

# CYBER BULLYING DILEMMA: A CASE FOR UBUNTU

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## SUMMARY

To really understand the concept of cyber bullying one cannot look at the dreaded act alone, but have to consider the unique nature of cyber bullying, dissect the incident, consider the profiles of the bully and the victim, identify what caused the incident and consider alternative creative ways to manage the situation bearing in mind the spirit of *ubuntu*, restorative justice, the child's age, his/her criminal liability and then deal with the legislative remedies available in the extreme circumstances.

Schools should ensure a safe environment for children, have policy that is consistently applied and ensure awareness and education about the use of the internet and the dangers of cyber bullying.

Parents should be involved in the monitoring and education of their children, ensuring a secure and nurturing relationship with their children to ensure that their children are encouraged to speak up about cyber bullying.

We can learn from other jurisdictions to creatively deal with the challenges faced.

Only when all stakeholders and disciplines collaborate can the cyber bullying dilemma be effectively managed in South Africa.

## **ABSTRACT**

When parents and teachers are faced with cyberbullying instances the first question that comes to mind is what measures could be initiated to protect the victim, to ensure no further emotional harm is caused and to make the cyberbullying stop.

The second question to consider is what should be done to secure the evidence, this is a topic for more research and definite guidelines, this will not be discussed in this research.

The third question is chasing the why. Why did the incident happen? Why is the child displaying bully behaviour and why was the other child chosen as the victim? This is where psychology meets the law and a multi-disciplinary approach is needed to answer the why's. Once the cyberbullying incident is dissected and the behaviour of the bully is understood, appropriate measure can be considered to correct the behaviour of the child, always taking into consideration the principles of the spirit of "ubuntu", the human rights of the victim and the bully, and the best interest of the children.

This is when the fourth question can be asked and answered, what punitive and/or restorative actions can be taken? What legislative tools are available and what other avenues should be considered to ensure that the victim is not bullied and the bully does not continue with his/her behaviour.

The victims of bullying should be protected and given the necessary tools to protect themselves from being the victims of cyberbullying. The bullies should be dealt with in a holistic way where the child is seen as a whole person, and not just his or her dreaded actions. The bully should not only be punished for his/her actions, but also be given the guidance to correct his/her future interactions.

Mediation, counselling and restorative justice are definite solutions to incidences of cyber bullying to ensure future behaviour and interactions are changed, but not all incidents of cyberbullying and bullies can escape punitive action. The bully is often a child that have a low self-esteem, who have been a victim to bullying or is the victim of bullying elsewhere and need guidance in social skills.

The motivation for this research is to reach common ground where law and psychology meet to find creative solutions to deal with the children involved and in the process develop policy, legislation and restorative remedies which cultivate a society where there is mutual respect for dignity and other human rights.

Immediate and definite action is needed address cyberbullying in South African legislation but also consider the value of educating parents and children about cyberbullying. The remedies in the United States of America will be compared to the remedies in South Africa to find possible solutions to respond more creatively to the cyber bullying dilemma.

This is not an easy task as tackling any bullying incident is a multi-disciplinary effort, educators, parents, the school, the State and other role players have to get involved to find solutions that is effective and sustaining.

## 1.1 Introduction

“Bullying is a global phenomenon that has the potential of impacting on children both physically and psychologically”.<sup>1</sup>

In the light of the above statement it is clear that the African proverb “*It takes a village to raise a child*”,<sup>2</sup> is applicable. This means an entire community of people must interact with children for those children to experience and grow in a safe and healthy environment. In South Africa this proverb is linked to the principle of “*Ubuntu*”.<sup>3</sup>

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<sup>1</sup> Laas A & Boezaart T “*The Legislative framework regarding bullying in South African Schools*” PER 2014 Volume 17 No 6 (PER/PELJ 2014(17)6

<sup>2</sup>**African Proverb Quotes.** (n.d.). *Quotes.net*. Retrieved May 14, 2019, from <https://www.quotes.net/quote/6994>.

<sup>3</sup> *Ubuntu* <http://www.humanitysteamsa.org/ubuntu/>. <https://askubuntu.com/questions/424/what-does-ubuntu-mean> and Christian and Gade BN “What is *Ubuntu*? Different Interpretations among South Africans of African Descent” *South African Journal of Philosophy* 31:3, 484-503, DOI: [10.1080/02580136.2012.10751789](https://doi.org/10.1080/02580136.2012.10751789).

The concept of “*Ubuntu*” is central to human dignity,<sup>4</sup> it is an African concept explained in *S v Makwanyane* as:<sup>5</sup>

Generally, *ubuntu* translates as *humaneness*. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*,<sup>6</sup> describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.

It also takes parents to nurture, protect and ensure their children have the social skills and savvy to navigate modern society. Literature suggests that parents play a very crucial role in their children’s development. It is adduced that parents are key parts of the immediate “eco-system” of a child and are critical in a healthy development of the child, including the functioning and progress of the child.

Parents are not always aware of legislative remedies or equipped to support and deal with the challenges faced by their children. In incidences of cyberbullying it is assumed children are legally literate, yet educational programs do not inform children about the legal risks of cyberbullying or encourage legal literacy because teacher training do not address these legal issues. The protection of the victims of cyberbullying is the immediate focus but there is also a need to protect legally naive children and teens who engage in cyberbullying for fun, peer pressure, anger or provocation, from legislation and policies that fail to take into account their immaturity and lack of knowledge.

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<sup>4</sup> Hills CA *Developing a law and policy framework to regulate cyber bullying in South African Schools* (LLD Thesis University of South Africa 2017)

<sup>5</sup> *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

<sup>6</sup> “*umuntu ngumuntu ngabantu*”, a zulu saying meaning “a person is what is because of other people” [https://zu.oxforddictionaries.com/translate/isizulu-english/umuntu\\_ngumuntu\\_ngabantu](https://zu.oxforddictionaries.com/translate/isizulu-english/umuntu_ngumuntu_ngabantu) and Ifejika N “I am, because you are”. In fact, the word ubuntu is just part of the Zulu phrase “*Umuntu ngumuntu ngabantu*”, which literally means that a person is a person through other people. Ubuntu has its roots in humanist African philosophy, where the idea of community is one of the building blocks of society. Ubuntu is that nebulous concept of common humanity, oneness: humanity, you and me both. <https://www.theguardian.com/theguardian/2006/sep/29/features11.g2>.

Children often drop out of school because of bullying, there is permanent damage to their education, their psychological welfare and sometimes they even kill themselves. Most incidents of bullying occur at schools, but the unique nature of cyber bullying enables the bully to follow the victim wherever he/she goes. Reactive and punitive suspension policies are rarely effective in reducing traditional bullying, let alone cyberbullying.<sup>7</sup>

Cyberbullying remains a relatively under-researched phenomenon.<sup>8</sup> With the emergence of technology, cellphones and the access to social media platforms and the internet that is freely available to children, this form of bullying has surfaced.<sup>9</sup> There are many different forms of cyber bullying, thus the definitions of cyber bullying in legislation and policy should be wide enough to address all the forms of cyber bullying.<sup>10</sup> The South African Constitution is the supreme law in South Africa, schools, courts, organs of state are bound by the spirit of the Constitution and by international obligations.<sup>11</sup>

This chapter briefly address the background to the research problem, the research aim and the objectives of the research. The research methodology used to achieve the objectives of the research is explained in this chapter.

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<sup>7</sup> Lankshear C and Knobel M "Digital literacy and digital literacies: Policy, pedagogy and research considerations for education" 2006 *Digital Kompetenz: Nordic Journal of Digital Literacy* 1(1) 12-24 and Boyd D "Facebook's Privacy Trainwreck: Exposure, Invasion, and Social Convergence" 2008 *Convergence* 14(1).

<sup>8</sup> Badenhorst C "Legal responses to cyberbullying and sexting in South Africa" CJCP Issue Paper No 10 August 2011 at 5

<sup>9</sup> Beale AV & Hall KR "Cyberbullying: What school administrators and parents can do" 2007(81)(1) *Clearing House: A Journal of Educational Strategies, Issues and Ideas* 8 at 8.

<sup>10</sup> Hayward JO "Anti-cyber bullying statutes: threat to student free speech" 2011(59) *Cleveland State Law Review* 85 at 89

<sup>11</sup> Coetzee SA and Mienie CA "South African educators' mutually inclusive mandated to promote human rights and positive discipline" 2013(31)(1) *Perspectives in Education* 87 at 88.

## 1.2. The types of cyber bullying

Cyberbullying could take the following forms,<sup>12</sup> Harassment, sending nasty, mean and insulting messages repeatedly; Flaming, online fights using electronic messages containing angry or vulgar language; Denigration, “dissing” or disrespecting someone online, sending or posting gossip or rumours about a person to damage his/her reputation or friendships; Impersonation, pretending to be someone else and sending or posting material to get that person in trouble or damage their reputation; Outing, sharing someone’s secrets or embarrassing information or images online; Exclusion, intentionally and cruelly excluding someone; Cyber stalking, involves threats of harm or intimidation through repeated online harassment and threats;<sup>13</sup> Sexting, the sending of nude or semi-nude photos or videos and/or sexually suggestive messages via mobile phone texting or instant messaging.<sup>14</sup>

The elements of cyber bullying can be identified as an act, with the intention to cause harm to another person, by using a communication device and/or electronic communication to commit the act, which causes actual harm to the victim, the acts of harmful communication should be repetitive.

Laas and Boezart,<sup>15</sup> suggests that the term bullying should have a wider interpretation. It should be defined as an international wrongful act (whether a physical act, in verbal or written or even a gesture) which takes place repeatedly; performed either by an individual or group of persons.<sup>16</sup> The definition suggested may include the creating of a pattern of victimisation; harm to a person or his/her property; emotional assault on the person; control over the victim through fear;

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<sup>12</sup> Hayward JO ‘Anti-cyber bullying statutes: threat to student free speech’ 2011(59) *Cleveland State Law Review* 85 at 89.

<sup>13</sup> Badenhorst C ‘Legal responses to cyber bullying and sexting in South Africa’ CJCP Issue Paper No. 10 August 2011 at 5.

<sup>14</sup> Badenhorst C (note 31) at 2.

<sup>15</sup> Laas A and Boezart T “The Legislative Framework regarding bullying in South African Schools” PER 2014 Volume 17 No. 6 at 2669.

<sup>16</sup> Definition of bullying by Bully OnLine (Tim Field Foundation date unknown <http://bullyonline.org/workbully/amibeing.htm>) which includes “unwanted or invalid criticism, nit-picking, fault-finding, also exclusion, isolation, being singled out and treated differently, being shouted at, humiliated, excessive monitoring”, as wrongful acts in the context of bullying.

disruption of the orderly function of school activities through negative behaviour; and creating a counterproductive learning environment through hostility.<sup>17</sup>

From the above suggestions it is clear that cyber bullying is far more than just childish bickering or competition. Bullying is a psychologically motivated act which infringes on various rights of persons and can lead to the victim's death.<sup>18</sup>

The unique nature of cyber bullying is that it can occur when children use technology deliberately and repeatedly to "bully, harass, hassle and threaten" their peers,<sup>19</sup> and leaving their victims without any escape. The victims are traced wherever technology is accessed, not only on the internet, e-mail or smartphones, but through any way where sending or retrieving of data, voice messages is possible.

### **1.3. The profile of the bully**

The profile of a bully changed when introduced with access to internet, the anonymity of the internet as well as the lack of facing up to the physical reaction of the victim are contributing factors in the prevalence of cyber bullying.<sup>20</sup>

Shariff states that:<sup>21</sup>

cyberspace creates an environment where learners who would not normally participate in traditional bullying can hide behind technology to inflict abuse. Hundreds of perpetrators can get involved with cyber bullying.

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<sup>17</sup> Laas et al "Legislative Framework regarding bullying in South African Schools" 2669.

<sup>18</sup> It must be borne in mind that when working with children, especially in the instance of a bullying incident, various disciplines come into play such as law (child law, criminal law, education law and the law of delict), psychology, sociology, etc. These disciplines must work in conjunction with one another to ultimately provide a solution. Laas in "Legislative Framework regarding bullying in South African Schools" 2670 referring to Boezaart T "Child Law, the Child and South African Private Law" in Boezaart T (ed) *Child Law in South Africa* (Juta Cape Town 2009) 3-37.

<sup>19</sup> Goodno NH 2011 *How public schools can constitutionally halt cyberbullying: A model cyberbullying policy that considers the first amendment, due process, and fourth amendment challenges* The Wake Forest Law Review 46:641-700. Available at [http://wakeforestlawreview.com/wp-content/uploads/2014/10/Goodno\\_LawReview\\_11.11.pdf](http://wakeforestlawreview.com/wp-content/uploads/2014/10/Goodno_LawReview_11.11.pdf) as referred to in Smit DM "Cyberbullying in South African and American Schools: A legal comparative study" 2015 *South African Journal of Education* vol 35(2) 1.

<sup>20</sup> Hills CA *Developing a law and policy framework to regulate cyber bullying in South African Schools* (LLD thesis University of South Africa 2017) 42.

<sup>21</sup> Shariff S "Cyber-dilemmas in the new millennium: School obligations to provide student safety in a virtual school environment" 2005 (40)(3) *McGill Journal of Education* 457 at 460 as referred to in Hill *Developing a law and policy framework to regulate cyber bullying in South African schools* 46.

Research has shown that several factors are linked to the participation in bullying behaviours,<sup>22</sup> bullies have a more positive attitude toward aggression than others, in addition to this, a child's home environment is also an important component in predicting bullying behaviours. Attachment theory states that, as infants, we all form attachments to our primary caregiver,<sup>23</sup> each of the attachment styles is distinguished based on several behavioural characteristics exhibited by the child. The parent-child attachment style plays a role in the development of bullying behaviour in adolescence, children with an insecure attachment with their primary caregiver tends to be at risk to develop bullying behaviour, whereas children with a secure attachment with their primary caregiver tend to be the victims of bullying.<sup>24</sup>

Warm and firm parenting protects against several youth risk behaviours, including bullying,<sup>25</sup> it can further also be predicted that parental monitoring may deter cyberbullying perpetration.<sup>26</sup>

From the above it is clear that the profile of the bully, the victim and the parent-child relationship is very important when dissecting the reason for bullying and the bully incident, it is also evident that parent-based programs to strengthen parent-child relationships,<sup>27</sup> may serve as a buffer to cyberbullying.

#### **1.4. The unique nature of cyber bullying and the harm caused**

The harm caused by cyberbullying found in a number of studies include the following: victims experience lower levels of academic performance; lower quality

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<sup>22</sup> Cole J, Cornell D and Sheras P "Identification of school bullies by survey methods" 2006 *Professional School Counseling* Volume 9 305-313 referred to in William K "Bullying Behaviours and Attachment Styles" 2011 *Electronic Theses and Dissertations* 444 found at <https://digitalcommons.georgiasouthern.edu/etd/444>

<sup>23</sup> Ainsworth M Infant-mother attachment *American Psychologist* 1979 Volume 34 932-937.

<sup>24</sup> Koiv K "Attachment styles among bullies, victims and uninvolved adolescents". *Psychology Research* 2012 Volume No. 3 160-165.

<sup>25</sup> Elsaesser C, Russell B, Ohannessian C and Patton D "Parenting in a Digital Age: A Review of Parents' role in preventing adolescent cyberbullying, aggression and violent behaviour". [Google Scholar]

<sup>26</sup> Doty JL, Gower AL, Sieving RE, Plowman SL and McMorris BJ "Cyberbullying Victimization and Perpetration, Connectedness and Monitoring of Online Activities: Protection from Parental Figures". 2018 found at <https://doi.org/10.3390/socsci7120265>

<sup>27</sup> Sandler IN, Schoenfelder EN, Wolchik SA and MacKinnon DP "Long-term Impact of Prevention Programs to Promote Effective Parenting: Lasting effects but uncertain processes. *Annual Review of Psychology* Volume 62 299-329 as referred to in Doty et al "Cyberbullying Victimization and Perpetration, Connectedness and Monitoring of Online Activities"



family relationships; psychosocial difficulties, anxiety, depression, in some instances suicide, social anxiety, social isolation, self-harm and low self-confidence.

Cyberbullying is hard to contain, as comments or photos can be spread on the internet quickly and widely.<sup>28</sup> This increases the perceived severity of the bullying by the victim, as millions of people can witness the humiliation of the victim.<sup>29</sup>

It is always important to remember that in a bullying incident there will be a bully and a victim, children are involved, as discussed above the incident and the profiles of the children involved should be approached in a holistic manner.

Laas,<sup>30</sup> state that alternative means than a punitive system of justice needs to be considered. The concept of *ubuntu* is critically important when dealing with restorative justice, through healing is to cement core values such as mutual respect, love, sympathy and empathy.

The age of the perpetrators also plays a very important roles with respect to criminal liability,<sup>31</sup> it should always be considered with all the other factors when investigating an incident of cyber bullying.

### **1.5. School jurisdiction and challenges to regulate cyber bullying**

The most difficult issue in the regulation of cyber bullying in a school environment is the fact that cyber bullying can be done from anywhere not just on the school grounds. The legal position is unclear on the legal responsibility of schools when cyber bullying is conducted from home.<sup>32</sup> Schools have the authority and responsibility to act in instances where the cyber bullying occur on the school

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<sup>28</sup> Lane DK "Taking the lead on cyberbullying: why schools can and should protect students online". 2011(96) *IOWA Law Review* 1791 at 1795-1796; Manuel NR "Cyber-bullying: its recent emergence and needed legislation to protect adolescent victims" 2011(13) *Loyola Journal of Public Interest Law* 219 at 229.

<sup>29</sup> Manuel "Cyber-bullying" at 222 referred to in Hills *Developing a law and policy framework to regulate cyber bullying in South African Schools* 44-45.

<sup>30</sup> Laas *Combating bullying in Schools: A South African Legal Perspective* 27-29

<sup>31</sup> According to section 7(1) of the Child Justice Act 75 of 2008, a child who, at the time the offence was committed, was under 10 years of age but under the age of 14 is presumed to be *doli incapax*. This assumption is rebuttable if it were to be found beyond a reasonable doubt that the child had the criminal capacity to understand his/her deeds and then could be held criminally liable.

<sup>32</sup> Campbell M, Cross D, Spears B and Slee P. "Cyberbullying – Legal implications for schools" (2010, November) Occasional Paper 118, Centre for Strategic Education, Melbourne, Victoria 1 at 8 referred to in Hills *Developing a law and policy framework to regulate cyber bullying in South African schools* 43

ground. Coetzee,<sup>33</sup> argue that the jurisdiction of schools will not be affected in certain circumstances, these circumstances was deduced from American case law. Some of the guidelines proposed by Coetzee are: whether the learner's posting cased or is reasonable likely to cause substantial disruption at school or interfere with the rights of other learners to be secure and safe and learners' right to freedom of expression may be limited in certain circumstances, speech that is not consistent with school policy.

This brings me to the next topic, school policy, awareness and accountability.

### **1.6. Policy, awareness, monitoring and accountability**

From the above discussions it is clear that a safe and nurturing home environment with parent-child relationships that are secure can have a significant effect on the development of bully behaviour. A positive school environment and successful anti-bullying programmes are not the only factors that could prevent bullying, a whole-school approach in the management of bullying is also a factor that should be considered.

The whole-school approach,<sup>34</sup> entails that school policies and the consistent implementation thereof makes the school virtually bulletproof. Bullies and victims are not just individually managed but the way to reduce bullying should include interventions at individual, class and whole-school levels.<sup>35</sup>

From literature review it can be adduced that for schools to effectively manage cyber bullying the school policy regulating cyber bullying should contain the following elements, (a) awareness of cyber bullying which includes educating learners, parents and other stakeholders such as teachers and school counsellors about the nature and the dangers of cyber bullying, as well as make them aware of the different attachment profiles of children. The awareness programs should include education about safe use of the internet, the negative influences of online behaviour,

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<sup>33</sup> Coetzee SA "Learner sexual offenders: Cyber child pornography" *Mediterranean Journal of Social Sciences* October 2012(4)(11) 752 -757.

<sup>34</sup> Richard FJ, Schneider BH and Mallet P "Revisiting the whole-school approach to bullying: Really looking at the whole school" 2011(33)(3) *School Psychology International* 263 at 266 as referred to in Hill *Developing a law and policy framework to regulate cyber bullying in South African Schools* 49.

<sup>35</sup> Swart E and Bredenkamp J "Non-physical bullying: exploring the perspectives of Grade 5 girls" 2009(29) *South African Journal of Education* 405 at 407.

how to report cyber bullying and preventative action against cyberbullying. (b) Monitoring and accountability should be the responsibility of all the parties involved, the parents, the teachers and other stakeholders. Parents have an obligation to monitor their children's online activities, teachers and learners have the responsibility to prevent cyber bullying and to speak up against cyber bullying.<sup>36</sup>

### **1.7. The regulation of cyber bullying in the United States of America**

The United States of America is a federation, this means that different states in America may have different laws on cyber bullying, this complicates a review of bullying laws in America. Smit,<sup>37</sup> state that there is no federal law regulating cyber bullying but different states have their own laws prohibiting bullying and cyberbullying. The Federal Prevention Task Force in the USA was established to investigate cyberbullying, bullying, sexting and peer aggression, to develop effective prevention and intervention strategies.<sup>38</sup> Freedom of speech is protected by the United States Constitution and courts, the South African Constitution refers to freedom of expression, this includes speech but also other acts of expression. In the USA there is also no explicit right to human dignity, as in South Africa where section 10 of the South African Constitution protects dignity. The principle of the best interest of the child is also not constitutionally protected in the USA, as it is in the South African Constitution.<sup>39</sup> There is however a duty on school districts in the USA to protect learners and staff from harassment and discrimination. Educating authorities must teach learners the boundaries of socially accepted behaviour and this means that speech that are offensive or threatening to others are restricted.<sup>40</sup> Most American states have implemented laws on cyber bullying, but the legislature or the courts have not managed to give clear guidance on how to manage cyberbullying effectively.<sup>41</sup> There is a balancing act between cyber bullying and

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<sup>36</sup>Hill *Developing a law and policy framework to regulate cyber bullying in South African Schools*, Laas *Combating bullying in schools: A South African legal perspective*, Smit *Cyberbullying in South African and American Schools: A legal comparative study*, Laas et al *The Legislative framework regarding bullying in South African schools*,

<sup>37</sup> Smit "Cyberbullying in South African and American Schools: A legal comparative study" 4.

<sup>38</sup> Smit "Cyberbullying in South African and American Schools: A legal comparative study" 4

<sup>39</sup> Hills *Developing a law and policy framework to regulate cyber bullying in South African Schools* 51

<sup>40</sup> Hinduja S and Patchin JW *Cyberbullying: A review of the legal issues facing educators. Preventing School Failure: Alternative Education for Children and Youth* (2011) 55(2): 61-78 referred to in Smit *Cyberbullying in South African and American schools: A legal comparative study* 5.

<sup>41</sup> Goodno 2011.

freedom of speech in the USA, the first amendment of the United States Constitution guarantees the right to freedom of speech by not allowing the American Congress to restrict the press or individuals to speak freely.<sup>42</sup>

Hill,<sup>43</sup> state that the right to freedom of speech of learners in schools may be limited under certain circumstances, this is irrespective of whether such freedom of speech is exercised by means of information and communication technologies or not. She provides the guidelines as derived from the following cases, *Tinker v Des Moines Independent Community School District*,<sup>44</sup> *Bethel School District NO 403 v Fraser*,<sup>45</sup> *Hazelwood School District v Kuhlmeier*,<sup>46</sup> *Morse v Frederick*.<sup>47</sup> Freedom of speech may be limited in the following circumstances: when it leads to substantial and material disruption of school activities, or where it interferes with the rights of others, when the language is so rude that it undermines the educational responsibilities of the school, when the restriction is reasonable related to pedagogical concerns, the special characteristics of the school environment and what is appropriate for the students applies when freedom of speech is considered and the court considers the importance of protecting the speech that is unpopular and controversial against the responsibility of schools to educated students about socially acceptable behaviour.

Smit,<sup>48</sup> argue that there is a dire need for a single law to review and ensure that policies adopted by school districts have the necessary constitutional impact to curb cyberbullying, a ban in some schools from using the internet or technology-enabling instruments has proactively curbed cyberbullying, but more needs to be done. Smit states that many authors argue that programmes such as the “Stop the Bullying Now”, the “Olweus Bullying Prevention Programme” and the “Let’s Get Real” curriculum can serve as proactive means to stop cyber bullying.<sup>49</sup>

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<sup>42</sup>Cornell University Legal Information Institute <https://www.law.cornell.edu/constitution/firstamendment> as referred to in Hills *Developing a law and policy framework to regulate cyber bullying in South African schools*.

<sup>43</sup> Hill CA *Developing a law and policy framework to regulate cyber bullying in South African schools*.

<sup>44</sup> 393 U.S 503, 508-9 (1969).

<sup>45</sup> 478 US 675 (1986).

<sup>46</sup> 484 US 260 (1998).

<sup>47</sup> 551 US 393, 406 (2007).

<sup>48</sup> Smit “Cyberbullying in South African and American schools: A legal comparative study” 8.

<sup>49</sup> Sbarbaro V and Smith TME An exploratory study of bullying and cyberbullying behaviours among economically/educationally disadvantaged middle school students. *American Journal of Health Studies* (2011) 26(3): 139-151.

## 1.8. The South African Constitution and Human rights

After consideration of the factors discussed above and reviewing the measures implemented in the United States of America, the South African legislative framework regarding cyberbullying must be considered. Various human rights come to play in a cyber bullying incident, some of these rights will be discussed now.

The rights to dignity and equality are inter-related, these rights are violated in a cyber bullying incident, the South African Constitution protects individuals, no person may discriminate against another person, the right to equality relates to the uniqueness of an individual. In the beginning of this paper, the right to dignity was mentioned and a passage from the *S v Makwanyane*,<sup>50</sup> was quoted, dignity is a constitutional value and a constitutional right, dignity gives human life value, it is a person's self-worth, it is central to the concept of *ubuntu*. When dissecting a cyber bullying incident it is the ultimate goal of bullying to negatively impact on the victim's dignity.<sup>51</sup>

The right to privacy is related to an individuals' identity, in a cyber bullying incident an individuals' privacy is invaded when personal details, data, photos, were obtained and then shared to shame that person. The right to privacy and dignity is then violated.<sup>52</sup>

The right to protection against violence, torture and cruel inhumane treatment, this right automatically protects children from cyberbullying (bullying). This right goes further to protect the right of control over his or her body, but also protects the physical integrity and psychological wellbeing of individuals.<sup>53</sup>

The right to education is an unqualified and immediately realisable right that demands priority, the state is obliged to respect, protect and promote the right to basic education.<sup>54</sup> Children are further afforded additional constitutional protection through section 28 of the South African Constitution. The principle of the "best interest of the child" is entrenched and any bullying incident goes against this. Any bullying affects the development of the child and the safe environment wherein

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<sup>50</sup> *Makwanyane* case.

<sup>51</sup> Laas et al The legislative framework regarding bullying in South African Schools 2675, The Constitution of the Republic of South Africa, Act No. 200 of 1996, The Bill of Rights.

<sup>52</sup> Laas et al The Legislative framework regarding bullying in South African Schools 2677.

<sup>53</sup> Section 12 of the Constitution, 1996, Currie and De Waal *Bill of Rights Handbook* 286.

<sup>54</sup> Sections 7(2), 29(1)(a) and (b) of the Constitution. Laas et al The legislative framework regarding bullying in South African Schools 2677.

children have a right to learn.<sup>55</sup> It can thus be adduced that bullying of any nature cannot be tolerated as it disrupts and is counterproductive to the education of children.<sup>56</sup>

## **1.9. The Statutory Law**

### **1.9.1. *The Electronic Communications and Transactions Act, Act No. 25 of 2002.*<sup>57</sup>**

The ECT Act main purpose is to regulate electronic communication and to prevent the abuse of information systems. The focus of the ECT Act is to protect “data” or data messages. Cybercrime is dealt with in Chapter 13, Sections 86 to 88, deals with the interception of data without authorisation, the interfering with data without authorisation, the selling, producing, distributing of any device or programs that can compromise security of data and passwords and the using of a device or computer program that can overcome security measures which protect data.

Cyber bullying can include the abuse of electronic communications and/or information systems to degrade and humiliate another person. A bully can access the data of another person and use this to intimidate, harass or humiliate the victim. This brings cyber bullying under the scope of the ECT Act and would make it available to address incidents of cyber bullying.<sup>58</sup>

### **1.9.2. *Cybercrimes and Cybersecurity Bill.*<sup>59</sup>**

Section 17 of the bill may have an impact on cyber bullying in schools, it provides for in Section 17(1) and 17(3) that, any person who unlawfully and intentionally who, (a) provides, broadcasts, distributes, (b) is instrumental to provide, broadcast, distribute, (c) assists in providing, broadcasting or distributing, through using a computer network or an electronic communications network, to another person or the general public, a data message which advocates, promotes or incites hate, discrimination or violence against a person or a group of persons, is guilty of an

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<sup>55</sup> Laas et al The legislative framework regarding bullying 2677.

<sup>56</sup> Section 2(b) of the Children’s Act of 2005 holds that one of the objectives of the Act is to provide structures to promote, monitor and protect the stable development of children, physically, psychologically, emotionally, intellectually and socially.

<sup>57</sup> Electronic Communications and Transactions Act, Act No 25 of 2002 (“ECT Act”).

<sup>58</sup> Cassim F “Formulating adequate legislation to address cyber bullying: Has the law kept pace with advancing technology” 2013(1) SACJ (*South African Journal of Criminal Justice*) 17-18.

<sup>59</sup> Cybercrimes Bill.

offence. The nature of the data message is defined in Section 17(3), the data message “*representing ideas of theories which advocate, promote or incite hatred, discrimination or violence*” against a person or a group of persons, based on (a) national or social origin, (b) race, (c) colour, (d) ethnicity, (e) religious beliefs, (f) gender, (g) gender identity, (h) sexual orientation, (i) caste or (j) mental or physical disability, will be guilty of the offence defined in Section 17(1), this has the implication that even when a child merely on send a WhatsApp they received, may also be guilty of assisting in the offence of creating or spreading a message that incites.

### **1.9.3. The Promotion of Equality and Prevention of Unfair Discrimination.<sup>60</sup>**

Section 10(1) of the Act provides that, subject to the provision in section 12, no person may publish, propagate, advocate or communicate words, with the intention to be hurtful, harmful, incite harm, promote or propagate hate, the words used in the communication should fall within the scope of the prohibit grounds, these words may not be against any person. This has the implication that persons who publish hurtful, harmful comments or comments that propagates hatred, can contravene Section 10 of this Act.

### **1.9.4. The Protection from Harassment Act.<sup>61</sup>**

In the preamble of this Act it is stated that the aim of the Act is to consider the best interests of the child of paramount importance. Any incident of bullying is harassment, this Act can therefore be applied to situation of bullying and aims at protecting the best interests of the child.<sup>62</sup> A victim of any incident of bullying can apply for a protection order against the bully, the victim can be assisted by his or her parents but can also apply for the order without assistance. The clerk of the court has the duty to inform the complainant that he or she may lodge criminal charges against the bully for any other offence that relates to the person or the property of the complainant. This could include charges such as *crimen iniuria*,

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<sup>60</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act, Act No.4 of 2000 (“Equality Act”).

<sup>61</sup> The Protection from Harassment Act, Act No. 17 of 2011 (“Harassment Act”).

<sup>62</sup> Laas et al The Legislative framework regarding bullying in South African schools 2689. Preamble to the Protection from Harassment Act 17 of 2011 (hereinafter the Protection from Harassment Act). This preamble is also embraces the Constitution, section 28(2) and sections 7 and 9 of the Children’s Act 38 of 2005 where the best interests of the child is regarded as of paramount importance.

assault, extortion or other statutory charges provided for in the ECT Act. The protection order is a great remedy to ensure that the victim is not bullied further and/or to ensure that other children bully the victim on behalf of the child against whom the protection order was applied for. The court can impose various conditions that provide for therapy, involve the families and remedy the incident with mediation and restorative justice. In this way criminal prosecution of a child could be prevented.

As discussed earlier in this paper, the child-bully under the age of 10 cannot be prosecuted in terms of the *Child Justice Act* but in terms of the *Protection from Harassment Act* a protection order can be issued against him or her irrespective of age.<sup>63</sup> This Act is an immediate form of relief to prevent the bully from continuing his or her disruptive and abusive behaviour. As discussed earlier in this paper, the phenomenon of bullying requires a multi-disciplinary approach. A protection order alone will not solve the reasons for bullying for the bully or the reasons why the victim was bullied. It is suggested by Laas et al, that restorative justice should accompany or immediately follow upon a protection order to prevent further damage and to set the victim's healing and restoration in motion.<sup>64</sup>

#### **1.9.5. Criminal Law (Sexual Offences and Related Matters) Amendment Act,<sup>65</sup> and The Films and Publication Act.<sup>66</sup>**

Sexting and the sending of nude, semi-nude pictures or videos and/or sexually suggestive messages via instant messaging.<sup>67</sup> Sexting can also involve the sending of sexually explicit text or nude or partially nude images of other minors, this can be regarded as child pornography,<sup>68</sup> and could lead to the prosecution of children in

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<sup>63</sup> Section 11(1)(a) of the Protection from Harassment Act, allows thus for a warrant to be issued and ultimately allows for the arrest of a child under the age of 10, this indicates that there are discrepancies between the Protection from Harassment Act and the Child Justice Act. Sect 28(2) of the Constitution and Sections 7 and 9 of the Children's Act and Section 2 of the Child Justice Act, protects the rights of the victim and the bully, arresting a child under the age of 10 would not be in the best interest of the child. A different approach is necessary. Laas et al The legislative framework regarding bullying in South African Schools.

<sup>64</sup> Laas et al The legislative framework regarding bullying in South African Schools 2692 and 2681.

<sup>65</sup> The Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act No. 32 of 2007 ("Sexual Offences Act")

<sup>66</sup> The Films and Publications Act, Act No. 65 of 1996 ("Films and Publications Act")

<sup>67</sup> Cumming PE *Children's Rights, Children's Voices, Children's Technology, Children's Sexuality*. Congress of the Humanities and Social Sciences, Carleton University, Ottawa, 26 May 2009.

<sup>68</sup> Badenhorst C Legal responses to cyber bullying and sexting in South Africa 2011 *CJCP Issue Paper 10*.



certain circumstances, this might not have the intention of the legislature and the minors involved might not have knowledge of the legal consequences of sexting. This is why there is a dire need to educate parents, teachers and children of the nature of sexting and the legal consequences when partaking in sexting.

#### **1.9.6. The Children's Act,<sup>69</sup> and the Child Justice Act.<sup>70</sup>**

Children in South Africa are afforded additional legal protection through section 28 of the Constitution.<sup>71</sup> The discussion here of the Children's Act and the Child Justice Act, only touch on a limited coverage of children's rights. The Children's Act in Section 2 highlights the importance of family, the protection of children and the best interest of the child.<sup>72</sup> The best interest of the child is also entrenched in Section 28(2) of the Constitution.<sup>73</sup> Section 6 of the Children's Act contains the principles applicable when dealing with children in actions, proceedings and decisions about children. This recognises the children's right to dignity, equality and development, this has the implication that children should be treated with respect. Laas,<sup>74</sup> argue that the application of the Children's Act in a cyber bullying incident is when disciplinary action is considered. The children, both the bully and the victim, must be given the opportunity to voice his/her opinion, and all actions taken must be in the best interest of the children involved.

The principle of best interest of the child is also underlined in international law, the Convention of the Rights of the Child,<sup>75</sup> and the ACRWC,<sup>76</sup> recognizes this principle. The best interest of the child is not only a concept that can be dealt with by legislation of international law, but is a multi-disciplinary process.<sup>77</sup> The Children's Act stipulates that every child has the right to bring a matter to court, or to be assisted,

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<sup>69</sup> The Children's Act, Act No. 38 of 2005 ("Children's Act")

<sup>70</sup> The Child Justice Act, Act NO. 75 of 2008. ("Child Justice Act")

<sup>71</sup> Laas A *Combating Cyber Bullying in schools: A South African Legal Perspective*.

<sup>72</sup> Section 2 of the Children's Act, Act No. 38 of 2005.

<sup>73</sup> Section 28(2) of the Constitution of South Africa 1996.

<sup>74</sup> Laas A *Combating Cyber Bullying in schools: A South African Legal Perspective*.

<sup>75</sup> United Nations Convention of the Rights of the Child ... Article 3(1) states the following: "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

<sup>76</sup> ACRWC Article 4(1) states: "1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."

<sup>77</sup> Davel in Davel and Skelton (eds) *Commentary on the Children's Act 2010* 2-6 makes the point that the best interest of the child standard is very vague. Different people form different professional capacities may deem different issues as being of paramount importance when dealing with children.

Section 14 has a direct application in any bullying incident. The Constitution further obliges the State to respect, protect and to promote the rights of citizens,<sup>78</sup> this together with Section 14 of the Children's Act have the implication that for the State to comply, administrative procedures must be in place to maintain these rights.<sup>79</sup> Section 15 of the Children's Act and Section 38,<sup>80</sup> of the Constitution applies in any bullying incident, not only the child, but his parents or his guardian or even the teachers acting *in loco parentis*,<sup>81</sup> may approach the court to protect the rights of children. Schools are bound by Section 60 of the Schools Act, which stipulate that the state can be held liable on account of damage, loss or injury incurred by a learner through the activities of a public school.<sup>82</sup> Although the Children's Act does not specifically mention bullying, the principles in the Act protect children against all forms of abuse. When discussing the Children's Act and the protection of children, the Child Justice Act also need to be discussed. This Act deals with the criminal capacity of children but also aims to rectify injustice through restorative justice.<sup>83</sup> It is evident from this legislation that the aim is not to punish a child punitively, but seek to rehabilitate a child.<sup>84</sup> The Child Justice Act seeks to protect a child when he/she come into conflict with the law. There should be a balance between the rights to the child offender and the rights of the victim (community). Accountability and restorative justice is prominent in the Child Justice Act, this does not mean that when apologising the child get away from the wrongdoing.<sup>85</sup> Parents, society and all other role players need to be involved in the rehabilitation and support of the offender, rather than just punishing the offender.<sup>86</sup> An important section in the Child Justice Act is Sections 7, 9, 10 and 11, where the Act deals with criminal capacity of children and how to deal with children when they are under the age of 10 and under the age

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<sup>78</sup> Section 7(2) of the Constitution.

<sup>79</sup> Laas, *Combating Bullying in Schools: A South African Legal Perspective*.

<sup>80</sup> Section 38 of the Constitution read as follows: "38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, as the court may grant appropriate relief, including a declaration of rights."

<sup>81</sup> Parental rights and responsibilities can either be full or specific rights or responsibilities and Laas *Combating Bullying in Schools: A South African Legal Perspective* 104.

<sup>82</sup> The South African Schools Act, Act No. 84 of 1996 and Laas *Combating Bullying in Schools: A South African Legal Perspective* 105.

<sup>83</sup> Laas *Combating Bullying in Schools: A South African Legal Perspective* 124.

<sup>84</sup> Sloth-Nielson and Gallinetti "Just say sorry?" Ubuntu, Africanisation and the child justice system in the Child Justice Act 75 of 2008" 2011 *PER* 64.

<sup>85</sup> Sloth-Nielson and Gallinetti 2011 *PER* 71 as referred to in Laas *Combating Bullying in Schools: A South African Legal Perspective*.

<sup>86</sup> Galinetti 12 as referred to in Laas *Combating Bullying in Schools: A South African Legal Perspective*.

of 14.<sup>87</sup> It is important that Section 9,<sup>88</sup> deals with children that come into the conflict with the law when under the age of 10, this is very important when dealing with bullying incidents. Although the Act does not mention it explicitly counselling or therapy would be more beneficial for a child offender under the age of 10. In a child centered system where the best interest of a child is paramount, the victim and the bully psychological profile must be considered.

The test for criminal capacity is set out in Section 78(1) of the Criminal Procedure Act,<sup>89</sup> the court has to ascertain if at the time of committing the offence the child (offender) had the necessary mental capacity to know that his/her actions is wrong and then if the child (offender) acted with the realisation that his/her action are wrong and that he/she can be punished for these actions. In *S v Dyk*,<sup>90</sup> it is stated that it is doubtful that a child of 11 will have the necessary mental capacity to appreciate wrong doing.

Another important Section in the Child Justice Act, is Section 8, that deals with diversion,<sup>91</sup> a prosecutor, in South African common law, is dominus litis and thus has discretion pertaining to prosecution.<sup>92</sup> The diversion of a child offender rather than prosecution is vested in the prosecutor's discretion.

It can be adduced from the above that in cases of any bullying incident, the best interest of the child is paramount, the right to dignity, the criminal capacity and the importance of restorative rather than punitive action should be considered.

When dealing with children in any bullying incident, family group conferencing as described in the Child Justice Act and victim-offender mediation is a model to

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<sup>87</sup> Section 7(2) of the Child Justice Act, state that a child over the age of 10 but under the age of 14 is presumed to be *doli incapax*. This assumption is rebuttable if found beyond a reasonable doubt that the child has criminal capacity to act. A child over the age of 14 has full criminal capacity and a child over the age of 18 is treated as an adult.

<sup>88</sup> A child under the age of 10 cannot be prosecuted. Section 7(2) of the Child Justice Act.

<sup>89</sup> Section 78(1) of the Criminal Procedure Act, Act No. 51 of 1977.

<sup>90</sup> *S v Dyk* 1969 (1) SA 601 (C) at par 603 C-E

<sup>91</sup> Section 51 of the Child Justice Act states that the aim of diversion is to deal with child offenders outside the formal criminal justice system; to encourage accountability, taking into account the needs of the specific child; facilitate reintegration within his family and society, give an opportunity to the victim to give an impact statement, consider compensation, reconciliation, prevention, stigmatization and secondary victimization and reduce the risk of re-offending; and promote the dignity and wellbeing of the child offender.

<sup>92</sup> Section 179(2) of the Constitution and Section 20(1) of the National Prosecuting Authority Act, Act No 32 of 1998.

resolve matters.<sup>93</sup> Section 61 of the Child Justice Act is therefore of crucial importance,<sup>94</sup> if parents can be part of the process needed to rehabilitate their child, it is a step in the right direction.

#### **1.9.7. The South African Schools Act .<sup>95</sup>**

The South African Schools Act, Section 8 prescribes a basic outline for a code of conduct for learners and how to deal with misbehaviour.<sup>96</sup> It is the task of the governing body of the school to formulate a code of conduct for a specific school, this set of rules must set the standard for learner behaviour, encourage self-discipline and mutual respect, but also include conduct that will not be tolerated. It is important that School Governing Bodies, set out all types of bullying behaviour in this code of conduct to ensure that children and parents are knowledgeable of what types of behaviour is not permissible and what the implications will be if children partake in any bullying behaviour as defined in the code of conduct.

The code of conduct of a school forms the basis of discipline in the school and therefore should always consider the constitutional rights of learners, the best interest of the child and measure to deal with misconduct. It is also important to consider restorative justice, rehabilitation and mediation, rather than just punitive measures when dealing with children in a disciplinary action because of misconduct.

#### **1.10. Le Roux v Dey 2011 (3) SA 274 (CC)<sup>97</sup>**

The majority decision in *Le Roux v Dey* ignores the rights of children and is in contrast to some of the minority judgments in the same case.<sup>98</sup> Matters are often decided on in South African courts where children are involved. From the above discussion it is clear that the best interest of the child and constitutional rights are paramount when dealing with children. The majority in the *Le Roux v Dey*

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<sup>93</sup> Family group conference is described as an informal procedure which is intended to bring a child who is alleged to have committed an offence and the victim together, supported by their families and other appropriate persons. Child Justice Act.

<sup>94</sup> Laas *Comparing Bullying in Schools: A South African Legal Perspective* 136.

<sup>95</sup> The South African Schools Act, Act No. 84 of 1996.

<sup>96</sup> The South African Schools Act is not the only piece of legislation governing education in South Africa.

<sup>97</sup> *Le Roux v Dey* case

<sup>98</sup> Couzens M “*Le Roux v Dey* and Children’s Rights approached to judging” 2018 *PER* (21) DOI <http://dx.doi.org/10.17159/1727-3781/2018/v21i0a3075>.

unfortunately marginalises the rights of children, a children rights approach was definitely not taken.<sup>99</sup> Yacoob J, however considered children's rights in his his minority judgement, he acknowledges the importance of the rights of children and their relevance to the dispute.

The High Court found the boys liable for the delicts of defamation<sup>100</sup> and infringement of his dignity.<sup>101</sup> The Supreme Court of Appeal however found the boys liable for defamation but not for the infringement of dignity. The boys involved appealed the SCA judgment to the Constitutional Court. The Freedom of Expression Institute and the Restorative Justice Centre, made submissions to the Constitutional Court in this matter.

The majority judgement (Brand AJ, Ngcobo CJ, Moseneke DCJ, Khampepe J, Mogoeng J and Nkabinde J concurring) found that the image constructed by the boys were defamatory and the boys were held liable for defamation. The majority rejected the views that the Court should apply the law of defamation in a more sensitive way because of the boys age.

The minority judgement of Yacoob J, were that the boys were not liable for the delicts. He decided that when deciding if the image was defamatory the Court should consider "all relevant circumstances for the purposed of interpreting the image and for deciding whether its impact is defamatory."<sup>102</sup> In dealing with the rights of children, Yacoob J set out some of the requirements arising from previous children's rights cases.<sup>103</sup> Yacoob J found that the current law allows a child to be held liable for defamation even when a child-friendly interpretation of a picture is reasonably possible.<sup>104</sup> He stated that this approach was incompatible with the rights of children, who would not receive adequate protection, and whose "vulnerability and weakness are not sufficiently catered for in that approach."<sup>105</sup>

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<sup>99</sup> Couzens "*Le Roux v Dey* and Children's Rights approached to judging"

<sup>100</sup> Defamation

<sup>101</sup> Dignity has a narrower meaning than it's constitutional interpretation, it refers to one's feelings of self-worth. *Le Roux* case para 138.

<sup>102</sup> *Le Roux* case para 43.

<sup>103</sup> *Le Roux* case para 49-50.

<sup>104</sup> *Le Roux* case para 52.

<sup>105</sup> *Le Roux* case para 53.

The *Le Roux* case was the first case in which South African courts engaged with defamation by children, Couzens,<sup>106</sup> argue that the case brought the law of defamation, which focuses on the victim and where there is “little scope for treating the child defendant differently from the adult defendant”,<sup>107</sup> face to face with children’s constitutional rights and jurisprudence generally sensitive to the rights of children.<sup>108</sup>

This case was also the first case to deal with children’s right to freedom of expression. The potential consequences for the future because of this judgement is that even at the highest level (the constitutional level) there is no guarantee that a children’s rights approach would be taken by judges.<sup>109</sup> Couzens, argue that in the context of a dispute in a different legal system, a children’s rights approach may entail different things. It can be adduced from this that in dealing with any bullying incident the “uniqueness of children as subjects of the law” require the “exploring or developing of the law in search of means to respond to that uniqueness.”<sup>110</sup>

Hill,<sup>111</sup> argue that when regulating cyber bullying there must be a specific policy, the policy must protect the rights of the victim and the bully, the policy must provide for respecting and enhancing rights and values such as human dignity, democracy, mutual respect, tolerance and peace in schools, the freedom of expression of the bully must not impact negatively on the successful function of the school before his/her freedom of expression may be limited (this is in line with American case law on freedom of speech), and the vulnerability of children should be taken into account during punishment for cyber bullying. Civil action must be avoided.

### **1.11. International Instruments**

When dealing with cyber bullying the South African Constitution is not the only relevant guideline that must be considered, one must look at international conventions specifically dealing with cybercrimes and children’s rights. The relevance of international instruments to incidence of bullying is that it enshrines the

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<sup>106</sup> Couzens 18.

<sup>107</sup> Restorative Justice Centre, represented by Professor Ann Skelton.

<sup>108</sup> Skelton “Constitutional Protection of Children’s Rights” in the *Le Roux* case 265.

<sup>109</sup> Couzens 22.

<sup>110</sup> Couzens 23.

<sup>111</sup> Hill *Developing a law and policy framework to regulate cyber bullying in South African Schools* 99.

principle of the best interest of the child, children should be protected from all forms of harm, have a right to education and a safe environment, it is the duty of the State to enforce and protect these rights.

#### **1.11.1. The African Union Convention of Cyber Security and Personal Data Protection.<sup>112</sup>**

The African Union adopted the Convention of Cyber Security and Personal Data Protection (hereinafter “the African Convention of Cyber Security”). The objective of this convention was to define cyber terminologies in legislation, develop principles and provisions related to cyber legislation, to outline cyber legislative measures required at Member State level and to develop principles and specific provision on international cooperation as related to cyber legislation.<sup>113</sup> This convention define, child pornography, which includes sexting, electronic communication, which includes what should be included as electronic communication in a definition of cyber bullying and racism and xenophobia is also defined. This convention places an obligation on Member States to establish a legal framework regarding cybercrimes that protect individuals against the infringement of their human rights.<sup>114</sup>

The African Convention on Cyber Security specifies certain cyber offences in Article 29. The offences specified in article 29(3)(1)(a-h) is relevant when dealing with cyber bullying. The implication of this convention is that the State has a duty to protect learners against cyber bullying, that a legal framework should be established to ensure that learners constitutional rights are protected. Guidance for this legislative framework can be taken from the African Convention of Cyber Security.

#### **1.11.2. Council of Europe Convention on Cybercrime.<sup>115</sup>**

The Convention is not a regional convention for South Africa, but can be used as a guideline for a legislative framework. This convention creates offences relating to child pornography and sexting can fall within these definitions. This Convention also provides for the criminal offence of aiding and abetting in a cyber crime, in Article

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<sup>112</sup> The African Union Convention of Cyber Security and Personal Data Protection

<sup>113</sup> <http://pages.au.int/infosoc/cybersecurity>.

<sup>114</sup> Article 8: Objective of this Convention with respect to personal data.

<sup>115</sup> The Council of Europe’s Treaty on Cybercrime (Budapest 2001) ratified <http://conventions.coe.int/Treaty/EN/Treaties/html/185.htm>

11. As pointed out earlier in this research a person forwarding an image in an incident of cyber bullying or assists in obtaining the image or indirectly participates in the cyber bullying incident would also be guilty of a cyber crime. In this convention the State parties are also responsible to adopt legislative measures, but this Convention expands on the responsibilities by including that service providers must collect or record data associated with specified communications and assist authorities to collect such data.

These guidelines can definitely be of value when considering a legislative framework and policies for dealing with cyber bullying in South Africa.

### **1.11.3. The United Nations Convention on the Rights to the Child 1989.<sup>116</sup>**

The United Nations Convention on the Rights of the Child (“UNCRC”) is the most ratified treaty of all human rights treaties.<sup>117</sup> The Constitution of South Africa and the Children’s Act, aligns itself with the UNCRC with regard to children. The best interest of the child principle is entrenched in the UNCRC and the recognition of the role of the parent is underlined in 19 articles in the UNCRC.<sup>118</sup>

The preamble states the following with regard to the importance of family –

Convinced that the family, as the fundamental group of society and the natural environment for the growth and the well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community, recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.”<sup>119</sup>

Children’s right to life, freedom of expression and to form their own opinions and have a right to be heard is recognized in the UNCRC.<sup>120</sup> Bullying is also addressed in the UNCRC, in Article 16 it is stated –

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<sup>116</sup> The United Nations Convention of the Rights of th Child.

<sup>117</sup> Mahery “The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child law” in Boezaart (ed) *Child Law in South Africa* 309

<sup>118</sup> Mahery in Boezaart (ed) *Child Law in South Africa* 312 states that these articles encompass 3(2), 5, 7(!), 8(1), 9, 10, 14(2), 18 and 21(a).

<sup>119</sup> Extract from the preamble of the UNCRC.

<sup>120</sup> Article 6, Article 12 of the UNCRC.



No child shall be subjected to arbitrary or unlawful interference with his privacy, family home or correspondence, nor to unlawful attacks on his or her honour and reputation. The child has the right to the protection of the law against such interferences or attacks.<sup>121</sup>

It is therefore implicit that the State based on article 16 of the UNCRC and section 7(2) of the Constitution, must take the necessary steps to ensure the safety of all South African learners in all South African Schools. This must be done through legislative and other measures, such as policies. This also relates directly to the child's right to education which is also addressed in articles 28 and 29 of the UNCRC.

The Child Justice Act, address the rights of the child offender, so do the UNCRC, it must be respected throughout legal proceedings,<sup>122</sup> once again from the above, it can be adduced that the best interest of the child is paramount when dealing with children.

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<sup>121</sup> Article 16 of the UNCRC.

<sup>122</sup> Article 40 deals with the child offender from the period of investigation right through to sentencing. UNCRC.

## 2. The South African Criminal Law and Civil Law remedies

There are several criminal law and civil law remedies when dissecting a cyber bullying incident, these will just be mentioned briefly, as the aim of this research is not the remedies that involve punitive measures or civil litigation, but to find creative solutions to deal with cyber bullying in South Africa. The discussion so far deals with the criminal capacity of children and when children can be prosecuted, as well as the *Le Roux* case where the boys were liable for defamation.

Assault is defined in Snyman as the unlawful and intentional act or omission which directly impairs the bodily integrity of another person, or which inspires the belief or fear that such impairment will take place immediately.<sup>123</sup> Cyber bullying can qualify as assault where the victim believes that the violence he/she is being threatened with is serious and will occur. As discussed earlier one would want to avoid charging a child with assault.

Extortion is when a person unlawfully and intentionally obtain information about another person, and then subject the victim to pressure, which induces the victim to do something or not do something that benefit the “bully”. This is also called “outing” as discussed previously in this research. It is necessary that any policy on cyber bullying address extortion.

Defamation is defined as the unlawful and intentional publication of a matter concerning another, which tends to injure his/her reputation seriously.<sup>124</sup> Criminal defamation can include verbal and written defamation. If the defamation did not come to the attention of another person other than the victim, the bully can only be charged with *crimen iniuria*.<sup>125</sup>

*Crimen iniuria* consists of the unlawful, intentional and serious violation of the dignity or privacy of another person.<sup>126</sup>

As discussed earlier in this research, one would not want to subject a child to criminal prosecution. Civil law remedies are also available in instances of cyber bullying, these can include, an interdict to restrain the person from committing or

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<sup>123</sup> Snyman CR “Criminal Law” 6<sup>th</sup> ed (LexisNexis) 455.

<sup>124</sup> Snyman 475.

<sup>125</sup> Badenhorst 8.

<sup>126</sup> Snyman 469.

continuing a wrongful act. The Harassment act can also be used for this as litigating in the High Court is costly.

For the civil remedy of defamation to succeed, there must be wrongfulness, intent, a publication and defamatory statement about the plaintiff. The *Le Roux* case dealt with a claim for defamation. Internet shaming is a form of cyber bullying and can attract a delictual action for defamation.<sup>127</sup>

In terms of the common law, teachers act *in loco parentis*,<sup>128</sup> they therefore have a duty of care towards learners, that implies that teachers must take care of the mental and physical wellbeing of learners.<sup>129</sup> A higher duty of care than the reasonable person can be expected from educators.<sup>130</sup> This brings me to my discussion in the introduction of this research, teachers and the school governing body are responsible to take measures to stop incidences of cyber bullying at schools. If an educator fail to act in situations where a learner is being cyber bullied, the school may be liable for damages.

It can also be argued that it is the responsibility of educators (the state) to provide quality education, they have an important role to play in educating children about cyber bullying and to ensure that the constitutional obligations in terms of section 7(2) of the constitution is fulfilled to “respect, protect, promote and fulfil the rights in the Bill of Rights.”

## **2.2. Conclusion**

From the above discussions the human rights obligations for the protection of learners in schools and the duties of the different role players were identified. The argument to consider the best interest of the child, dissect a bully incident and to approach cyber bullying as a multi-disciplinary team was substantiated. It was determined that although there is some protection by means of legislation to protect children and to deal with cyber bullying, this protection is not sufficient.

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<sup>127</sup> Alfreds D “Internet shaming could land you in jail” <http://www.fin24.com/Tech/Opinion/Internet-shaming-could-land-you-in-jail-20150521>.

<sup>128</sup> Potgieter J “Delictual negligence of educators in schools: the confusing influence of the “in loco parentis” doctrine”. 2004 *Perspectives in Education* 22(3) 153.

<sup>129</sup> Prinsloo IJ “How safe are South African School?” 2005 *South African Journal of Education* 5 at 9.

<sup>130</sup> Potgieter at 154 and Coetzee SA “Educator sexual misconduct, exposing or causing learners to be exposed to child pornography or pornography” 2015 *PER/PELJ* 2127.

Bullying is an escalating phenomenon that intrudes the safe confines of family life, impairing a harmonious environment that is crucial to learning.<sup>131</sup> Children are regarded as a vulnerable group and therefore need protection against harm.<sup>132</sup>

Bullying defined –

Bullying (includes cyber bullying) is a wrongful, intentional act; where physical and/or gesture and/or verbal and/or written and/or electronic communication, is perpetrated repeatedly by an individual and/or more than one person, the perpetration of the acts, cause physical and/or psychological pain and distress, harassment, social exclusion, intimidation and can include theft and or destruction of property and public humiliation.

There is currently no definite definition for bullying in South Africa, it is important to consider that the definition should be as wide as possible to include the growing phenomenon of acts on the internet.

Any policy or legislation regulating cyber bullying (or any bullying) should include provisions regarding the criminal capacity of children (like the Child Justice Act), consider the best interest of the child principles (like the UNCRC, the Children's Act and the Constitution) and consider a multi-disciplinary approach where the whole child and whole school approach is followed.

To really understand the concept of cyber bullying one cannot look at the dreaded act alone, but have to consider the unique nature of cyber bullying, dissect the incident, consider the profiles of the bully and the victim, identify what caused the incident and consider alternative creative ways to manage the situation bearing in mind the spirit of *ubuntu*, restorative justice, the child's age, his/her criminal liability and then deal with the legislative remedies available in the extreme circumstances.

Schools should ensure a safe environment for children, have policy that is consistently applied and ensure awareness and education about the use of the internet and the dangers of cyber bullying.

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<sup>131</sup> Laas *Combating Bullying in Schools: A South African Legal Perspective* 230.

<sup>132</sup> Sect 7 and 28 of the Constitution.

Parents should be involved in the monitoring, education and education of their children, ensuring a secure and nurturing relationship with their children to ensure that their children are encouraged to speak up about cyber bullying.

The policy or legislation regulating cyber bullying should consider the following as suggested by Laas,<sup>133</sup>

Legislation providing for the maintenance of school safety.

Cyber bullying (Bullying) must be defined in a legal sense.

Anti-bullying policies must be mandatory in schools.

Restorative justice mechanisms must be implemented in schools.

Schools must communicate with parents and all stakeholders to improve the involvement of parents and families in schools.

South Africa should furthermore do away with punitive remedies to deal with cyber bullying but focus on developing well rounded children.

Advocacy and training work should be done to inform and educate people on cyber bullying and its effects and methods to address the situation in the future.

There is still more research that can be useful to formulate a framework within which cyber bullying can be addressed. Processes of restorative mediation and other non-punitive rehabilitative remedies should be implemented.

It is the duty of South Africans to respect, protect and promote the rights of others, the State is obliged to ensure the safety of all South Africans and this imposes the duty on the legislature to draft legislation to deal with cyber bullying and bullying.

It takes a village to raise a child, this village includes, parents, peers, the school and the State.

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<sup>133</sup> Laas *Combating Bullying in Schools: A South African Legal Perspective* 239.

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