage children and may not be fully aware of the risks associated with the publication and dissemination of personal data.

On the other hand, case law has helped to delineate the contours of proper parental action with regard to both the publication of personal data of children over the age of

[52] Images disseminated on the web can be downloaded and contribute, through simple manipulation, to child pornography. The dissemination of personal data, such as habits, school attended, spots played, etc., can contribute to online grooming by ill-intentioned persons.

[53] Constant publication of photos and personal data contributes to the creation of a digital identity of the sharenting child, which may not correspond to 'the self-projection desired by the individual once he or she matures'. I A Caggiano, I.A, 'Privacy e minori nell'era digitale. Il consenso al trattamento dei dati dei minori all'indomani del Regolamento UE 2016/679, tra diritto e tecno-regolazione' (2018) 1 Familia, 3 ss.

[54] One thinks of the fairly widespread habit of creating blogs by parents who wish to share stories and details of the personal lives of their children with disorders or other problems, even if only with the intention of receiving comfort from other parents in similar situations.

[55] In this regard, the solution followed by France, which recently introduced a law (*Loi no. 2020-1266 du 19 octobre 2020*) regulating the commercial exploitation of the image of minors under the age of 16 on *online* platforms, is considered reasonable and congruous. In particular, the law places the activity of baby influencers within the framework of the regulations on employment relations, giving it the same protection as that provided for minors in the entertainment, fashion and advertising sectors. In particular, there is the obligation for parents to obtain prior authorisation from the administrative authority, as well as the obligation to deposit with the *Caisse des dépôts* a part of the income received by the child, which can be made available to the latter once he or she has reached the age of majority (or emancipation).

[56] In particular, the child's right to the deletion of personal data collected under Article 17 of the GDPR must be taken into account.

[57] S Donovan, 'Sharenting: The Forgotten Children of the GDPR' (2020) 4 (1) Peace Human Rights Governance, 38.

14 and the publication of data relating to children under that age.[58] With reference to the first type of conduct, we note the decision (order) of the Court of Rome of 23 December 2017 in relation to a judgment of separation between spouses which was followed by the suspension of parental responsibility of both parents for prejudicial conduct towards the child and which was therefore followed by the appointment of a Guardian. In the course of the proceedings, which had arisen to assess the child's request to leave Italy and continue his studies abroad because of the conflictual relationship with his parents, it emerged that the mother had behaved prejudicially, as she had published and disseminated on social networks photos, videos and information relating to her son, despite the latter's opposition. This conduct had clearly created serious psychological distress for the child. In the course of the proceedings, the Court ordered the mother to stop the dissemination of such data and to remove all those published on social networks. In addition, in order to ensure the fulfilment of the parents' obligations (to do), the 'astreinte' referred to in Article 614-bis c.p.c. was ordered, according to which, in the event of failure to comply with the obligations laid down in the order, the mother is condemned to pay a certain sum of money.[59]

For the hypotheses in which the publication of personal data concerns minors under the age of 14, reference can be made to the decisions of the Court of Mantua of 19 September 2017, and the Court of Rieti of 7 March 2019, in which the need for the consent of both parents was affirmed, provided that the publication takes place with respect for the honour, decorum and reputation of the image of the children. In any case, it is good to clarify, in addition to the established orientation in case law, that parents, as they are responsible for the care of their children and therefore for their right to privacy, image and personal identity, even if they both agree, should not be considered authorised to dispose of their children's personal data at will (even) if they are under the age of fourteen, especially if this could potentially harm them. Obviously, the parents' duty to refrain from publishing personal data where the child, regardless of age, has expressed his or her will/opinion to the contrary remains in place, as, moreover, is argued by the same Article 315 *bis of the* Civil Code.

7. Privacy of the child in relation to health data.

A different kind of antagonism between the child's autonomy and parental protection instances within which the child's right to privacy is relevant concerns the medical-health context. In this area, moreover, the principle of listening to the minor has recently been enhanced by the law on advance treatment provisions (Art. 3, Law No. 219 of 22 December 2017), where it is provided that informed consent to the minor's health treatment is expressed or refused by the parents (or guardian) taking into

[58] It should be noted that in France, a bill is currently under consideration (*Proposition de loi no. 758 visant à garantir le respect du droit à l'image des enfants*) aimed at guaranteeing respect for the right to the image of minors, which provides that the publication of a minor can only take place with the agreement of both parents.

[59] It is stated in the explanatory statement that this measure follows from the application of the general principles of the legal system based on the necessary protection of the child and the official powers recognised in this matter.

account the will of the minor's person, in relation to his or her age and degree of maturity, always respecting the minor's rights to life, health and dignity.[60]

However, there are cases, expressly provided for by the law,[61] in which the minor is granted more complete self-determination, through the possibility of expressing his or her consent directly and personally in relation to certain diagnostic/therapeutic choices. The *rationale* behind these provisions is the need to protect the very health of the child, who, fearing having to interface with his or her parents, may be deterred from seeking treatment. The conflict in these cases may arise between the child's right to self-determination and privacy with regard to the choices made and the parents' right to be informed and to give consent before any health treatment of their child. It goes without saying that the recognition of a minor's full self-determination in relation to certain therapeutic or diagnostic choices, which are absolutely indicated by law, also implies the recognition of a sphere of privacy to be asserted vis-à-vis the parents themselves, in full respect of informational self-determination, which therefore implies a power of control over their personal data, generated by the treatment process.[62] This principle must therefore also be maintained in relation to the use of the Electronic Health Record (Fascicolo Sanitario Elettronico - FSE),[63] a digital tool that allows the collection of documents, health and socio-health data "generated by present and past clinical events concerning the assisted person and care episodes that have taken place for each citizen" (art. 12 of Decree-Law no. 179 of 18 October 2012 and Art. 2, Regulation no. 178/2015), allowing the sharing of information relating to the citizen's health among the various health professionals who are treating him or her. Given the nature of the data processed, the FSE can only be fed and consulted with the free and informed consent of the patient, which can, however, be revoked at any time. In the case of minors, consent to consultation is given by the person exercising parental responsibility or by the legal representative, after identification of the same (Art. 7, paragraph 3, Regulation no.

[60] It should be borne in mind how the spaces of decision-making autonomy left to the minor in the healthcare sphere are still confusingly delineated and need a more complete 'interpretive work of arrangement and systematisation'. In this sense R Senigaglia, 'Consenso libero e informato' del minorenne tra capacità e identità' (2018) 4 Rass. dir.civ., 1327.

[61] Thus, for example, Article 2 of Law 194 of 1978 allows contraceptive drugs to be administered to minors in health facilities and family advice centres, even without their parents' knowledge; Article 12 of Law no. Art. 12 of Law No. 194 of 1978 allows minors to proceed with the voluntary interruption of pregnancy, if the conditions are met, even without parental consent (if there are serious reasons for not informing the parents, and in any case always through the judge); the Consolidated Text of the laws on the regulation of narcotics and psychotropic substances, prevention, treatment and rehabilitation of drug addiction (art. 120 of Presidential Decree No 309 of 9 October 1990) provides that the request for diagnostic tests and therapeutic and social rehabilitation programmes may also be made directly by the minor (paragraph 2) and that anonymity must be guaranteed; Art. 3 of Law 219 of 2005 allows minors giving birth to children to donate haematopoietic stem cells, placenta and umbilical cord blood, subject to the expression of their informed consent.

[62] This is with a view to better protecting the child's right to health and thus avoiding evasive strategies that would be detrimental to his or her own health. The minor could in fact be induced not to turn to the health facility for fear that his or her parents might learn certain information. Cf. R. Ducato-U. Izzo, 'Diritto all'autodeterminazione informativa del minore e gestione dei dati "supersensibili" nel contesto del fascicolo sanitario elettronico'[2013] Dir.inf., 704.

[63] The Electronic Health File (Fascicolo Sanitario Elettronico) was established by Decree-Law 179/2012 and subsequently regulated by Prime Ministerial Decree No 178 of 29 September 2015, containing 'Regulations on the electronic health file'. On the critical issues and risks related to the ESF, *see*: A M Gambino, E Maggio V Occorsio, 'La riforma del fascicolo sanitario elettronico' [2020] DIMT, available at https://www.dimt.it/wp-content/uploads/2020/07/fse-gambino-occorsio-maggio-completo.pdf; S Corso, 'Sanità digitale e riservatezza', in A Thiene - S Corso (ed.), *La protezione dei dati sanitari* (Jovene editore 2022), 91 ff.

178/2015). However, Art. 5 of the same regulation provides that "health and socio-health data and documents governed by the regulatory provisions for the protection of HIV-positive persons, women undergoing voluntary termination of pregnancy, victims of acts of sexual violence or paedophilia, persons who use drugs, psychotropic substances and alcohol, women who decide to give birth anonymously, as well as data and documents referring to the services offered by family advice centres, are made visible only with the explicit consent of the person assisted".

Furthermore, Art. 8 of the regulation specifies that 'the assisted person has the right to request the obscuring of health and social-health data and documents both before the FSE is fed and afterwards, guaranteeing that they can only be consulted by the assisted person and the holders who generated them'.

A correct interpretation of the rules therefore leads to the conclusion that it is possible, even for a minor with discernment, to have access to the FSE independently, as well as to request the obscuring of data that he intends to keep confidential. This perspective is, moreover, followed by the Privacy Guarantor Authority, which has intervened on several occasions with injunctions for the application of administrative fines and accessory sanctions against a number of local health authorities, which, disregarding the right of obscuration exercised by minor patients, have made it possible for their parental authority holders to access the report.[64] It is understood that where the involvement of the parent proves to be functional for the protection of the child's health or that of a third party, the child's right to privacy will have to be set aside.

[64] *See* injunction order against 'Azienda Usl di Bologna', 29 April 2021 [9676172]. The' Azienda' in particular made it possible for the parents of a minor patient to access the report in relation to the service provided by a consultation centre for adolescents, which they could access independently, on the subject of contraception and responsible procreation.