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**CRITICAL ANALYSIS OF HOW THE SOUTH AFRICAN PROCEDURAL AND
CRIMINAL LAW ADDRESSES CYBER BULLYING CRIME**

BY

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ABSTRACT

The research examines how the South African Procedural and Criminal Law addresses cyber bullying.

This is an investigation of cyber bullying as a criminal conduct and how it is currently addressed in our criminal justice system. Traditionally, bullying occurred physically where the victim was harassed and abused by the bully. However, currently bullying is not only committed through personal encounter between the victim and bully. Cyber bullying is a very prevalent form of bullying that affects so many people and mostly the youth who are very active on social media platforms.

The challenge is that the victim of cyber bullying has nowhere to hide and it occurs anytime without any physical contact but its impact is very strong. Cyber bullying exposes the victim to faceless bullies at times and so it is difficult to investigate and combat it. Due to anonymity through the use of technology, the cyber bullies have freedom to be very cruel in their approach. The instruments used to commit cyber bullying are modern technological gadgets that outsmart old police investigation methods and common law litigation tools. The majority of cyber bullying victims are still too young to deal effectively with the harassment and humiliation.

This study will deal with a general overview of cyber bullying at the outset of the research. Then the report will focus on the scourge caused by the prolific access to information and communication technologies which are used by cyber bullies. The focus will shift to the current legislative frameworks that deal with cyber bullying in South Africa in comparison to American jurisdictions that deal with it more effectively.

The advent of social media platforms had introduced a culture of self-expression that permits individuals to create, control and broadcast their own views. Social networks have created a new youth culture of self-expression beyond control and supervision of parents. The main concern of people is whether the social networks tools are used properly to promote social cohesion and respect for democratic values of human dignity, equality and freedom as enshrined in the Constitution of South Africa Act 108 of 1996. The study will deal with the required balance between freedom of speech and expression against the need to protect values of equality, dignity and privacy.

Then in conclusion the report will focus on making certain recommendations of how South Africa can better address the complex issues relating to cyber bullying. The study will put emphasis on the importance of protecting our Constitutional values and balancing the contesting the rights through legislative frameworks.



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DECLARATION

I hereby declare that the research paper titled “Critical analysis of how the law addresses Cyber bullying in the South African Criminal and Procedural Law: A comparative study is my own work.

ADV M A MACHITELA

DATE: 13/11/2019



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CHAPTER 1: THE DEFINITIONS AND ELEMENTS OF CYBER BULLYING

Would you kill someone because you can?

Not with a knife, a gun or your own hands.

The words you say, your devious ways makes someone's life a living hell.

You called him gay, the poor thing, poor thing.

You called him weak, the poor thing, poor thing.

You pushed him beyond his limits.

His life was taken, his own two hands, murder can be invincible, it happened, it can.

But you can change it. Change your ways. Brush away the rainy days.

Apologise for those evil ways, because in the end, it really pays.

And for all you poor things, no more need for the sighs, I promise, promise that you will get by.

There really is no reason to die, you can always turn an ink blot, into a butterfly.¹

A poem by Teresa Motherway

1. Introduction / Definitions

The phenomenon of cyber bullying is an ever-increasing worldwide problem due to the advancement of technology. Cyber bullying is prevalent among schoolchildren and adults who participate in social media platforms. Cyber bullying can be an easy way to harass a person compared to physical harassment. The perpetrators of cyber bullying are faceless and can commit it anytime, so there is an alarming increase.²

Cyber bullying is the use of information and communication technologies to support deliberate, repeated, and hostile behaviour by an individual or group that is intended

¹Hills, C.A. 'Developing a law and policy framework to regulate cyber bullying in South African schools' 2017, 1 at 1.: This poem was posted on a website dedicated to Ryan Patrick Halligan, a 13-year-old American teenager who committed suicide after being bullied.

² Smit, M.D. 'Cyber bullying in South African and American schools: A legal comparative study' South African of Education, Volume 35, Number 2, May 2015. Article No. 1076, 1 at 1.



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to harm others.³ Its elements are the following: usage of information and communication devices, intent, repeated behaviour, hostile behaviour and harm.⁴

Doering defines cyber bullying with more details in the following manner: Cyber bullying can be generally defined as using the Internet, cell phones, emails, text messaging, online chat rooms, and other forms of electronic communication to deliberately harass, mock, defame, intimidate or threaten someone.⁵ Both the two elaborated definitions contain elements of intention and hostile conduct. The second definition is distinct as the conduct is not repeated, neither is the victim harmed.

Smith's definition is coined as follows: cyber bullying is "an aggressive intentional act carried out by a group or individual using electronic forms of contact, repeatedly and over time against a victim who cannot easily defend himself or herself."⁶

Campbell on the other hand, defines cyber bullying as "repeated, harmful interactions which are deliberately offensive, humiliating, threatening and power assertive; that is enacted using electronic equipment, such as cell (mobile) phones or the internet, by one or more individuals towards another."⁷

Patchin and Hinduja describe cyber bullying as "wilful and repeated harm inflicted through the medium of electronic text"⁸

Smit defines cyber bullying as "constituting rapid, repeated, intentional actions of harassment or aggression, which are specifically prohibited by the enactment of our Constitution."⁹ Cyber bullying is "when adolescence use technology deliberately and repeatedly to 'bully, harass, hassle and threaten,' their peers, leaving their victims without any escape, as continuous technological development and increased connectedness are shrinking the world."¹⁰

³ Kift S, Campbell, M. and Butler, D. 'Cyber bullying in social networking sites and blogs: legal issues for young people and schools' 2009/2010 (20) *Journal of Law, Information and Science* 61 at 62.

⁴ Mienie, C.A. 'Managing cyber bullying in schools: Lessons from American and Australian law' 2013(28) *Southern African Public Law* 146 at 149.

⁵ Doering, S.L. 'Tinkering with school discipline in the name of the First Amendment: expelling a teacher's ability to proactively quell disruptions caused by cyberbullies at the schoolhouse' 2008/2009(87) *Nebraska Law Review* 630 at 635.

⁶ *Supra* note 2 at 63.

⁷ Campbell, M.A, Slee, P.T, Spears, B, Butler, D and Kift, S. 'Do cyberbullies suffer too? Cyberbullies' perceptions of harm they cause to others and to their own mental health' 2013(34)(6) *School Psychology International* 613 at 613.

⁸ Patchin J.W. and Hinduja, S. 'Making friends in cyber space' 1996 (46) (1) *Journal of Communication* 80 at 80; Kift, Campbell and Butler (not 2) at 62.

⁹ *Supra* note 2 at 2

¹⁰ *Ibid*



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2. The various definitions indicate the following elements of cyber bullying

- an act
- the intention to harm the bullied victim
- the use of a communication device to commit the act
- actual harm to the bullied victim, and
- repetitiveness¹¹

3. There are various types of bullying

Naturally bullying is the usual form of youth violence to which many learners are subjected to while at school.¹² When someone is exposed, repeatedly and over time, to negative actions on the part of one or more other students then he is bullied according to Olweus. He defines negative action as intentional inflicting or attempts to inflict injury or discomfort on someone else.¹³

Bullying is commonly defined as ‘a sub-set of aggressive behaviours, intended to be harmful, that are characterised by repeated aggressive acts and in which there is an imbalance of powers between perpetrator(s) and the victims(s).¹⁴

Stephens and Smith describes bullying as a form of social interaction in which a more dominant individual (the bully) exhibits aggressive behaviour which is intended to and does, in fact, cause distress to a less dominant individual (the victim). The aggressive behaviour may take the form of a direct physical and / or verbal attack or may be indirect as when the bully hides a possession that belongs to the victim or spreads false information about the victim.¹⁵

Nansel et al describes real world bullying as “a specific type of aggression in which (1) the behaviour is intended to harm or disturb, (2) the behaviour occurs repeatedly over time, and (3) there is an imbalance of power, with a more powerful person or group attacking a less powerful one”¹⁶

¹¹ Supra note 1 at 30.

¹² Patchin, JW. And Hinduja, S. ‘Bullies move beyond the schoolyard: A preliminary look at Cyberbullying’ Youth violence and Juvenile Justice 148 at 148.

¹³ Olweus, D. *Bullying at school: What we know and what we can do.* 1993 Blackwell Publishers at 9.

¹⁴ Blake, P and Louw, J. ‘Exploring high school learner’ perceptions of bullying’ 2010(22) (2) *Journal of Child and Adolescent Mental Health* 111 at 111.

¹⁵ Stephens, P., Smith, D. *Bullying in junior school in Tattum, D.P. and Lane, D.A. (ed) Bullying in Schools* 1989 Trentham at 45.

¹⁶ Nansel, T.R., Overpeck, M., Pilla, RS., Ruan, W., Simons-Morton, B. and Scheidt, P. ‘Bullying behaviours among US youth: Prevalence and association with psychosocial adjustment’ 2001 (285)(16) *JAMA* at 2094.



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Real world bullying consists of the following three elements of intention to harm, repetition and power imbalance as key elements of bullying¹⁷

Normally a typical bully portrays certain type of advantage over the victim.¹⁸ The advantage could be confidence, age, sex, race, physical, intellectual and social advantage over the victim.¹⁹ The victims usually feel powerless to retaliate.²⁰

There are three types of bullying:

- direct physical bullying, for example hitting, kicking, pushing and property damage.
- direct verbal bullying, for instance name calling, public insults, derogatory remarks.
- indirect bullying, for example relational bullying like social exclusion, isolation and spreading of rumours and gossiping.²¹

4. Manifestations / Characteristics of cyber bullying

Cyber bullying is characterised by aggression in the form of direct verbal bullying, relational bullying or indirect bullying. Huang and Chou found that victims of cyber bullying regularly report verbal threats, harassment, being made fun of, and rumour spreading.²²

Direct verbal cyber bullying is when a victim is attacked publicly through posted insults on social media platforms such as Facebook. The attacks can even take place by posting insults and threats on WhatsApp social media. At times verbal bullying may be indirectly inflicted by other parties. Another method of verbal bullying may be the posting of insulting or private pictures. The various types of cyber bullying can be raised as an argument for a need to enact law and develop policy framework that can address the different aspects of cyber bullying in schools.²³

¹⁷ Ibid.

¹⁸ Swart, E. and Bredenkamp, J. 'Non-physical bullying: exploring the perspective Grade 5 girls@ 2009(29) South African Journal OF Education' 405 at 407; Gini, G. 'Bullying as a social process: The role of group membership in student's perception of inter-group aggressive at school' Reprint of an article published in 2006(44) Journal of Psychology 2 at 5.

¹⁹ Swart and Bredenkamp (note 17) at 407; Patchin and Hinduja (note 9) at 150.

²⁰ Garcia, S. 'Cyberbullying: A guide for educators, school counsellors, and parents' A Capstone project submitted in partial fulfilment of the requirements for the Master of Science Degree in Counselor Education at Winona State University; Pachin and Hinduja (note 9) at 150 .

²¹ Swart and Bredenkamp (note 14) at 407; Gini (note 14) at 2.

²² Huang, Y. and Chou, C. 'An analysis of multiple factors of cyber bullying among junior high school students in Japan' 2010(26) Computers in human behaviour 1581 at 1585.

²³ Supra note 1 at 31.



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Cyber bullying can be expressed as follows:

- Harassment-Repeatedly sending nasty, mean and insulting messages.
- Flaming-Online fights using electronic messages containing angry or vulgar language.
- Denigration-Dissing or disrespecting someone online; posting gossip or rumours about a person to damage his or 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 shameful information or images online.
- Exclusion-Intentionally and cruelly excluding someone.
- Cyber stalking-Involves threats of harm or intimidation through repeated online harassment and threats.
- Sexting-The sending of nude or semi-nude photos or videos and/or sexually suggestive messages is phone texting or instant messaging.²⁴

Sexting is essentially not regarded as cyber bullying but it can evolve into it if it manifests aspects of coercion, increased aggression and violence. Posting children's nude or sexually related photos on social media is described as child pornography.²⁵

Sexual harassment at school can be inflicted by electronic or written means.²⁶ The latter conduct can still be used to commit sexual harassment at a workplace. Hill and Kears define sexual harassment in a school as undesirable sexual conduct that infringes the right of a learner to receive education.²⁷

Elements of cyber sexual harassment consist of "cyber-stalking, cyber defamation, hacking, morphing (editing pictures), email spoofing (misrepresentation of origin), cyber pornography, cyber sexual defamation, cyber flirting and cyber bullying."²⁸ There are similarities between definitions of cyber bullying and cyber harassment. Cyber bullying is regarded as a form of cyber harassment and vice versa but still each is a different misconduct or crime regulated by distinct statute and punishment to be meted out differs.²⁹

²⁴ Badenhorst, C. 'Legal responses to cyber bullying and sexting in South Africa' CJCP Issue Paper No. 10 August 2010 at 2.

²⁵ Coetzee, S.A. 'Learner sexual offences: Cyber child pornography' Mediterranean Journal of Social Sciences October 2013(4)(11) 752 at 752-757.

²⁶ Hill, C. and Kears, H. 'Crossing the line: Sexual harassment at school' Washington AAUW 2011 at 5.

²⁷ Ibid.

²⁸ Ritter, B. 'Deviant behaviour in computer-mediated communication: Development and validation of a measure of cyber sexual harassment' 2014(19) Journal of computer-mediated communication 197 at 198.

²⁹ Supra note 1 at 33.



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5. Role of repetition in cyber bullying

Cyber stalking and flaming require recurrence of an act and repeated action is in essence an element of cyber stalking. But the description of outing indicates that only one act is needed. If one post an embarrassing image to a Facebook group, even if it is not on purpose, still it will be adequate to inflict harm on the victim.³⁰

Walker et al are of the opinion that just a single incident is required to qualify as cyber bullying as it can cause emotional pain, anger, and fear on victims.³¹ The latter authors cited a case where a single event of cyber bullying led a student committing suicide.³² This can lead to an argument that repetitiveness must not form part of cyber bullying definition because one posted comment can spread to many people.³³

Exclusion of repetition in the definition of cyber bullying could have inadvertent results. A case in study is H, WS v W, N where the applicant applied for court order to bar the respondent from posting any information about the applicant on Facebook.³⁴ The respondent had posted an open letter on Facebook on 27/02/2012 wherein she had accused applicant of abusing alcohol and drugs. The court raised the serious privacy issues with regard to Facebook in the sense that a person can control his or her Facebook profile but there is no Facebook system to control what other people place on their profiles about a person and who can access the information.³⁵

The court in RKM v RLB was facing an urgent application to compel the respondent to delete a Facebook post and desist from posting slanderous statements on Facebook about the applicant.³⁶ The applicant was subjected to accusations of being an irresponsible father to his five-year-old child. The post was deleted by the respondent but still remnants of the discussion initiated by the post continued to exist for all friends of the respondent to view.³⁷

6. Liability in cyber bullying

Liability can extend to a third party who was tagged in Facebook post only if he was aware of the fact even if he was not the author of the comment. This was held by the court in Isparta v Righter and Oosthuizen where the first defendant had posted

³⁰ Ibid.

³¹ Walker, C.M. 'Twenty-first century cyber bullying defined: An analysis of intent, repletion, and emotional response.'

³² Ibid.

³³ Supra note 1 at 34

³⁴ H,WS v W, N Case No: 12/101142.

³⁵ Supra note 34 at paragraph 15.

³⁶ RKM v RLB Case No: 10175/2013

³⁷ Ibid at paragraph 12.



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defamatory statements on her wall in respect of the plaintiff. The second defendant was aware that he was tagged in the post and the court found him liable for letting his name be involved with defamatory comments, although he was not the author.³⁸

Patchin argued that it is ideal for intention to form part of cyber bullying definition. The argument is that not all incidents of harmful conduct should be seen as cyber bullying but only those where there was repeated and intentional bullying behaviour. The challenge of incorporating intent as an element of cyber bullying is the fact that its proof must be subjective. It implies that the offender must be aware of the harm that is caused by his behaviour. The offender who was warned of the harmful conduct but carried on with it will be regarded to be intentional in his behaviour.³⁹

To prove intention in the form of *dolus eventualis* can resolve the issue of subjective test.⁴⁰ A comprehensive framework policy and legislation are required to deal with cyber bullying. If cyber bullying is criminalised with all its aspects and still an offender persists to cause harm then intention exists. This implies that the offender foresaw the possibility of causing unlawful harm and reconciled his actions to that possibility.⁴¹

Fault may be included as an element of cyber bullying if indirect intent (*dolus directus*) or *dolus eventualis* is required to commit cyber bullying. On the other hand, an offender may negligently commit cyber bullying if negligence can form part of cyber bullying.⁴²

Snyman makes distinction between conscious and unconscious negligence. He submits that conscious negligence is when an offender foresees the possibility to inflict unlawful harm but decides that the possibility would not occur. When an offender does not foresee the prohibited result, then it is unconscious negligence⁴³

The test for negligence as a form of culpability in our common law is the objective standard of a reasonable person. A defendant is negligent if a reasonable person in his position would have acted contrary to him in view of the fact that a reasonable person would have foreseen that his action could cause damage, and would have taken measures to avoid the damage.⁴⁴

³⁸ *Isparta v Richter and Oosthuizen* Case No: 22452/12

³⁹ Patchin, J.W. 'The case for including intent in a definition of bullying' Cyber bullying research centre <http://cuberbullying.org/intent-efine-bullying/> (Last accessed on 12 November 2019)

⁴⁰ *Director of Public Prosecutions, Gauteng v Pistorius* (96/2015) ZASCO 204 (3 December 2015) at par. 26.

⁴¹ *Supra* note 1 at 35.

⁴² *Supra* note 1 at 36.

⁴³ Snyman, C.R. *Criminal Law*. 2008 Lexis Nexis at 218.

⁴⁴ *Kruger v Coetzee* 1966 (2) SA 428 (A) 430.



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7. Conclusion

The above discussion referred to various definitions of cyber bullying and some of them overlaps. The various authors have also described cyber bullying in different ways. The elements of cyber bullying are not the same in the light of the above discussion. Cyber bullying is not given a specific meaning even in our South African jurisdiction. This situation is a lacuna in the fight against the issue of cyber bullying.

The important fact is that determination of liability requires fulfilment of legality principle. A cyber bully should not be arrested and be punished by a criminal court if his conduct was not clearly stipulated as a crime that is punishable by the law.⁴⁵

There must be clarity on the definition of cyber bullying and elements that constitute it. All the characteristics of cyber bullying should be codified to create a solid definition. The indicated elements of cyber bullying should be examined for selection of specific elements that will constitute a crime. What is required is a legal framework that will define and describe elements of cyber bullying for effective dealing of the problems caused by cyber violence.

The current legal framework seems to be insufficient as it is only the Protection from Harassment Act that addresses cyber bullying.⁴⁶ The Act does not empower the victim to report criminal case. Cyber bullying victim is only empowered to apply for an interdict to prohibit further bullying. The Act was enacted on 27/04/2013 to address harassment and stalking acts, which violate Constitutional provisions of right to privacy and dignity of individual persons. The Act provide for inexpensive civil remedy to protect a person from harassment in a form of interdict.

⁴⁵ Supra note 43 at 32.

⁴⁶ Protection from Harassment Act 17 of 2011.



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CHAPTER 2: THE EFFECTS OF CYBER BULLYING

1. Introduction

This chapter seek to indicate the effects of cyber violence on the victims. The focus is to portray all the dangers of cyber aggression. The chapter will also establish the extent of the impact of cyber violence on the victims, especially the children who are the vulnerable group. The author will highlight the negative impact of cyber bullying on the children in respect of family relations at home and their learning performance. The chapter will also indicate the psychological effects of cyber violence on children.

2. General effects of cyber bullying

The victims of cyber bullying are harassed from the moment they wake up and check their cell phones or laptops until the time they retire to bed and shut their devices. Ruan Quinn TD said “Things were bad enough when cyber bullying was confined to the playground, but now it can follow you home in your pocket.”⁴⁷

Cyber bullying differs from traditional bullying because the Internet affords the bullies anonymity. People can post anything they like, express their personal opinions just by pressing buttons on cyberspace tools. What is sad about cyber bullying is that when it occurs beyond the school borders then it escapes the legal reach of school boards.⁴⁸

“The effects of cyber bullying can be devastating among the students all over the country and indeed the world. The repercussions of cyber bullying experience on a victim, whether short or long term can cause anxiety, depression, and fear that may lead to absenteeism at school, tension in friendships, abnormal embarrassment, school relocation, drug abuse and suicide.”⁴⁹

Statistics in global survey of almost 5000 teenagers across 11 countries including Ireland revealed the following:⁵⁰

- Almost half of Irish teens said they felt helpless when cyber bullied and three out of ten felt extremely lonely.
- As many as 25%, one in four, of those who had been cyberbullied went so far as to experience suicidal thoughts as a result.
- Nine in ten Irish teens said they would find it easier to cope with cyberbullying if they received support from their friends or social media.

⁴⁷ Alustforlife.com/the-bigger-picture/the-societal-impact-of-cyberbullying?gclid=EAlalQobChMlhcku_szp5QlVGqqaCgs (Last accessed on 14 November 2019)

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid



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- However, four in ten admitted that they would find it hard to find the right words to support a friend who was being bullied online.

Minister Frances Fitzgerald said “Bullying can have absolutely terrible and corrosive impact on our children and young people, on their confidence, their self-esteem, and their mental health. It is abusive of young people and desperately damaging. We have already have high suicide rates and it’s the most vulnerable that will be hurt,” she added, Fitzgerald also said cyberbullying posed a particular risk because parents “might be a bit slower to find out.”⁵¹

However, it is not only children and teenagers that are victimised by cyber bullies. Employees at workplaces can also be cyber bullied by their own colleagues. Adults can become victims of cyber bullies in their daily lives.⁵²

The fact that cyber bullying can end the life of a person or cause long lasting impact in his life is shocking but it is a reality. Due to the new technological devices to be introduced in 2016 what can be done about cyber bullying and will it ever end?⁵³

3. Harmful effects of cyber bullying

What forms of harm can emanate from bullying? The damage can either be physical or psychological injury. The harm that is caused by cyber bullying is often psychological because of its nature but physical injury may ensue. Damage to the good name or reputation of the victim has to be considered in the definition of harm. There is great extent of research done in determining the results of cyber bullying on the victim.⁵⁴

The repercussions of cyber bullying consist of the following:⁵⁵

- Sleep disturbances
- Headaches
- Depression
- Anxiety
- Low self-esteem
- Truancy, and in extreme cases
- Murder, or

⁵¹ Ibid

⁵² Supra note 47

⁵³ Ibid

⁵⁴ Vreeman, R.C. and Carrol, A.E. ‘A systematic review of school-base interventions to prevent bullying’ <http://jamanetwork.com/journals/jamapediatrics/fullarticles/569481>. (Last accessed on 14 November 2019)

⁵⁵ Ibid



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- Suicide

Other related injuries emanating from cyber bullying are the following:⁵⁶

- Lower levels of academic performance
- Lower family relationship quality
- Number of psychosocial difficulties
- Affective disorders
- Social isolation, and
- Self-harm

Popavac and Leoschut referred to the following damages of cyber bullying:⁵⁷

- Depression, suicidal ideation and other psychological problems
- Development of somatic complaints such as headaches and stomach aches
- Impaired concentration (affecting school performance)
- Truancy
- Anxiety and fear of being rejected, excluded or humiliated
- Loneliness and isolation
- Substance abuse
- Delinquency and aggression
- Weapon carrying
- Poor parent-caregiver relationships (children lashing out at family that is unaware of the cyber bullying)
- Offline victimisation

4. Effects of cyber bullying in South Africa

It is apparent that cyber communications present us with countless benefits. Some of the benefits of information and communication technologies are the following:⁵⁸

- Social connections
- Creating opportunities for academic and social support, and
- Identity exploration and cross-cultural interactions

⁵⁶ Sticca, F. and Perren, S. 'Is cyber bullying worse than traditional bullying? Examining the differential roles of medium, publicity, and anonymity for the perceived severity of bullying' 2013(42) J Youth Adolescence 739 at 740.

⁵⁷ Popovac, M. and Leoschut, L. 'Cyber bullying in South Africa: Impact and responses' CJCP Issue Paper No. 13 June 2012 at 5.

⁵⁸ Ibid at 1



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However, the same technology has capacity to make the youth encounter high risk content that they could not have come across. The frequently uncensored content that is available in cyberspace has potential to expose the youth to pornography, violence, harmful information, sexual predators and disturbing images. What is even worse is that it has introduced new forms of aggression and victimisation that are inflicted against the children and youth of South Africa.⁵⁹

Various terms such as cyber violence, cyber aggression, internet bullying, electronic bullying, internet harassment or online harassment are used in reference to violence and aggression perpetrated via cyber communication devices. Different reports may use various terminologies but the result is the same and that is any awkward feeling or harm inflicted constantly and intentionally on a specific person or group.⁶⁰

The cyber bullies use several cruel means such as sending a harassing email or instant message, posting obscene, insulting and slanderous messages online bulletin boards or social networks sites or developing web pages to promote and disseminate defamatory content. Some bullies may send spiteful text messages of sexual nature (known as sexting), or shooting photos or videos of someone with the purpose of distributing them via cell phone or online. At times, bullies may pretend to be another person online and fake a profile to perpetuate internet bullying.⁶¹

Information and communication technology is advancing faster than the study of internet harassment in South Africa. Thus, there is a shortage of literature on the basic features and extent of cyber violence at a national level. There is also insufficient study on the results of internet aggression.⁶²

The Centre for Justice and Crime Prevention (CJCP) had a pilot study in 2009 and in 2011 Nelson Mandela Metropolitan University did another study. Both studies were major quantitative reports that sought to support the idea that the youth use cyber space more than adults.⁶³ The two studies indicated that there were more cyber violent incidents reported among the South African youth. Youth in excess of 37% among those who were surveyed by CJCP had reported that they had experienced cyber

⁵⁹ Ibid at 1

⁶⁰ William, K.R. and Guerra, N.G. 'Prevalence and predators of internet bullying, Journal of Adolescence Health,' 41, S14-21, 2007.

⁶¹ Supra note 57 at 1

⁶² Ibid at 2

⁶³ Burton P. and Mutongwizo T. 'Inescapable violence: Cyber bullying and electronic violence against young people in South Africa. Centre for Justice and Crime Prevention,' CJCP Issue Paper No. 8, 2009 at 2



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violence either at home or school environment. Whereas, 36% surveyed by the Nelson Mandela Metropolitan University had also suffered cyber violence.⁶⁴

A 13-year-old from Doornpoort Primary School had committed suicide after she was cyber bullied by a peer learner. The child cyber bully had threatened the deceased that she would distribute a picture of the deceased pupil depicted naked via WhatsApp group. The extremely traumatised 13-year-old rang the alarm and reported the alleged bullying to her teachers in an effort to get help. She also named the perpetrator who was responsible for the cyber bullying. But unfortunately the victim did not get adequate help and finally she decided to take her own life on 19 February 2019.⁶⁵

One in five South African teens have been cyber bullied and 84% reported to know someone who has experienced it according a Vodafone survey. The survey found that over half of youth saw cyber bullying to be worse than traditional bullying.⁶⁶

Statistics increased to almost half of all respondents (46.8%) when violence via mobile phone was included in the survey.⁶⁷ The latter figures corresponded with American stats of 30% youth who had suffered cyber violence. Canadian stats indicated 21.9% of the youth in grades 6-11 had been victims of cyber violence.⁶⁸

Cyber bullying is perpetuated through different mediums but in most cases voice calls (28%) and text messages (25.6%). As the youth always carry their mobile phones; it is difficult for them to avoid cyber aggression.⁶⁹ Most of violent posts sent via mobile phones came through Mxit as per UNICEF survey. The study found that 26% of respondents were subjected to insults and in particular race-based insults.⁷⁰

South African girls were found to be more susceptible to cyber aggression both at home (43.4%) and schools (33.4%) compared to boys with stats of (42.4%) at home and 29.3% at school.⁷¹ This trend was noticed as an international occurrence.⁷²

⁶⁴ De Lange, M. and von Soms, R. 'The importance of raising e-Safety awareness among children in South Africa.' Proceedings of the 13th annual conference on world wide web applications, 13-16 September 2011.

⁶⁵ <http://www.enca.com/news/cyber-bullied-teen-commits-suicide>. Last accessed on 15 November 2019.

⁶⁶ <http://www.it.web.co.za/contents/z5yONPvEWIOMXWrb>. Last accessed on 15 November 2019.

⁶⁷ Supra note 12 at 148-169.

⁶⁸ Wade, A. and Beran, T. 'Cyber bullying: The new era of bullying. Canadian Journal of School Psychology,' 26(44), pp 44-61, 2011.

⁶⁹ Supra note 63.

⁷⁰ Beger g. Hoveyda PK & Sinha A, From 'What's your ASLR' to 'Do you wanna go privat?' The United Nations Children Fund (UNICEF), 2011. http://www.unicef.org/southafrica/SAF_resources_mxitstudy.pdf. Last accessed on 14 November 2019.

⁷¹ Supra note 63

⁷² Wade, A. and Beran T, Cyber bullying: 'The new era of bullying. Canadian Journal of School Psychology,' 26(44),pp 44-46, 2011.



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The CJCP study had found that the line between victims and perpetrators of cyber bullying was most often obscured. It was discovered that seven out of ten (69.7%) perpetrators of cyber violence had been cyber bullied. Thus, it means that being a victim of cyber bullying most probably can make one become a cyber-bully in revenge. This finding is aligned to the international stats where one study indicated that three quarters (75%) of the culprits of cyber violence were themselves victimised previously by other cyber bullies.⁷³

It is believed that youth is unable to deal with cyber bullying and it is vulnerable. Some youth cannot differentiate between real and virtual world. So they assume that the virtual world is as real as the physical world.⁷⁴ The virtual world is so real to some youth so much that they are prepared to commit suicide due to its violence. So people need education on the internet usage and cyberspace context⁷⁵

South Africa has a shortage of empirical data about cyber bullying and international studies indicate a need to create safety initiatives and programmes for children who are participating in cyberspace. The current indications point out to a range of psycho-social and school problems caused by cyber violence. Thus, there is a need for child-centred and comprehensive plan of action to make certain that perpetrators of cyber violence face consequences. Secondly, the victims need support in order to minimize the effects of cyber bullying.⁷⁶

South Africa has the highest prevalence of cyber violence and a quarter of parents reported that their child had been cyber bullied. This is in accordance with study by Ipsos Global Advisor conducted across 28 countries in the year 2018. The findings of another survey conducted by 1st for women support the great extent of this growing problem with 64% of 4000 respondents believing that children are at risk.⁷⁷

5. Effects of cyber bullying in foreign jurisdictions

A scary thing about cyber violence is that the bullying comments and images can be distributed to a wide audience very quickly which affects the victim on daily basis. It is also horrific to learn that the insults and comments posted online can be stored and

⁷³ Supra note 12.

⁷⁴ Von Solms R, Cyber bullying- A real threat. Presentation at the Centre for Justice and Crime Prevention Round Table discussion, South Sun Hotel, Cape Town, 19 August 2011.

⁷⁵ Supra note 57.

⁷⁶ Supra note 57.

⁷⁷ <https://www.iafrica.com/sa-tops-cyber-bullying-stats-across-28-countries>. Last accessed on 15/11/2019.



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read repeatedly which can cause severe outcomes. The exacerbated results of cyber violence are proven by the reported suicides, murders and school dropouts.⁷⁸

Victims of cyber violence are susceptible to many emotional and psychological issues that are also experienced by traditional bullying victims. According to a 2006 study by Patchin and Hinduja, 42.5% of young people who were victims of cyber violence had reported feelings of frustration, about 40% were angry and over a quarter (2.7%) felt sad.⁷⁹ According to other studies victims are most likely prone to suffer depression, emotional stress and tendency of bullying others.⁸⁰

Literature shows that cyber violence affect school functioning and school environment.⁸¹ Effects like weapon-carrying at school and poor family relations.⁸²

Hinduja and Patchin indicated that victims of cyber bullying may at times be prone to other negative developmental and behavioural repercussions such as school violence and delinquency. They discovered that victims of cyber violence will most probably abuse drugs, cheat on school test, play truant, assault peers and damage property as a result of cyber bullying.⁸³

Hinduja and Patchin also reported that suicide was another risk associated with cyber violence (termed cyberbulicide). The basis of their finding is that the victims of cyber aggression had mostly attempted to commit suicide more than the youth who had not been exposed to cyber bullying.⁸⁴

Studies revealed that victims of cyber bullying are given low level of support. Stats in Canada showed that adults at school failed to stop cyber violence when it was reported. It was found that students cannot trust adults to understand cyber

⁷⁸ Bauman, S. Cyberbullying: 'A virtual menace. Paper presented at the National Coalition Against Bullying National Conference,' 2-4 November 2007. Melbourne, Australia, 2007.

⁷⁹ Supra note 12

⁸⁰ Ybarra, M. Diener-West, M. & Leaf P. 'Examining the overlap in internet harassment and school bullying: Implications for school intervention.' *Journal of Adolescence Health*, 41, S42-S50, 2007.

⁸¹ DavidFerdon, C. & Feldman Hertz M, "Electronic media, violence and adolescence: An emerging public health. *Journal of Adolescent Health*," S1-S5, 2007

⁸² Ibid

⁸³ Hinduja S. & Patchin JW, 'Offline consequences of online victimization: School violence and delinquency' : *Journal of School Violence*, 6(3), PP 89-112, 2007.

⁸⁴ Hinduja S. & Patchin JW, 'Cyber bullying and suicide. Cyber Bullying Research Summary' 2009. Available online: http://www.cyberbullying.us/cuber_bullying_and_suicide_research_fact_sheet.pdf. Last accessed on 15/11/2019.



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aggravation and respond accordingly. So awareness is needed for youth and adults in order to tackle the issue of cyber bullying effectively.⁸⁵

“I love you so much, just remember that please, and I am so sorry for everything” This is the message that Brandy Vela sent to her siblings moments before she committed suicide. The 18 year old raised a gun in front to her chest and pulled the trigger in the presence of her parents and grandparents at her home in Texas, in the United States. Vela had had enough of the merciless abuse from her cyberbullies.⁸⁶

For years, the teenager was mocked about her weight on social media. Bullies bombarded her with hateful messages on Facebook calling her “fat” and ugly. Some had even encouraged Vela to take her own life. In the end, the humiliation and abuse pushed her to do just that. Yet while Vela’s story made headlines around the world, her case is not unique. Every year, more teenagers who are victims of cyberbullying are committing suicide.⁸⁷

6. Conclusion

The above discussion refers to many serious effects of cyber bullying and some of them are extreme. The devastating impact of cyber violence on the victims is a strong persuasion for strategic intervention to protect children and adults who are victimised by cyber bullies. There is an urgent need for support structures to be established for victims of cyber violence in order to mitigate its impact. It is equally imperative to have legal framework that will deal with cyber bullies to ensure that they face the wrath of the law; otherwise the scourge will not be combated.

⁸⁵ Supra note 57.

⁸⁶ <https://www.iol.co.za/news/south-africa/gauteng/the-devastating-consequences-of-cyberbullying-7924082>.

Last accessed on 15/11/2019.

⁸⁷ Ibid



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CHAPTER 3: AMERICAN LEGAL FRAMEWORKS THAT DEALS WITH CYBER BULLYING

1. Introduction

This chapter focuses on the various cyber bullying cases that were litigated in American Federal State's courts. Secondly, this chapter will outline American legal frameworks on cyber violence. The aim is to show how America deals with cyber bullying. The author seeks to extrapolate lessons that South Africa can adopt to address cyber violence. American legal system differs to South African system. America use inquisitorial system and South Africa applies the adversarial system. But South Africa can learn from America how to deal effectively with cyber bullying.

2. General American cyber bullying related incidents

United States of America apply the federal system of government. Thus, the various federal states in America may use different legal frameworks to address cyber bullying among their citizens.

Ryan Halligan Case is about a child who was receiving special education due some disability. Ryan's academic and physical challenges made him a regular target of specific bully at school during his grade 5 to grade 7. In 2003, a fight between Ryan and the bully ended the harassment and made them friends.⁸⁸

But Ryan shared an embarrassing personal story that made the new friend to spread a rumour that Ryan was gay. The friend taunted Ryan for some time to a stage when Ryan thought that he had struck a friendship with a girl. The friend pasted embarrassing material about Ryan into AIM exchange with the girl and her friends. Ryan eventually hanged himself in the family bathroom on 07 October 2003. Ryan's father John, later found AIM exchange material that led him to believe that the technology was used as harassment weapon. There were no criminal charges filed since no criminal code applied in the circumstances. Seven months after Ryan's death, Governor Jim Douglas signed Vermont's Bully Prevention Law Act 117.

Jessica Logan was 18 years old High School senior who had posted her nude photo to her boyfriend but later the same photo was sent to hundreds of teenagers around Cincinnati-area high schools after the couple broke up. Apparently the bullying went viral on Facebook, MySpace and text messages. Jessica hanged herself after attending a funeral of another boy who had also committed suicide. The parents of Jessica instituted civil claims against Sycamore High School and Montgomery police for allegedly failing to protect their daughter from bullying and harassment after the

⁸⁸ <https://nowcomment.com/documents/36945>. Last accessed on 19/11/2019.



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spreading of her nude picture. In 2012, the Governor of Ohio John Kasich signed House Bill 116, also known as Jessica Login Act into law.⁸⁹

3. American case law in respect of freedom of speech

The first amendment to the United States Constitution provides that:

Congress shall make no law against establishment of religion, or prevent free exercise of religion or bar freedom of speech, or of the press, or the right of the people peaceably to assemble and petition government for a redress of grievance.⁹⁰

First Amendment stipulates the right to freedom of speech by barring the American Congress from preventing the press or individuals to have freedom of speech.⁹¹

In the case of *Tinker v Des Moines Independent Community School District*, a group of high school students wore black armbands to school in protest against Vietnam War. Then, the school implemented a policy stating that students found wearing black armbands would be suspended. Subsequently, three students were suspended for contravening the policy. The majority of the Supreme Court judges decided that the students were not disruptive but protested quietly and passively. Thus, their conduct was found to have been protected by the first amendment of freedom of speech. Teachers and students were found to have right to freedom of speech that is based on the special attributes of the school environment.⁹²

Another case of *Bethel School District No 403 v Fraser* was litigated in court because Fraser made a speech at school assembly in which he used lewd language. This led to his suspension and removal from a list of candidates that could possibly speak at graduation. The majority of Supreme Court found that the right to freedom of speech does not prohibit the School District from disciplining the respondent for giving the offensively lewd and indecent speech at the assembly.⁹³

The American legal system protects their minors against vulgar and offensive language. But the School Boards have to decide on policies of acceptable language at schools and meet out sanctions on students who violate the principles.⁹⁴

⁸⁹ Ibid

⁹⁰ U.S Constitutional Amendment I

⁹¹ McCarthy, M. 'Cyberbullying laws and first amendment rulings: Can they be reconciled?' 2014 (83)(4) Miss. L.J. at 805 at 806.

⁹² 393 U.S 503,505-506, 506-507, 508-509 (1969)

⁹³ 393 U.S 503

⁹⁴ 478 U.S 680-686



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In *Hazelwood School District v Kuhlmeier*, the court dealt with a dispute of a school that limited student's rights to express their ideas in a school newspaper that was created to publish articles on serious social issues like pregnancy. The anonymity of students involved in the articles was not protected. Thus, the headmaster removed some pages from the newspaper for protection. The court held that the school must not tolerate speech inconsistent with its basic education mission despite the fact that government could not censor similar speech outside the school.⁹⁵

In the fourth case of *Morse v Frederick*, the principal of the school prohibited students from displaying a poster that was promoting the use of illegal drugs. In this case, as part of an approved social trip, students were permitted to leave class to watch the Olympic torch relay. When the relay passed, the student and his friends exhibited a banner that stated "Bong HiTS 4 JESUS." The principal of the school immediately confiscated the banner and later suspended the student for encouraging illegal drug usage. The court held that the school have a right to protect students that are entrusted to its care from speech that can be regarded reasonably as promoting illegal drug use. The special attributes of the school environment and the government's interest to curb student drug abuse, permit the school to prevent student expression that can reasonably be viewed as encouraging drug abuse.⁹⁶

It is very apparent that America can limit student's freedom of speech in certain circumstances, although it does not have the limitation clause like South Africa. The limitation is independent of whether the freedom of speech was exercised by means of information and communication technology. The following guidelines can be inferred from the above four cases:⁹⁷

- Freedom of speech may be limited when it leads to substantial and material disruptions of school activities, or where it interferes with the rights of others.
- Freedom of speech may be limited when language is lewd that it undermines the education responsibilities of the school.
- Freedom of speech may be limited where the restriction is "reasonably related to pedagogical concerns."
- Freedom of student's speech must be applied with consideration of the special attributes of the school environment and in the light of what is appropriate for students at school.

⁹⁵ 484 U.S 260-261 1988

⁹⁶ 551 U.S. 393, 406 (2007).

⁹⁷ Supra note 1 at 55.



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- The courts weigh the importance of protecting speech that is unpopular and controversial against the schools' responsibility to educate students about socially acceptable behaviour and enable them to take their place in society.

The four cases do not address the question on unpopular speech that occurs to a student outside the school premises. Can freedom of speech and responsibility to instil the growth of students' independent thinking be limited when it disturbs the quality of education of another learner only? Cyber bullying that occurs beyond school campus can still affect the right of a student's education so negatively. Can the case of Tinker's decision still apply if the wrong speech occurred outside the school? Most of the scholars argue that the Tinker case cannot apply to a speech outside the school campus.⁹⁸

American lower courts are not clear about which principles set by the federal courts regarding free speech must be observed according to the author Fenn.⁹⁹

In *JC v Beverly Hills Unified School District*, a student posted a YouTube video in which she and her friends humiliated another student. The court held that the conduct did not cause "substantial disruption" and that a student should not be disciplined by the court for speech "simply because young persons are unpredictable or immature, or because, in general, teenagers are emotionally fragile and may often fight over hurtful comments."¹⁰⁰ The court has failed to identify the severe effect of cyber bullying on the victim and his or her education.

A boy wrote two violent and indecent letters to an ex-girlfriend in the case of *Doe v Pulaski Country Special District*. He never provided the letters to her but he spoke to her and his friends about their contents. One of his friends later supplied the letters to her at school and the student was expelled for a year. The court found that "most if not all, a 13-year-old girls (and probably most reasonably adults) would be frightened by the message and tone" of the messages and would be scared for their safety. Then it was held that the letters posed a true threat and the student's freedom of speech was limited.¹⁰¹

⁹⁸ Varel, S. 'Limits on school disciplinary authority over online student speech' 2013 (33) Northern Illinois University Law Review 1 at 5.

⁹⁹ Fenn, M. 'A web of liability: Does new cyber bullying legislation put public schools in a sticky situation?' 32013(81)(5) Fordham Law Review 2729 at 2758 at 2758.

¹⁰⁰ *JC. Ex rel. R.C v Beverly Hills Unified Sch. District.*, 711F. Supp.2d 1094 (C.D Cal.2010)

¹⁰¹ 306 F.3d 616 (2002).



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A student created a website for criticising the school and the headmaster in *Beussink v Woodland R-IV School District*. The website was created at home but later accessed by students on the school campus through school computers and the creator of the website was suspended. The court held that there was no substantial and material disruption of school operation and freedom of speech should be protected, mostly when it is controversial, as popular speech will probably not even be opposed.¹⁰² This decision clearly demonstrates the unwillingness of the courts to limit unpopular or controversial speech. Thus, it is still unclear as to when will criticism of a teacher constitute interference of his/her duties and become cyber bullying.

In *Layshock ex rel. Layshock v Hermitage School District*, a student created a MySpace page on his grandmother's computer that insulted the school principal. The court held that the website did not cause a substantial disruption in the school environment. It was also found that it did not lead to cancellation of classes, widespread chaos or school violence.¹⁰³ The Tinker test was applied by this court and it was held that whatever disruption that occurred was insufficient to justify the disciplinary action against the student.¹⁰⁴

However, in South Africa, a teacher is entitled to institute a civil claim for defamation if a learner can disrespect him/her as it transpired in the case of *Le Roux* and it is regarded as a serious misconduct that can lead to a suspension.¹⁰⁵

The U.S. Department of Education promulgated a policy that stipulated "Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential"¹⁰⁶ It is clear that the U.S. Department of Education prioritise bullying and cyber bullying in schools. Afterwards, anti-bullying laws were enacted by various American states.

¹⁰² Manuel, N.R. 'Cyber-bullying: its recent emergence and needed legislation to protect adolescent victims' 2011(13) *Loyola Journal of Public Interest Law* 219 at 229.

¹⁰³ Auerbach, S. 'Screening out cyberbullies: remedies for victims on the internet playground' 2008-2009(30) *Cardozo L. Rev.* 1641 at 1653.

¹⁰⁴ *Supra* note 102 at 240.

¹⁰⁵ *Le Roux v Dey* CCT45/10 (2011) ZACC; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC).

¹⁰⁶ <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-2010.html>. Last accessed on 20 November 2019.



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4. American cyber bullying legislation

America has promulgated anti-bullying laws in 49 of its states.¹⁰⁷ In some states the law refer particularly to cyber bullying but other states refer to anti-bullying legislation and policies.¹⁰⁸

Connecticut, Public Act No. 11-232 effectively 01/07/2012, defines bullying as:

Bullying means the repeated use by one or more students of a written, oral or electronic communication, such as cyberbullying, directed at or referring to another student attending school in the same school district, or a physical act or gesture by one or more students repeatedly directed at another student attending school in the same school district, (i) Causes physical or emotional harm to such a student or damage to such student's property, (ii) places such a student in reasonable fear of harm to himself or herself, or of damage to his or her property, (iii) creates a hostile environment at school for such student, (iv) infringes on the rights of such student at school, or (v) substantially disrupts the education process or the orderly operation of a school.¹⁰⁹

The definition outlines many aspects relating to cyber bullying and concurs with the ideas shared by the American Supreme Court decisions on when can freedom of speech be limited. The issue about it is that receptiveness is required to constitute cyber bullying. The Act also states the causal effects of cyber bullying but what if a causal effect is not mentioned in the Act? A typical example is fear that a loved one will be hurt, then will it be seen as cyber bullying? This definition may inform South African law and policy but it does not fully address the severity of cyber bullying.¹¹⁰

Public Act No. 11-232 effectively 01 July 2012 defines the following terms:

Cyberbullying means any act of bullying through the use of internet, interactive and digital technologies, cellular mobile telephone or other mobile electronic devices or any electronic communications;

Mobile electronic device means any hand-held or other portable electronic equipment capable of providing data communications between two or more individuals, including, but not limited to, a text messaging device, a paging device, a personal digital

¹⁰⁷ Sacco, D.T, Silbaugh, K, Corridor, F, Casey, J and Davis, D. 'An overview of state anti-bullying legislation and other related laws' http://law.harvard.edu/publications/2012/state_anti_bullying_legislation_overview. Last accessed on 21 December 2019.

¹⁰⁸ Ibid

¹⁰⁹ Public Act No. 11-232

¹¹⁰ Supra note 1 at 59.



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assistant, a laptop computer, equipment that is capable of playing a video game or digital disk, or equipment on which digital images are taken or transmitted;

Electronic communication means any transfer of signs, signals, writing, images, sounds, data or intelligence of nature transmitted in whole or in part by wire, radio, electromagnetic, photo electronic or photo-optical system;

Hostile environment means a situation in which bullying among students is sufficiently severe or pervasive to alter the conditions of the school climate;

Outside of the school setting means at a location, activity or program that is school related, or through the use of an electronic device or mobile electronic device that is not owned, leased or used by a local or regional board of education;

School climate means the quality and character of school life with particular focus on the quality of relationships within the school community between and among the students and adults.¹¹¹

The inclusion of the above definitions in the Act indicates circumstances in respect of cyber bullying and tools used to commit cyber bullying. The definitions of electronic communication and mobile electronic device are wide enough to cover any possible way and means of committing cyber bullying in schools.¹¹²

The Massachusetts provides an anti-bullying plan that includes a comparative definition of cyber bullying in section 370 of General Laws Chapter 71.

Cyber bullying is defined as:

Bullying through the use of technology or any electronic communication, which shall include, but shall not be limited to, any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or part by a wire, radio, electromagnetic, photo electronic or photo optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications. Cyber-bullying shall also include (i) the creation of a web page or blog in which the creator assumes the identity of another person or (ii) the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying. Cyber-bullying shall also include the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more

¹¹¹ Supra note 109.

¹¹² Supra note 1 at 60.



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persons, if the distribution or posting creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying.¹¹³

Once more cyber bullying is widely defined to include all possible means or tools of cyber bullying. The terminology is inclusive of the necessary effects that ensue from cyber bullying in order to limit free speech rights of a bully as per Supreme Court.¹¹⁴

Massachusetts General Laws Chapter 71, section 370 prohibits bullying (including cyber bullying) under the following circumstances:

- (i) On school grounds, property immediately adjacent to school grounds, at a school-sponsored or school-related activity, function or program whether on or off school grounds, at a school bus stop, on a school bus or other vehicle owned, leased or used by school district or school, or through the use of technology or an electronic device owned, leased or used by a school district or school and
- (ii) At a location, activity, function or program that is not school-related, through the use of technology or an electronic device that is not owned, leased or used by a school district or school, if the bullying creates a hostile environment at school for the victim, infringes on the rights of the victim at school or materially and substantially disrupts the education process or the orderly operation of a school. Nothing contained herein shall require schools to staff any non-school related activities, functions, or programs.¹¹⁵

Point (ii) provides for comprehensive off-campus cyber bullying. It makes provision for any form of cyber bullying, whether at school-controlled function or on a school device or not, may be regulated if it impacts negatively on the school environment.¹¹⁶

The effective regulation of cyber bullying requires it to have a clear definition.¹¹⁷ The definition must include clear description of the prohibited conduct.¹¹⁸ The specified prohibited behaviour must have cyber bullying definition with a list of specific conduct that constitutes cyber bullying but the list must not be exclusive.¹¹⁹

¹¹³ Massachusetts General Laws Chapter 71, section 370

¹¹⁴ Supra note 1 at 61.

¹¹⁵ Supra note 113.

¹¹⁶ Supra note 1 at 62.

¹¹⁷ Birk, S.L, Meisenheimer, J.W, and Price, J.A. A policy analysis examination cyber bullying at the national, state and local level Proquest LLC; Ann Harbor MI 2014.

¹¹⁸ Ibid

¹¹⁹ <http://www.stobullying.gov/laws/key-component/> (Last accessed on 20 December 2019.)



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Prohibition of racial cyber bullying is very imperative and relevant even to South Africa. Unfair discrimination must be prohibited and the prohibition must be concrete.¹²⁰ Thus, cyber bullying policies must contain a section that clearly prohibits cyber bullying on the basis of race, national origin, gender, religion, disability and sexual orientation.

State of New Jersey Model Policy:

Harassment, intimidation or bullying means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristics, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that is substantially disrupts or interferes with the orderly operation of the school or the rights of the other students and that:

- a. a reasonable person should know, under the circumstances, will cause physical or emotional harm on a student or damaging his/her property, or placing a student in reasonable fear of physical or emotional personal harm or damage to his property;
- b. has the effect of insulting or demeaning any student or group of students; or
- c. creates a hostile educational environment for student by interfering with his/her education or by harshly or widely causing him/her physical or emotional harm.¹²¹

5. Conclusion

The above discussion have illustrated how American Supreme Court have dealt with the right to freedom of speech and the circumstances under which the right was limited with regard to school environment. Thus, South Africa can learn a lesson of protecting rights such as privacy, dignity and equality by limiting freedom of speech.

The discussion has also stipulated various American states' legal frameworks and policies in relation to schools environment. Different definitions of cyber bullying have been cited which are precise, clear and comprehensive. The definitions constitute so many aspects of cyber bullying with the view to cover as many as possible ways and tools of cyber bullying behaviour. Thus, South Africa can learn to craft a comprehensive and precise definition of cyber bullying that can even cover racism.

¹²⁰ Supra note 117.

¹²¹ State of New Jersey Department of Education, 2011.



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CHAPTER 4: SOUTH AFRICAN LEGAL FRAMEWORKS THAT CAN APPLY TO CYBER BULLYING

1. Introduction

This chapter seeks to indicate the various mechanisms that South African law can use to address cyber bullying. The aim is to examine as to whether the legal frameworks implemented in South Africa are adequate to deal with cyber bullying effectively.

2. South African Common Law

South African common law can provide cyber bullying victims with remedies. Criminal law and civil law remedies can be used to address cyber bullying. But the question is whether common law remedies are sufficient to adequately redress for victims?¹²²

The criminal law offences of *crimen injuria*, assault, criminal defamation and extortion can be used to apply to acts of cyber bullying.¹²³ Snyman defines *crimen injuria* as the unlawful, intentional and serious violation of the dignity or privacy of another person.¹²⁴ The latter definition encapsulates the conduct of cyber bullying. Another offence is assault which is the unlawful and intentional act or omission which results in another person's bodily integrity being impaired directly or indirectly. The action should also inspire a belief or fear of impending impairment of a person's bodily integrity.¹²⁵ Any behaviour of cyber bullying that involves the threat of personal violence may fall under the ambit of assault.¹²⁶

Criminal defamation comprises the unlawful and intentional publication of a matter concerning another person which results in an injury to that person's reputation.¹²⁷ This crime definition constitutes elements that cover defamatory remarks made on social media platforms. Extortion is when a person unlawfully and intentionally obtains some advantage over another person which is of a patrimonial nature, inducing the latter to hand over an advantage.¹²⁸ Any conduct of cyber bullying which involves a threat to post disturbing or compromising images on the cyber space unless a monetary advantage is handed over, constitute extortion.¹²⁹

¹²² Cassim, F. 'Formulating adequate legislation to address cyber bullying: Has the law kept pace with advancing technology?' at 16.

¹²³ Badenhorst, C. 'Legal responses to cyber bullying and sexting in South Africa' (August 2011) Centre for Justice and Crime Prevention 1-20 at 8.

¹²⁴ Snyman, C.R. Criminal Law 5 Edition (2008) at 469.

¹²⁵ Ibid at 455.

¹²⁶ Supra note 123 at 8.

¹²⁷ Supra note 124 at 475.

¹²⁸ Ibid at 426.

¹²⁹ Supra note 122 at 16.



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An application for an interdict or defamation claim may be used as civil remedies.¹³⁰ But civil remedies may be costly and thus may deny cyber bullying victim recourse.

3. South African Schools Act

The South African Schools Act only protects learners against traditional bullying not cyber bullying.¹³¹ The Internet was originally created for adults and not for children. But the rise in number of children that use the Internet pose a challenge for policy makers to consider laws of safeguarding the welfare of children in the cyber space.¹³² The majority of South African adolescence are mostly using the digital devices and the media to communicate with their friends and family. Thus, they may even use the latter technology to commit cyber bullying.¹³³

The Children's Act defines abuse as "any form of harm or ill-treatment deliberately inflicted on a child" and includes *inter alia* "bullying by another child" and "exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally."¹³⁴ The Constitution provides for protection of children's rights against abusive and degrading acts as enshrined in section 28(2).¹³⁵ This provision emphasizes that the child's best interests are of paramount importance in all matters affecting a child. It means that children's rights are given priority in the Constitution.

The South African Schools Act currently regulates the conduct of the learners.¹³⁶ The Guidance for Code of Conduct for Learners was adopted in 1998 by the Department of Education in order to promote a culture of tolerance and positive discipline. Cyber bullying behaviour may constitute degrading or abusive treatment dealt out on children. At times cyber bullying conduct may also constitute violation of children's rights provided for in section 28 of the Constitution.¹³⁷ School governing bodies should be persuaded to adopt anti-cyber bullying policies to protect rights of all learners regardless of the fact whether a child is the offender or the victim in a fair and equitable manner as per the Constitutional core values.¹³⁸

¹³⁰ Section 30 of the Magistrate's Court Act 32 of 1944 and Rule 6 of the Uniform Rules of Court.

¹³¹ Moodley, I. "Cyber bullying: A legal framework for South African educators" (2012) 27 SAPL 540.

¹³² O'Neil, B. "Trust in the information society" 28 (2012) Comp. Law & Rev. 559 at 551.

¹³³ Supra note 122 at 15

¹³⁴¹³⁴ Children's Act 38 of 2005.

¹³⁵ Ibid

¹³⁶ South African Schools Act 84 of 1996.

¹³⁷ Supra note 131 at 15.

¹³⁸ Ibid at 15,



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4. Protection from Harassment Act

The Protection from Harassment Act 17 of 2011 was promulgated on 27th of April 2013.¹³⁹ The Act provides for a process whereby victims of harassment that is either online or off, can apply to the court for a protection order lasting up to five years. The definition of harassment in the Act is wide enough to encompass cyber bullying. Harassment means directly or indirectly engaging in conduct that the respondent knows or ought to know causes harm or inspires the belief that harm may be caused to the complainant or related persons by unreasonably: *inter alia* sending, delivery or causing the delivery of electronic mail.¹⁴⁰ The effects of harassment can cause harm which can be mental, psychological, physical or economical according to the Act.

Section 2(1) of the Protection from Harassment Act provides that a complainant may apply to the court for a protection order against harassment. Section 2(2)(b) stipulates that clerk of the court must inform the complainant of the right to also lodge a criminal complaint against the respondent of *crimen injuria*, assault, trespass, extortion or any other offence which has a bearing on the person or property of the complainant or related person. The Act also provides that electronic communications service providers are required to assist the court in identifying individuals responsible for harassment. It is an offence for an electronic communication service provider not to provide the required information. It is also an offence to contravene a protection order issued by the court in terms of the Act.¹⁴¹

The primary intention of the Protection from Harassment Act is to set up a system whereby an individual can apply to the court for a protection order against another person to stop that offending person from harassing them. The system is free to the complainant and does not require them to have legal representative.¹⁴² Applications can be brought by someone acting on behalf of a victim of harassment,¹⁴³ and can also be brought by the children without parental permission.¹⁴⁴

The Act provides a necessary mechanism for recourse for the victims of harassment outside of domestic relationships. The imperative part is that it has a wide definition of conduct that constitutes harassment, including that which is effected by electronic devices. Secondly, the Act seeks to address the anonymity afforded by the internet

¹³⁹ Nyst, C. 'End violence: Women's rights and safety online. Technology-related violence against women': Recent legislation trends, May 2014.

¹⁴⁰ Section 1(a)(iii) of the Protection from Harassment Act 17 of 2011.

¹⁴¹ Supra note 140, section 18.

¹⁴² Supra note 140, section 2(2).

¹⁴³ Supra note 140, section 2(3).

¹⁴⁴ Supra note 140, section 2(4).



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and information communication technologies by creating obligations on service providers to facilitate the identification of those accused of harassment.¹⁴⁵

But, the Act does not provide for harassment or stalking to be considered as a crime. The drafters had considered the option of criminalising harassment but discarded it because they thought that it is covered by the existing common law offences. The option consideration is reflected in the Act where it is required of the clerk of the court to advise an unrepresented complainant of their right to report criminal cases against a responded of *crimen injuria*, assault, trespass, extortion or any other offence which has a bearing on the persona or property of the complainant.¹⁴⁶

The Act defines harassment so broad to cover wide range of acts that may constitute cyber bullying. For instance, it includes conducts such as the sending of electronic mail and engaging in electronic communication whether or not conversation ensues. These would cover wide range of frequent actions taken by cyber bullies. Application of the Act will be determined by how the court interprets the alleged offence.¹⁴⁷

Section 10 protects the applicant of the interim protection order by barring the harasser to continue with the harassment or to enlist the help of another to continue the harassment, as well as any measure the court deems fit. When one post or leave comments network that is open to comments from others amounts to inviting or enlisting help to continue the harassment. Section 8 provides for proceedings to be held 'in camera' which can protect cyber bullying victims who have fear of retaliation.

The main aim of the Act is in its preamble: Since the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of the people in the Republic of South Africa, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of a person, which incorporates the right to free from all forms of violence from either public or private sources, and the rights of children to have their best interests considered to be of paramount importance;

AND in order to:-

- (a) afford victims of harassment an effective remedy against such behaviour; and
- (b) introduce measures which seek to enable the relevant organs of the state to give full effect to the provisions of this Act.

¹⁴⁵ Supra note 139 at 7.

¹⁴⁶ Supra note 139 at 8.

¹⁴⁷ Supra note 139 at 8.



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The purpose of this Act is to protect victims of harassment and offer them legal remedies while still protecting the human rights of all parties involved.

5. Electronic Communications and Transactions Act

Another legislation that deals with cyber related offences is the Electronic Communications and Transaction Act (ECT).¹⁴⁸ The Act was enacted to address *inter alia* to facilitate and regulate electronic communications and prevent abuse of information systems. The focus of the ECT is mainly to protect 'data' or data messages. The ECT deals comprehensively with cybercrime in chapter 13. Cyber bullying may involve the potential abuse of electronic communications or information systems to degrade, humiliate or bully another person. Thus, if a person hacks into a person's computer to intimidate, harass or threaten him or her, then cyber bullying charge will ensue. Subsequently, it can be argued that that the act of cyber bullying may conceivably fall under the scope of cybercrime, and it can therefore be addressed by chapter 13 of the ECT. Although ECT does not directly deal with cyber bullying but it can be submitted that the ambit of section 86-88 can be widened to address the act of cyber bullying.¹⁴⁹

Ultimately, there is a need in South Africa to develop the current legal frameworks to keep abreast with the new criminal behaviours such as cyber bullying. Such legislation should, nevertheless consider the competing interest of online users and victims of cyber bullying in a fair manner.¹⁵⁰

6. The Children's Act

The Children's Act 38 of 2005 defines child abuse in section 1 as any form of harm or ill-treatment deliberately inflicted on a child, and includes:

- (a) assault a child or inflicting any form of deliberate injury to a child;
- (b) sexually abusing a child or allowing a child to be sexually abused;
- (c) bullying another child;
- (d) a labour practice that exploits as a child; or
- (e) exposing or subjecting a child to behaviour that may harm the child psychological or emotionally.

The definition constitutes bullying as child abuse; it can be argued that cyber bullying is a form of child abuse as it exposes a child to psychological and emotional harm.¹⁵¹

¹⁴⁸ Electronic Communications and Transactions Act 25 of 2002.

¹⁴⁹ Supra note 122 at 18.

¹⁵⁰ Ibid at 18.

¹⁵¹ Supra note 1 at 119.



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7. Sexual Offences and Related Matters Amendment Act

The Sexual Offences and Related Matters Amendment Act 32 of 2007 also provides for offences that are cyber bullying related and the Act defines child pornography as:

any image, however created, or any description or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any image or description of such person-

- (a) engaged in an act that constitutes asexual offence;
- (b) engaged in an act of sexual penetration
- (c) engaged in an act of sexual violation;
- (d) engaged in an act of self-masturbation
- (e) displaying the genital organs of such person in a state of arousal or stimulation;
- (f) unduly displaying the genital organs or anus of such person;
- (g) displaying any form of stimulation of sexual nature of such person's breast;
- (h) engaged in sexual suggestive or lewd acts;
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
- (j) engaged in any conduct or activity characteristically associated with sexual intercourse;
- (k) showing or describing such person
 - (i) participating in, or assisting or facilitating another person to participate in; or
 - (ii) being in the presence of another person who commits or in any other manner being involved in, any act contemplated in paragraph (a) to (j)
- (l) showing or describing the body, or parts of the body, of such person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or integrity or dignity of that person or any category of persons under 18 or is capable of being used for the purpose of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons.

The Act encapsulates serious repercussions of cyber bullies who engage in sexting. If a learner sends a semi-nude picture of herself to her boyfriend, it will qualify as child pornography. Even posting the head of a fellow learner on a nude body and distributing the image in the form of revenge bullying will be child pornography. Revenge bullying is when a learner posts a nude picture shared by another learner during a relationship after breaking-up.¹⁵²

¹⁵² Supra note 1 at 121.



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Section 19 states that any person exposing or displaying, or causing exposure or display, of a child pornography to a child is guilty of the offence of exposing or displaying, or causing the exposure or display, of a child pornography or pornography to a child. A conviction in terms of this Act will also result in the offender being registered as a sex offender in the national register for sex offenders.

This section implies that intentional or negligent distribution of images that fit the definition above constitutes child pornography. For instance, a girl will be guilty of child pornography if she sends such image to her boyfriend and the boyfriend is similarly guilty if he shows the image to his friends. Learners who are ignorant of these provisions may be convicted of serious crimes that will affect their future.¹⁵³

8. Films and Publications Act 65 of 1996

The Act defines child pornography as image, however created, or any description of a person, real or simulated, who is, or who is depicted or described as being, under the age of 18 years:

- (i) engage in sexual conduct
- (i) participating in, or assisting another person to participate in, sexual conduct, or showing or describing the body, or parts of the body, of such a person in a manner or circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of exploitation.

Section 27 (1) of the Act provides for an offence if a person, creates, produces, contribute towards the production of, distributes or is in possession of child pornography. It stands to reason that people who create or distribute sexually explicit images depicting a child on the cyber space are guilty of child pornography.

9. Films and Publications Amendment Act 11 of 2019

Section 1 of the Films and Publications Amendment Act 11 of 2019 has amended section 1 of the Films and Publications Act 65 of 1996. Section 1(b) of the Films and Publication Amendment Act provides that child pornography means child pornography as defined in the Sexual Offences Amendment 32 of 2007. Section 1(j) of the Films and Publication Amendment Act provides that harmful means causing emotional, psychological or moral distress to a person, whether it be through a film, game or publications any on or offline medium, including through internet and harm has

¹⁵³ Ibid at 121.

corresponding meaning. Thus, the meaning of harm in the Act corresponds with harmful effects of cyber bullying as mentioned in the discussion of chapter three.

Section 24E of the Films and Publications Amendment Act provides that intentional distribution of private sexual photographs and films in any medium including internet and social media, without prior consent of the individual in the said sexual photograph or film with the intention to cause the individual harm shall be guilty of an offence and liable upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment. This provision addresses 'revenge pornography' as a form of cyber bullying. Section 18F prohibits the posting of sexual photos without consent of the individual who is on the photo or film and such act is criminalised by section 24E.

Section 18G of the Films and Publications Amendment Act prohibits the creation, production or distribution in any medium, including the internet, and social media any films or photographs depicting sexual violence and violence against children. Thus, even the posting of violence fights among learners in the social media is an offence according to section 24F of the Act. Thus, traditional bullying that encompasses violence can constitute an offence as provided for in the Act. This implies that anyone who films an act of bullying or fight between other learners wherein violence or sexual violence is depicted shall be guilty of an offence.

Section 1(j) of the Films and Publications Amendment Act defines hate speech as any speech, gesture, conduct, writing, display or publication, made using the internet, which is prohibited in terms of section 16(2) of the Constitution of the Republic of South Africa of 1996, which propagates, advocates or communicates words against any person or identifiable group, which words could reasonably be construed to demonstrate a clear intention to be harmful, to incite harm and promote or propagate hatred against the said person or identified group. Cyber bullying that amounts to hate speech may constitute a crime in terms of section 24G of the Act.

10. Cybercrimes and Cybersecurity Bill

The preamble of the proposed Bill¹⁵⁴ provides, *inter alia* that is to create offences and impose penalties which have a bearing on cybercrime, to criminalise the distribution of data messages which is harmful and to provide for interim protection orders, to further regulate jurisdiction in respect of cybercrimes, to impose obligations on electronic communications service providers and financial institutions to assist in the investigations of cybercrime. The scope of its application will be wide.

¹⁵⁴ Cybercrimes and Cybersecurity Bill, as introduced in the National Assembly (proposed section 75); Explanatory summary of Bill published in the Government Gazette No. 40487 of 9 December 2016.



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Section 17 of the proposed Bill contains provisions that may have an influence on cyber bullying incidents. Section 17(1) provides that:

Any person who unlawfully and intentionally-

- (a) makes available, broadcasts or distributes;
- (b) causes to be made available, broadcasted; or distributed; or
- (c) assists in making available, broadcasts or distributes, through a computer network or an electronic communications network, to a specific person or the general public, a data message which advocates, promote or incite hate, discrimination or violence against a person or a group of persons, is guilty of an offence.

Thus, any person who posts hateful or violent or discriminatory comments on Facebook or social media will be convicted of an offence in terms of section 17(1).

Section 18(1) provides that:

Any person who unlawfully and intentionally

- (a) makes available;
- (b) broadcasts or distributes, by means of a computer system, a data message of an intimate image of an identifiable person knowing that the person depicted in the image did not give his or her consent to the making available, broadcasting or distribution of the data message, is guilty of an offence.

Section 18(2) provides that for purposes of subsection (1), 'intimate image' means a visual depiction of a person made by any means:

- (a) under circumstances that give rise to a reasonable expectation of privacy; and
- (b) in which the person is nude, is exposing his or her genital organs or anal region or, in the case of a female, her breasts.

Section 18 will criminalise cyber bullying behaviour called revenge porn, for instance if a boyfriend distributes lewd photographs of his girlfriend on Facebook after they have broken-up.

Section 19 of the Bill provides that:

A complainant who lays charges with the police that an offence contemplated in section 16, 17 or 18 allegedly been committed against him or her, may on an ex parte

basis in the prescribed form and manner, apply to a magistrate's court for an order for an order pending the finalisation of the criminal proceedings to:

- (a) prohibit any person from further making available, broadcasting or distributing the data message contemplated in section 16,17 or 18 which relates to the charge; or
- (b) order an electronic communication service provider or person in control of a computer system to remove or disable access to the message in question.

Section 2 states that the court must as soon as reasonably possible consider an application submitted to it in terms of subsection (1) and may, for the purpose, consider any additional evidence it deems fit, including oral evidence or evidence by affidavit, which must form part of the record of the proceedings.

Section 3 stipulates that if there is *prima facie* evidence that the data message in question constitutes an offence as contemplated in section 16, 17 or 18, the court may issue the order referred to in subsection (1) in the prescribed form.

Section 4 provides that the order must be served on the person referred to in subsection (1)(a) or electronic communications service provider or person referred to in subsection (1)(b) in the prescribed form and manner. Provided that, if the court is satisfied that the order cannot be served in the prescribed form and manner, the court may make an order allowing service to be effected in the manner specified in that order.

Section 5 states that an order referred to in subsection (1) is of force and effect from the time it is issued by the court and the existence thereof has been brought to the attention of the person referred to in subsection (1)(a) or electronic communications service provider or person referred to in subsection (1)(b).

The aforesaid court order that may be issued pending criminal proceedings is very imperative to protect a victim of cyber bullying from further harm. Thus, the victim's rights to privacy and dignity will be fully protected pending criminal hearing. The protection order will also allow justice to prevail smoothly without any interruption.

Section 22 provides that any person who contravenes the provisions of section 16, 17 or 18 is liable on conviction to a fine or to imprisonment for a period of not exceeding three years or to both a fine and such imprisonment. This prescribed sentence is very clear that the legislator regards cyber bullying as a serious offence. However, this Bill is not yet promulgated and thus it is still not effective as a law.



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The Department of Justice and Constitutional Development presented the radically amended version of the Bill to the Portfolio Committee for Justice and Correctional Services on 23 October 2018. The biggest shift is the removal of provisions relating to cybersecurity, necessitating the renaming of the Bill from the Cybercrimes and Cybersecurity Bill to the Cybercrimes Bill.¹⁵⁵

The Cybercrimes Bill was adopted by the Portfolio Committee for Justice and Correctional Services on 07 November 2018 and will henceforth go to the National Assembly for debate on 27 November 2018.¹⁵⁶ On 06 February 2019 the Select Committee on Security and Justice in the National Council of Provinces had invited the public to submit written comments on the Cybercrimes Bill as part of the NCOP's considerations of the Bill. Comments were to be emailed to Mr G Dixon (gdixon@parliament.gov.za) by no later than 08 March 2019.¹⁵⁷

11. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Section 10 of the Act states as follows:

Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-

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

Therefore, if a person publishes comments on social media that is either hurtful, harmful or propagates hatred based on the grounds of race or sexuality then such a person can be held criminally liable in terms of section 10 of the Act.¹⁵⁸

12. Conclusions

This chapter focused on the current South African legal frameworks that can be applied to address cyber bullying. Common law was considered and found to be incompatible with cyber bullying due to technological advancement. South African

¹⁵⁵ <https://www.ellipsis.co.za/cybercrimes-and-cybersecurity-bill>. Last accessed on 27 November 2019.

¹⁵⁶ Ibid

¹⁵⁷ Ibid

¹⁵⁸ Supra note 1 at 126.



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Schools Act was also mentioned and found not to be dealing with cyber bullying but degrading or abusive treatment of learners which can be forms of cyber bullying. The Protection from Harassment Act was considered but found to be lacking in criminalisation of cyber harassment. A victim can apply for interdict to prevent further cyber harassment in terms of the Act. The ECT Act was also discussed and it was found that it does not deal directly with cyber bullying. But the Act can apply to cyber bullying by extension of the scope of its application and its penalties are too lenient.

The Children's Act was also mentioned and it was discovered that it addresses specifically child abuse contraventions and can only apply to cyber bullying by extending interpretation of the unlawful conduct. The Sexual Offences and Related Matters Amendment Act was considered and it was found to be encompassing only few aspects of cyber bullying like child pornography and sexting. The Films and Publications Act was also discussed but it was discovered that it can apply to cyber bullying in the form of child pornography. The Films and Publications Amendment Act was mentioned and it was found to be dealing with sexual offences. The Act can also apply to cyber bullying by extension of the scope of its application.

Cybercrimes and Cybersecurity Bill was discussed at length and it was found to be covering wide range of cyber bullying acts. The Bill can be regarded as a significant step in the right direction to address cyber bullying.

The Bill criminalises the distribution of malicious communication and provides for interim protection measures.¹⁵⁹ The penalties of the Bill are harsh enough to deter other prospective offenders from committing cybercrimes. The Bill also obligates the service providers to provide information in determining the identity of the offender.

However, Duncan is of the opinion that the drafts law's promise to make the internet a much safer, freer space for South Africans is illusory.¹⁶⁰ Duncan argues that the Bill threatens digital rights in significant ways, especially the freedom of expression and association, and the right to privacy. It is also observed that the Bill lacks important checks and balances, and increase state power over the internet in concerning ways in section 51 of 64 of the Bill provides for significant state involvement in the monitoring of business and private cyber activity.¹⁶¹

The Right2Know Campaign states that the current legal framework to combat cybercrime is a hybrid of legislation and the common. The common law however, takes its approach on a case by case basis, thus has not kept pace with the dynamic nature

¹⁵⁹ Supra note 154 at Chapter 3.

¹⁶⁰ Duncan, A. 'A new Bill threatens our digital rights and raises the spectre of internet censorship.'

¹⁶¹ Ibid.



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of cybercrimes. The Right2Know Campaign believes that the Bill is a product of calls by various stakeholders for the State to enact specialised legislation and to align South Africa with international practice.¹⁶² The Campaign have criticised the Bill extensively. But, the Bill is now cleared of cybersecurity provisions and deals only with cybercrimes.¹⁶³

The chapter has indicated that cyber bullying could not be addressed effectively by the various legislative frameworks in South Africa. Thus, the legislature had proposed the Cybercrimes and Cybersecurity Bill which covers wide aspects of cyber bullying. The Bill is still not yet enacted and that means its provisions are not applicable as it was delayed by criticism that its cyber security provisions were unconstitutional. The current legal frameworks in South Africa are not addressing cyber bullying efficiently.

There are several shortcomings in the discussed promulgated legislation that make them insufficient to address cyber bullying. Most of the discussed legislations do not even deal directly with cyber bullying but only apply to it when the scopes of their applications are extended. The various discussed legislations indicate that there is no uniform and integrated approach to deal with cyber bullying in South Africa. The need to develop a new legal framework that can deal effectively with cyber bullying seems to be very clear in accordance with the discussion in chapter four.

CHAPTER 5: Conclusions and Recommendations

1. Introduction

This chapter will outline lessons learnt in the preceding chapters of the dissertation and make the necessary recommendations. All the discussions have painted a clear picture that cyber bullying is increasing at a high pace and its effects are devastating. The suicides incidents and permanent damages that are caused by cyber bullying require clear legal regulation to address the scourge thereof. The current legal framework cannot deal effectively with the proliferation of cyber bullying according to the discussion. The discussion also indicated a clear need to develop the legal framework of South Africa in order to deal effectively with cyber bullying.

2. Lessons learnt in this dissertation

¹⁶² Shultz, C.B, 'Cybercrime: An Analysis of current legislation in South Africa' Right2Know campaign.

'Legislation: concerns over proposed cyber law,'

¹⁶³ Supra note 155.



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Chapter one of this dissertation have elaborated the various definitions of cyber bullying. The discussion had indicated the various characteristics of cyber bullying. Elements of cyber bullying were also discussed in the first chapter. The analysis of the first chapter clearly points out that there is no uniform definition of cyber bullying. The author concluded that South Africa does not have sufficient legal framework that defines cyber bullying in order to criminalise it and thus, there is a lacuna.

Chapter two had discussed the various negative effects of cyber bullying in the lives of the victims. The discussion clearly demonstrated the harmful effects of cyber bullying on the victims as it can even lead to suicide and other serious psychological damages. The author concluded that the devastating impact of cyber violence indicate an urgent need for victim's support structures and legal framework to punish cyber bullies appropriately in order to combat cyber bullying.

Chapter three focused on the various American legal frameworks and policies that are applied by different states to deal with cyber bullying. American schools policies limit the right to freedom of speech if it causes substantial disruption of the school's operation as it was discussed in this chapter. The discussion contains a clear and comprehensive definition of cyber bullying in terms of section 370 of Massachusetts General Laws Chapter 71. South Africa can adopt such a definition to address cyber bullying more effectively because information and communications technology is always advancing. The author concluded that an effective regulation of cyber bullying requires a wide and clear definition of the crime.

Chapter four addressed the current legal regulations that South Africa has that can be applied in dealing with cyber bullying. This chapter has indicated various legislations that are applicable to address cyber bullying. However, this chapter highlighted that the current legal framework is insufficient to deal effectively with cyber bullying. This has necessitated the legislature to introduce Cybercrimes and Cybersecurity Bill which defines cyber bullying wider and deals with it directly. The other available statutory provisions do address cyber bullying but indirectly.

3. Recommendations

In concluding, an effective fight against cybercrimes requires increased, rapid and efficient international co-operation in criminal matters. The possibility exists that the new forms of cybercrime will emerge with evolving technology and legislation needs to be created to address such issues both now and in the future. The question is whether the Bill sufficiently caters for this?¹⁶⁴

¹⁶⁴ Supra note 162 at 42.



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Cyber bullying is one of the cybercrimes addressed in the Bill and the above-mentioned question is relevant to this crime as well. What is provided in the Bill regarding cyber bullying must then be scrutinized to answer the question. The Bill must be on par with international standards of cyber bullying laws to be sufficient.

According to Whatney the state cybercrime laws should be comprised of more than merely criminalising unlawful conduct but also need to deal with procedures in the prevention, detection and investigation of crime and collection of evidence for subsequent prosecution.¹⁶⁵

The latter view point of Whatney pose a question as to whether can the Bill provide for the necessary measures to prevent, detect and investigate cyber bullying. The measures can be achieved in collaboration with other role players in cyber space such as the electronic communication service providers. Most importantly, the various departments of the state will need to apply a uniform and integrated approach to deal with cyber bullying. For instance, the Department of Education must collaborate with the Department of Police and Department of Justice and Correctional Services to develop a new uniform and integrated approach.

South Africa can acquire knowledge from the approaches followed in other countries like the USA but still keep in mind the South African context. The skills acquired should be relevant to the South African context in order to adopt an approach that is practical and implementable.¹⁶⁶ The American Massachusetts section 370 of General Laws Chapter 71 is a good law that can be adopted in South Africa to deal with cyber bullying more effectively because it contains a very wide definition.

Sulfab states that the wide spread and dependence on digital devices had ushered in a new form of cybercrime which requires new legislation. He suggests that in order to successfully combat the growing phenomenon of cybercrime, the government of South Africa needs to amend and legislate laws to address current issues facing governments and society relating to cyber hacking, cyber terrorism and violation of intellectual property.¹⁶⁷ The latter opinion is also relevant to cyber bullying as a cybercrime encompassed in the Cybercrimes and Cybersecurity Bill.

The constant rise and dynamic nature of cybercrime in recent years had required the government of South Africa to establish new mechanisms to address issues related to cyber intrusion and online fraud. While South Africa has successfully enacted the ECT Act, amendments and new laws are needed according to Sulfab.¹⁶⁸ These views of

¹⁶⁵ Whatney M. 'Cybercrime regulation at a cross-road: state and trans

¹⁶⁶ Supra note 162 at 43.

¹⁶⁷ Sulfab, M. 'Challenges of cybercrime in South Africa' American University 2004 at 40.

¹⁶⁸ Supra note 167 at 41.



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Sulfab are also relevant to cyber bullying as mentioned in the Cybercrimes and Cybersecurity Bill. The current South African legislation is insufficient to deal effectively with cyber bullying. Thus, new legal mechanisms must be developed for South Africa to combat cyber bullying.

In *Bernstein and Others v Bester and Others NNO*, the Constitutional Court held that “In South African law the right to privacy is recognised as independent personality right which the courts have included within the concept of *dignitas*”¹⁶⁹

The Constitutional Court has also entrenched in our law the close link between human dignity and privacy.¹⁷⁰ The Constitutional Court has clearly indicated the close link between the rights of privacy and dignity.

In *Financial Mail Pty Ltd and Others v Sage Holdings Limited and Another*, the court held that: “In demarcating the boundary between the awfulness and unlawfulness in this field (infringement of personal privacy) the Court must have regard to the particular facts of the case and judge them in the light of contemporary *boni mores* and the general sense of justice of the community as perceived by the Court. Often a decision on the issue of unlawfulness will involve a consideration and weighing of competing interest.”¹⁷¹ The competing interests in the case cyber bullying are normally the right of privacy or dignity and freedom of expression.

It was held that “It is in respect of the remedy where infringement of privacy take place in the social media that the common law needs to develop,” according to the case of *H, WS and W,N*.¹⁷² The court found that common law is lacking in the area of cyber space claims. It reiterates the need for development of new legal frameworks.

The court in *Van Berg v Coopers and Lybrand Trust (Pty) Limited and Others* found that “resolving the tensions between every human being’s constitutionally enshrined rights both to freedom of expression and to *dignitas* is all about balance.”¹⁷³

¹⁶⁹ *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) at paragraph 68.

¹⁷⁰ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) where it was said at paragraph (30): This case illustrates how, in particular circumstances, the rights of equality and dignity are closely related, as are the rights of dignity and privacy; and *Khumalo and Others* 2002 (5) SA 401 (CC) at paragraph (21); and *De Reuck Director of Prosecutions, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC) at paragraph 46 to 50.

¹⁷¹ *Financial Mail (Pty) Ltd and Others v Sage Holdings Limited and Another* 1993 (2) SA 451 (A).

¹⁷² *Supra* note 34 21.

¹⁷³ *Van Der Berg v Coopers and Lybrand Trust (Pty) Limited and others* 2011 (3) SA 274 (CC).



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Cyber bullying violates several rights enshrined in the Constitution of South Africa.¹⁷⁴ The rights that are involved in cyber bullying are the right to freedom of expression, right to privacy and right to dignity which are all encapsulated in the Constitution. The right to freedom of expression may violate the rights to privacy or dignity of cyber bullying victim. There is a need to balance the competing interests as it was held in the case of *Van Der Berg v Coopers and Lybrand Trust Pty Limited and Others*.¹⁷⁵

Since the victims of cyber bullying are mostly young people then it makes sense to discuss the provisions of section 28(1)(d) of the Constitution of South Africa. The provisions of this section stipulates that:

“Every child has a right to be protected from maltreatment, neglect, abuse or degradation.”

It is apparent that this right in section 28(1)(d) will be violated if a child is subjected to cyber bullying. On the other hand, section 28(1)(g) of the South African Constitution protects the right of a cyber bully. Section 28(1)(g) provides that:

“Every child has a right not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under section 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be:

- (i) kept separately from detained persons over the age of 18 years; and
- (ii) treated in a manner, and kept in conditions, that take account of the child’s age.”

It is noteworthy that section 28(2) provides that:

“A child’s best interests are of paramount importance in every matter concerning the child.”

Thus, the interests of children involved in cyber bullying must be given high priority according to the provisions of section 28(2). It implies that even the legislature must protect the interests of children by developing the South African legal frameworks to deal effectively with cyber bullying.

Section 10 of the South African Constitution states that:

“Everyone has inherent dignity and the right to have their dignity respect protected.”

¹⁷⁴ The Constitution of the Republic of South African Act 108 of 1996.

¹⁷⁵ Supra note 173.



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The Legislature is obligated to protect the right to dignity of cyber bullying victims by implementing laws and legal regulations that can address cyber bullying effectively.

The right to dignity is also protected in Article 5 of the African Charter on Human and People's Rights,¹⁷⁶ which provides that:

“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

The right to dignity in this Article is linked to the prohibition against cruel, inhuman and degrading treatment. In order to protect the dignity of human beings, they must not be submitted to such treatment. Section 12(1)(e) of the South African Constitution gives effect to this article. Since cyber bullying can be degrading and cruel, there is a duty on the state to protect learners against cyber bullying.¹⁷⁷

The court had recognised the right to freedom of expression in a democratic society in the case of *Khumalo and Others v Holomisa*.¹⁷⁸ The court also held that the right be interpreted in the context of the values of human dignity, freedom and equality.¹⁷⁹

Section 16(1) of the South African Constitution provides as follows:

“Everyone has the right to freedom of expression, which includes-:

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity;
- (d) academic freedom and freedom of scientific research.”

Section 16(2) states the following:

The right in subsection (1) does not extend to-:

- (a) propaganda for war;
- (b) incitement of imminent violence;
- (c) advocacy to cause harm.

¹⁷⁶ African Charter on Human and People Rights, OAU Doc CAB/LEG/Rev(1990)

¹⁷⁷ Supra note 1 at 91.

¹⁷⁸ *Khumalo and Others v Holomisa* (CCT53/01) (2002) ZACC 12; 2002 (5) SA 401.

¹⁷⁹ *Ibid* at paragraph 25.



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In the instance where cyber bullying constitutes incitement of imminent violence or hate speech then the protection of a cyber bully falls away according to provisions of section 16(2) of the Constitution.

The Constitutional Court had limited the right to freedom of expression where it infringed the right to dignity and reputation in the case of *Le Roux and Others v Dey*.¹⁸⁰ A learner had created an image in which the principal and his deputy were pasted onto a picture of two gay bodybuilders in a compromising position. The picture included the two men sitting with their legs over one another's and their hands in the region of each other's genitals. Mr Le Roux pasted an image of the school badge on the picture to cover the genitals. The other learners then suggested that the picture be posted on the school notice board. The school authorities then punished the involved learners. Subsequently, criminal charges were laid against the learners they were sentenced to community services. The latter sentence was due to the injury to dignity, good name and reputation of the complainant. The High Court granted compensation of R45 000 for defamation and insult to dignity. The Supreme Court of Appeal upheld the decision. The applicant still appealed to the Constitutional Court and majority decision was given in his favour on the basis of defamation claim. The Court held that dignity was the heart of the South African Constitution.¹⁸¹ But there was dissenting judgement of Yacob J that was delivered as a minority judgement.¹⁸²

Buthelezi argued against the minority judgement in the case of *Le Roux* and stated that the importance of right of freedom of expression should be recognised but the South African Constitution is founded on the value of human dignity and the freedom of expression and the best interests of a child were overemphasized at the expense of human dignity.

Finally, the latter discussion clearly indicates that the Constitutional Court had limited the right to freedom of expression at the expense of the right to dignity as one of core values of the South African Constitution. Even section 36 of the Constitution provides for limitation of rights whereby the right to freedom of expression can be limited. Thus, the author submits that cyber bullies must not be protected if they infringe human dignity. The right to dignity of cyber bullying victims must be considered as a priority.

The author recommends that the legislature should develop new legal framework that will deal effectively with cyber bullying on the strength of the right to human dignity as enshrined in the South African Constitution.

¹⁸⁰ *Le Roux and Others v Dey* CCT 45/10 (2011) ZACC (4); 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC).

¹⁸¹ *Ibid* at paragraph 202.

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