

Cyberbullying in South African and American schools: A legal comparative study

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Bullying conjures up visions of the traditional schoolyard bully and the subordinate victim. However, bullying is no longer limited to in-person encounter, having come to include cyberbullying, which takes place indirectly over electronic media. In this electronic age, cyber platforms proliferate at an astonishing rate, all attracting the youth in large number, and posing the risk that they may become subject to cyberbullying. Far from being limited to those individual learners being cyberbullied, the effects of this phenomenon extend to the learner collective, the school climate, and also the entire school system, management and education, thus requiring an urgent response. This article first provides a general overview of cyberbullying and its impact on learners, schools and education. This is done through a comparative lens, studying the extent of the phenomenon in both the United States and South Africa. The focus then shifts to the existing legislative frameworks within which the phenomenon is tackled in these respective jurisdictions, particularly the tricky balancing act required between learners' constitutional right to free speech and expression, and the protection of vulnerable learners' right to equality, dignity and privacy. The article concludes by proposing certain possible solutions to the problem.

Keywords: cyberbullying; electronic media; harassment; learners; potential solutions; right to dignity and respect; right to free speech; schools; South Africa; United States

Introduction and Background

One of the most important social spheres in which children operate is the school environment. The significant influence that educational institutions have on children's psycho-educational development cannot be overstressed (Burton & Mutongwizo, 2009); the educational institution should therefore not only be a place of learning for the child, but a place of safety, too. Violence in schools is no new phenomenon and presents cause for great concern worldwide – especially in South Africa, where this has claimed the lives of both learners and educators (Burton & Mutongwizo, 2009). Bullying has been shown to have a negative effect on both educators and learners (De Wet, 2011), while the added dimension of anonymity (Hughes & Louw, 2013) typically associated with cyberbullying, leads to increased antisocial behaviour (Hughes & Louw, 2013), which merely serves to “exacerbate” the bullying problem in South African schools (confer (cf.) Mienie, 2013:146).

Bullying in South African schools has recently received media attention, and several media reports on this topic have consequently appeared (Rooi Rose, 2011). Studies on violence in the workplace and on bullying in South Africa are limited (De Wet, 2011:66). Bullying in general leads to feelings of “incompetence, alienation and depression” (Le Roux, Rycroft & Orleyn, 2010:51); in schools, it has been shown that cyberbullying may result in “low self-esteem, family problems, academic problems, school violence, delinquent behaviour and suicidal thoughts” (Goodno, 2011:645). In the United States of America, several teenagers have committed suicide due to cyberbullying (Goodno, 2011:645-647) and “school taunting” (Burnham, Wright & Houser, 2011:7), which led the legislature in various states to seek a uniform definition of cyberbullying, to investigate the prevalence and frequency of cyberbullying in schools. Prevalence rates differ due to numerous factors, such as “sample characteristics, the definitions used”, and whether traditional bullying is also measured, according to Kowalski, Giumetti, Schroeder and Lattanner (2014:1108). This is no minor problem: the attempt to demonstrate power and authority over subjects through “anonymous” cyberspace is experienced by as many as “93%” of youth accessing the internet in North America (Law, Shapka, Domene & Gagne, 2012:665). In February 2012, it was even reported that a woman who had been bullied at a young age about her red hair, suffered that same abuse as a 35-year-old, after a childhood picture of her had been posted on Facebook. The online attack became so blistering that she was forced to call the police, saying that at least at school, she was able to see the bullies, but now, the bullies were faceless, hiding behind their keyboards (Faulkner, 2012).

To set the scene for studying the phenomenon, this article first presents a general overview of cyberbullying and its characteristics, as well as its effect on learners, schools and education. The focus then shifts to the legal position in respect of cyberbullying in both the United States and South Africa, after which the paper will investigate the way in which cyberbullying could be halted in order to give effect to our constitutional imperatives, and to balance the rights of the various parties in a school environment.

Cyberbullying

Cyberbullying occurs when adolescents use technology deliberately and repeatedly to “bully, harass, hassle and threaten” their peers (Goodno, 2011:641), leaving their victims without any escape, as continuous technological development and increased connectedness are shrinking the world. Victims are therefore traced wherever technology is accessed – not only on the “internet, e-mail or smartphones”, but through “cellphones, tablets” and any other way of “sending or retrieving” data or voice messages (Li, 2005:1779). Goodno has argued that bat-

ting cyberbullying is one of the most pertinent “challenges facing public schools” in the United States of America (hereinafter ‘the USA’) (2011:655).

Bullying is primarily defined as encompassing physical acts, such as hitting, kicking or pushing; verbal aggression, such as name-calling and abusive language; or relational aggression, such as spreading rumours or socially excluding peers. Cyberbullying merely takes this phenomenon to the next level. All instances are characterised by a “power imbalance”, a clear “intent to inflict harm”, and the repeated occurrence of harmful acts (Varjas, Henrich & Meyers, 2009:160). Victims of cyberbullying seem to be at a greater risk of experiencing poor psychosocial adjustment, as many internet users are socially isolated, and incite participation from peers in a cyberworld. Therefore, appropriate preventative and intervention strategies should be developed to ensure the “safety of all students” (Li, 2005:1780).

According to Bauman (2013:249), “[c]yberbullying is possible because of the wide availability of digital technology”, and the proliferation of technological innovations will therefore always mean that research and, by implication, legislation, will lag behind. This is not to say that a magnitude of research on cyberbullying, especially in foreign jurisdictions, had not been done in recent years, but that the “very nature” of electronic communication leads to different results (Kowalski et al., 2014:1074). What does stand firm, however, is that South African society needs to take a firm stand to protect our learners from the negative effects of cyberbullying, such as “depression, pathological technology use, obsessive and addictive technology behaviours” and cyberbullying, specifically (and should South Africa investigate the position in other countries, such as the USA (Kowalski et al., 2014:1074)).

Defining cyberbullying

There is no single definition for cyberbullying: in South Africa, Belsey defined cyberbullying as “bullying which involves the use of information and communication technologies, such as e-mail, cellphone and text messages, instant messaging, and defamatory online personal polling websites, to support deliberate, repeated and hostile behaviour by an individual or group that is intended to harm others” (in Burton & Mutongwizo, 2009:1). Williams (in Burton & Mutongwizo, 2009:1) have further defined it as “the use of speech that is defamatory, constituting bullying, harassment or discrimination, and the disclosure of personal information that contains offensive, vulgar or derogatory comments”, while Varjas et al. (2009:160) describes it as follows: “the newer technolog[ical] phenomenon of cyberbullying has been defined as willful and repeated harm inflicted through the

medium of electronic communication tools”.ⁱ Kowalski et al. (2014) states that cyberbullying is not easily defined, but that, in general, it refers to the use of electronic communication technologies to bully others. It has been found that prevalence rates differ due to this problem, where the “definition used” by researchers will invariably lead to different results (Kowalski et al., 2014:1074).

Here we thus define cyberbullying as constituting rapid, repeated, intentional actions of harassment or aggression, which are specifically prohibited by the enactment of our Constitution.

Characteristics of cyberbullying

Although cyberbullying shares certain characteristics with ‘traditional’ bullying, with Bauman (2013:251), for instance, referring to an “overlap” between the two, there are also some major differences, with the key ones being “anonymity” (cyberbullies are often not known to their victims), “disinhibition” (Bauman, 2010:808) (the perpetrators of online bullying are often less inhibited since they are able to avoid face-to-face contact), accessibility (cyberbullying and its effects follow the victims wherever they go), and punitive fear (the additional disincentive to report cyber-violence due to victims’ fear of losing control over their electronic media) (Anti-Defamation League, 2009).

Hinduja and Patchin have stated that “cyberbullying is a growing problem because increasing numbers of kids are using and have completely embraced online interactivity” (2014:3). Judging by the medium through which cyber bullying is perpetrated, one would be tempted to argue that a child can avoid being cyberbullied simply by not logging on electronically. However, this does not hold water: the publishing of defamatory personal material on the internet is extremely difficult to prevent, and, once posted, millions can download it before it is removed, at which time it becomes irrelevant whether the victim was logged on or not. Rather, the specific nature of cyber-bullying poses problems related to the basic rights of learners and educators guaranteed by the Constitution (Republic of South Africa, 1996a). In a contemporary school setting, the right to equality (Republic of South Africa, 1996a, s. 9); the right to human dignity (Republic of South Africa, 1996a, s. 10); the right to freedom and security (Republic of South Africa, 1996a, s. 12c) (“to be free from all forms of violence from either public or private sources”); the right to privacy (Republic of South Africa, 1996a, s. 24a); the right to a safe environment (Republic of South Africa, 1996a, s. 14); and the right to freedom of expression (Republic of South Africa, 1996a, s. 16), should all be balanced.

Prevalence of cyberbullying

Although definitions used by researchers depict certain commonalities, prevalence figures are de-

pendent on whether cyberbullying is defined in terms of “specificity versus generality.” (Kowalski et al., 2014:1074 - for more detail on prevalence rates in different countries and the different definitions, please see tables on pp. 1075-1106 in this article). Although Bauman (2013:251) refers to “mixed research findings” pertaining to age and gender in terms of prevalence, a study done in 2009 (Varjas et al., 2009:162) revealed that 50% of the respondents reported having been a victim of cyberbullying, while 22% of them had personally perpetrated cyberbullying. Another study, also undertaken in 2009, indicated that 35% of children between the ages of 13 and 17 were the targets of cyberharassment (Goodno, 2011:644). Reports further indicate that 93% of teens are active users of the internet and 75% own a cellphone (Schneider, O'Donnell, Stueve & Coulter, 2012:171). More than 3,2 million are victims of bullying annually. One of the largest studies conducted online in 2008 indicated a prevalence rate of 72%, with youth between the ages of 12 and 17 reporting at least one incident of “cybervictimisation” (Bauman, 2013: 251). A study done in 2011 found that 53% of adolescents aged 12-13 were victims of cyberbullying (Aftab, 2011, in Kowalski et al., 2014: 1108).

The latest figures from the USA indicate prevalence at between 10%-40%, once again depending on the definition used to depict online aggression (Kowalski et al., 2014:1108). Both Bauman (2013:250) and Kowalski et al. (2014:1074) refer to the “difference” in prevalence rates and ascribes these to the “different definitions” used in research. Kowalski et al. (2014:1074) also sets out the different prevalence rates in different countries, and indicate cyberbullying to be a worldwide problem in schools. A dispute exists in the USA on whether cyberbullying has increased or decreased over the years, but it is asserted as still being a “serious problem confronting youth today” (Kowalski et al., 2014:1108).

The overlap between bullying and cyberbullying is substantial; with nearly “two thirds” of cyberbullying victims reporting that they were “bullied at school” as well (Schneider et al., 2012:175). An estimated 160,000 children miss school every day out of fear of attack or intimidation by other students. A total of 72% of teens reported at least one incident of bullying online (name calling, insults via instant messaging or social networking sites), but 90% did not report the incident to an adult (Berkshire District Attorney's Office, 2015:1). Taking into account that teenagers' use of cellphones and text messaging has increased from 45% to 75% since 2004; that 72% of teens make use of this message service, and that 22% of teens check their social networking sites more than 10 times per day (Lenhart, Ling, Campbell & Pur-

cell, 2010:1), there is clearly a dire need to address cyberbullying.

In South Africa specifically, a study by the Centre for Justice and Crime Prevention proposed that almost a third of the more “traditional” bullying could be ascribed to cyberbullying (Burton & Mutongwizo, 2009:1). The Centre's study among 1,726 adolescents also found that 46.8% had experienced some form of cyberbullying (Burton & Mutongwizo, 2009:1-2). In addition, in 2011, it was found that 36% of learners in primary and secondary schools had experienced cyberbullying (Davids, 2011; Unisa, Bureau of Market Research, 2011).

Clarifying certain cyberbullying terminology and categories

Cyberbullying should firstly be distinguished from cyberstalking, which is the use of electronic communication to follow an individual or groups of individuals with the intent to initiate in person contact, generally through a pattern of threatening or malicious behaviour. As such, cyberstalking could be seen as the more dangerous form of cyberbullying, in that a real, credible threat of harm exists (National Conference of State Legislatures, 2015). Moreover, although cyberbullying and cyber harassment are terms that are sometimes used interchangeably, the former usually refers to the electronic harassment of minors within a school context. This paper focuses on cyberbullying specifically.

Another important distinction is that to be made between so-called ‘sexting’ and cyberbullying. These two are regarded as separate phenomena in South Africa, but are often concurrent. While cyberbullying is defined as “acts involving bullying and harassment through the use of electronic devices or technology”, sexting is described as a combination of texting and sex, involving the sending of nude or semi-nude photos or videos and/or suggestive messages via mobile texting or instant messaging (Badenhorst, 2011:2). For example, in Springs, Gauteng, a peace order was granted against a 16-year-old girl for allegedly humiliating another 16-year-old girl at her high school on MXit, calling her a “slut” (Badenhorst, 2011:6).

In 2006, seven subcategories of cyberbullying were devised by Smith, Mahdavi, Carvalho and Tippet (2006:1), namely “text message bullying, picture/video clip bullying (via mobile phone cameras), phone call bullying via mobile phones, e-mail bullying, chat-room bullying, bullying through instant messaging and bullying via websites”. South African researchers have since added internet gaming and social networking sites such as Facebook and Twitter as ways in which cyber-bullying can be practised. According to Badenhorst (2011), cyberbullying can take the form of harassment

(frequently sending cruel or threatening messages to a person's e-mail account or mobile phone); denigration (sending or posting malicious gossip or rumours about, as well as digitally altered photos of, a person to damage reputation or friendships); impersonation or identity theft (posing as another person after breaking into that other person's e-mail account or social networking account); outing (the sharing of secrets or embarrassing information online with others with whom this should not have been shared); cyberstalking (similar to traditional stalking in that it involves a real threat of harm, either through repeated online harassment or stalking); happy-slapping (where people would walk up to others and slap them, with the action being captured by another using a mobile phone camera); and sexting (focusing on the involvement of children or minors, which could in some instances be classified as child pornography).

The impact of cyberbullying on learners, schools and education

At an individual level, it has been shown that cyberbullying leads to "low self-esteem, academic problems, delinquent behaviour" and, last but certainly not least, "suicidal thoughts" and "suicide" in learners (Goodno, 2011:645). Adolescents who contemplated suicide were "twice as likely" to have contemplated such behaviour, due to having experienced cyberbullying (Hinduja & Patchin, 2010:204). Cyberbullying has been described as being more pernicious than traditional bullying, since it allows for the "gradual amplification" of cruel and sadistic behaviour, and may cause an extreme emotional response, for instance a victim taking his or her own life (Belnap, 2011:501). In their study, Adams and Lawrence (2011) found that the negative effects associated with being bullied as a school learner continue into the college years, which would obviously detract from such victims' ability to perform academically.

However, the impact of cyberbullying is not limited to the individual effects suffered by victims, but also shows a ripple effect on learners collectively, creating a general feeling of being unsafe at school. Feinberg and Robey (2008) found that cyberbullying can undermine school climate and interfere with school functioning.

School systems, school leaders and the education sector are equally affected – both directly and indirectly. As articulated by Welker (2010), direct, on-campus cyberbullying disruption during the school day makes it even more complex to maintain school operations, safety and academic achievement. At a more indirect level, principals and other school leaders may find themselves in the awkward position of having to establish their authority over cyberbullying actions that "technically may occur outside of school, but for which the effects on students in school are very real"

(Feinberg & Robey, 2008:10). Increasingly, therefore, calls are made for school administrators to also understand and respond to cyberbullying (Mitzner, 2011), and for school leaders to be equipped with a framework against which to assess cyberbullying and its impact on learners (Magliano, 2013). Feinberg and Robey (2008:10) have stated in no uncertain terms that "school leaders cannot ignore cyberbullying, but rather must understand its legal and psychological ramifications and work with staff members, students and parents to stop it."

It is thus clear that the impact of cyberbullying on the education sphere extends from the individual learner, to the learner collective, through to the school and education system as a whole, and requires an urgent response.

The Legislative Framework

However, considering the rapid pace at which modern technology develops methods to curb this form of bullying struggle to keep up. While learners have the right to free speech and expression in terms of the South African Constitution, cyberbullying in a school could also interfere with other fundamental rights entrenched in that same Constitution, including the right to equality, the right to dignity and the right to privacy. Therefore, tackling the issue of cyberbullying in schools requires an enormous balancing act, which begs the question as to how to effectively guarantee and enforce the myriad of rights granted by our Constitution, while still protecting vulnerable learners and educators in a school setting. In an attempt to answer this question, the focus now shifts to the existing legislative frameworks and to the 'balancing act' in both the USA and South Africa, after which possible solutions to the problem will be suggested.

The American perspective

There is currently no federal US law addressing or prohibiting cyberbullying, neither in the workplace, nor in schools. Several US states have therefore resorted to passing their own laws prohibiting bullying and cyberbullying. Cyberbullying concerns first surfaced around 2004, while sexting concerns grabbed the public's attention in 2008 (Willard, 2011:125). The Georgia legislature was the first to codify requirements for school districts to address bullying among learners in public schools (Willard, 2011:124).

In 2010, the Federal Prevention Task Force in the USA was established to investigate the phenomenon of cyberbullying, bullying, sexting and peer aggression, as well as to develop effective prevention and intervention strategies. Clearly, school districts are obligated to protect learners and staff from "harassment and discrimination" once this is brought to the authorities' attention (Hinduja & Patchin, 2011:72-73), but they are equally bound to respect the right to free speech. When it comes

to the latter, however, education authorities are still expected to teach learners the boundaries of socially acceptable behaviour (Hinduja & Patchin, 2011:73) and, therefore, to restrict speech that is “highly offensive or highly threatening to others”.ⁱⁱ

Neither the legislature nor the courts have been able to give public schools clear guidance on how to manage cyberbullying effectively, and even states having adopted legislation to address bullying, still fail to address cyberbullying in public schools (Goodno, 2011). Lately, the District of Columbia and 45 other states have enacted general anti-bullying laws, mainly with reference to ‘off-line bullying’. It is noted, though, that the US Federal Government has proposed formal anti-bullying laws, which are currently pending (Goodno, 2011).

Due to the distinct features of cyberbullying, traditional anti-bullying measures are insufficient to address cyberbullying in education, and many states have now resorted to adopting policy to deal with this peril. We do know, however, that even a zero tolerance policy in “isolation” is insufficient to curbing negative behaviours (Hoel, 2013:17, McAndrews, 2001:3-4), wherein it is stated that policies “set in stone” with no flexibility hinder administrators’ ability to deal with minor incidents. It is thus clear that an integrated approach is needed. Relevant research on parent and teacher training suggests that positive outcomes often occur when “families and educators” are included in school prevention programmes (Fox, Farrington & Ttofi, 2012:279). Internet predators and cyberbullying via social media are major concerns. Children are far more likely to be bullied online (Kite, Gable & Filippelli, 2010), where traditional anti-bullying tactics would be ineffective. Although 43 states require public schools to develop policy regarding bullying, only 18 have model school policies, a mere six expressly prohibit cyberbullying, while 28 states prohibit “electronic harassment”, which is likely to encompass most elements of cyberbullying (Goodno, 2011:654). It is argued that even the “model policies” fail to address school cyberbullying effectively, and do not guide educators on how to deal with the unique aspects of this phenomenon (Goodno, 2011:654). In June 2008, a federal law was proposed that would have criminalised acts of cyberbullying, but the law was never passed (Olsen, 2008). Therefore, even though there are several laws to assist parties exposed to cyberbullying, there is no one specific federal act to curb cyberbullying in schools.

In light of this lack of a consolidated federal act prohibiting cyberbullying in schools specifically, there is a dire need for a single law to review and ensure that policies adopted by school districts at least have the necessary constitutional “teeth” (Conn, 2010:99) to curb cyberbullying, as the adoption of policy by individual schools seems to be the only proactive measure to take in order to

halt cyberbullying. In some jurisdictions, such measures take the form of a ban on the internet and technology-enabling instruments in schools (Conn, 2010:99).

Many authors argue that preventative programmes such as the “Stop Bullying Now” school programme, the “Olweus Bullying Prevention Programme” and the “Let’s Get Real” curriculum, could serve as proactive means to stop cyberbullying and bullying in schools (Sbarbaro & Smith, 2011:150) and to lessen the legal responsibilities incurred by school districts.

The South African perspective

In South Africa, cyberbullying as such is not prohibited by legislation, which seems to be a deficiency in our legal system. South African responses “are fragmented and rely on various pieces of legislation, common-law definitions of criminal offences, and civil law remedies” (Badenhorst, 2011:7). None of them are preventative measures. As cyberbullying is but another form of bullying, which has in turn been established as a form of harassment by the recently promulgated Protection from Harassment Act 17 of 2011 (Republic of South Africa, 2011), learners who fall victim to cyberbullies may in future explore this as a potential avenue for redress, albeit a protection order only, which falls within the realm of an interdiction and is not a real punishment or preventative measure.

Should cyberbullying lead to either common-law or statutory crimes, the normal criminal avenues should be followed to institute criminal action. This is however not preferable in a school environment.

In 2005, the Safer Internet Plus programme was adopted, which focused on empowering parents, children and educators with internet safety tools to combat illegal and harmful internet content (European Commission, 2009). Sexual harassment is further managed by the provisions in the Department of Education’s 2008 Guidelines for the Prevention and Management of Sexual Violence and Harassment in Public Schools (De Wet, 2013: 22).

Sexting in a South African context could be regarded as child pornography, and could lead to the prosecution of children under the Films and Publications Act 65 of 1996 (Republic of South Africa, 1996b), which could be seen as an unintended consequence of the legislation.

The Electronic Communications and Transactions Act 25 of 2002 (the ECT Act) (Republic of South Africa, 2002) assists in the gathering of information, and affords cyber-inspectors wide-ranging powers of seizure and investigation. Certain provisions of the Criminal Procedure Act 51 of 1977 (Republic of South Africa, 1977), which regulates general seizure and seizure warrants, have been

incorporated into the ECT Act (Republic of South Africa, 2002, s. 82(3),24), and the two acts are intended to be used in tandem. The Regulation of Interception of Communications-Related Information Act 70 of 2002 (Republic of South Africa, 2003), in turn, allows for the interception of data to prevent serious bodily harm (Republic of South Africa, 2003, s. 7), or to determine the location of a party to a communication in the case of an emergency (Republic of South Africa, 2003, s. 8), or whenever interception is authorised by other acts (Republic of South Africa, 2003, s. 9).

The South African Schools Act 84 of 1996 (Republic of South Africa, 1996c) does not prohibit bullying or cyberbullying, but refers to bullying as “abuse”. A Bill of Responsibilities for the Youth of South Africa refers to the obligations of the youth with reference to the constitutional imperative of ensuring the right to freedom and security of the person, and explicitly prohibits bullying: “my responsibilities in ensuring the right to freedom and security of the person [...] the right is upheld by taking responsibility for not hurting, bullying [...] others or allowing others to do so...” (Department of Education, Republic of South Africa, 2008:1, own emphasis). Teachers are also required to uphold the Batho Pele principles, which include “courteous behaviour”, “open and transparent” dealings with customers, and ensuring “access to information” as per the latest policy on the organisation, roles and responsibilities of education districts (Department of Basic Education, 2012:21). Cyberbullying would naturally undermine these principles.

The Balancing Act between Constitutional Rights and the Protection of our Learners

The American perspective

Cyberbullying in particular raises issues that require a fine balance between protecting the constitutional rights of public-school students, while also allowing for a safe learning environment (Goodno, 2011). The absence of federal legislation in this regard serves as the backdrop to the following discussion, along with the fact that the majority of cyberbullying incidents occur between peers, which implicates schools as the most likely setting in which cyberbullying will occur, as that is where youth mostly interact with their peers (Hinduja & Patchin, 2011).

The balancing act between the rights and obligations afforded by the Constitution and subsequent legislation poses three particular challenges. The first challenge that public schools face in adopting policy is that the First Amendment (the right to free speech) could be infringed. The second is that the right to due process could be challenged, as unconstitutionally vague or overtly broad language could be used in drafting cyberbullying policies. The third challenge lies in how to formulate

policy to guide educators on when they may search a student’s personal electronic devices without violating the Fourth Amendment (the right to reasonable searches and seizures) (Goodno, 2011). Consistent application of these policies, proper implementation thereof, clear definitions and consequences for misbehaviour, allowing for flexibility and collaboration with all stakeholders in compiling policies, as well as regular review, seem to be required for any policy to be successful (McAndrews, 2001:6).

The onus for controlling cyberbullying rests with many institutions; yet, schools seem to carry the greatest burden, as the negative effects of cyberbullying can seriously hamper the creation of a safe and healthy environment for the learners for whom schools are ultimately responsible. Schools’ reluctance to act is to be expected, because school administrators often fear “civil litigation” under the First Amendment over “regulating speech” or behaviour, and remaining uncertain as to who may intervene and when (Stewart & Fritsch, 2011:81).

It is trite law that the First Amendment right to freedom of speech extends to students in public schools, as was already found in the *Tinker*ⁱⁱⁱ judgement 41 years ago (see Mienie, 2013:149-151, for more information). This should, however, be balanced with schools’ right to have at least “some form of control” over their learners’ speech, so as to retain order and control in the learning environment (Goodno, 2011:657). In the absence of a uniform approach by the courts on the extent of control to be afforded to schools, the school firstly has to establish whether it has jurisdiction over speech, and secondly, whether the school, as a matter of substantive law, may regulate speech. With regard to on-campus cyberbullying (by implication), case law^{iv} dictates that schools indeed have jurisdiction to regulate speech if it originates on school campuses or relates to “school-sanctioned activities” that would be deemed equivalent to being on campus, and refers to instances where the student uses the school’s tools of trade, or where the student uses his/her own personal technology while on campus (Goodno, 2011:658). Goodno notes that off-campus speech, however, is much more difficult to regulate (2011:658).

Only once a school’s jurisdiction has been established, can the question be asked as to whether the regulation of speech violated the First Amendment, which zealously guards free speech. Although the fight about the right to free speech does involve competing principles, exceptions could be made to protect the youth.

The South African perspective

The South African Constitution (Republic of South Africa, 1996a) transcends all other legislation passed and becomes the “yardstick” against which to measure the “constitutionality” of promulgated

legislation (Van der Merwe, Roos, Pistorius & Eiselen, 2008:23). Two apparently conflicting provisions are found in sections 14 and 32, the principles of which could be applied to the school environment. Section 14 guarantees privacy and the right thereto. However, at the same time, section 32 guarantees the right to access to information, being information held by another person and that is required for the exercise of any rights (Republic of South Africa, 1996a). The question about how to pair the *prima facie* conflicting wording will of course arise, but since the enactment of the Promotion of Access to Information Act 2 of 2000 (Republic of South Africa, 2000a), clear guidelines have been laid down to ensure minimum infringement.

The constitutional right to privacy includes the rights of persons not to have their homes or property searched, their possessions seized or the privacy of their communication infringed (Republic of South Africa, 1996a, s. 14). The common law should be developed by the court taking into consideration the “spirit, purport and objects of the Bill of Rights,” and that fundamental rights in terms of the aforementioned bill (Buys & Cronjé, 2004:173) are not absolute. In terms of section 36 (Republic of South Africa, 1996a), the rights in the Bill of Rights may be limited by means of general application insofar as this is reasonable and justifiable. This leads to the inference that where the right to privacy and the right to freedom of expression conflict, a balancing act or the weighing of these opposing rights is required.

The Regulation of Interception of Communications and Provisions of Communication-Related Information Act 70 of 2002 (RICA) (Republic of South Africa, 2003), which serves to limit the constitutional right to privacy, has been repealed and replaced by the Interception and Monitoring Prohibition Act 127 of 1992 (Republic of South Africa, 1992). E-mail and text communication may only be intercepted, as a balancing act, by means of existing legislation that serves to “limit the right to privacy” (Buys & Cronjé, 2004:183). Courts favour a restrictive approach, and it is still to be seen whether the legal provisions for interception are wide enough to cater for all types of interception, without written approval from the courts or the generator of the data. In light thereof, the adoption of policy in schools as a proactive measure is proposed.

Hate speech, among others, is prohibited by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Republic of South Africa, 2000b), while the distribution of hate speech is criminalised by the Films and Publication Act (Republic of South Africa, 1996b, s. 29(1)). Therefore, the constitutional protection of the right to freedom of expression, as per section 16(1) (Republic of South Africa, 1996a), needs to be bal-

anced with these provisions, particularly since section 16(2) of the Constitution (Republic of South Africa, 1996a) stipulates that protection is not extended to the advocacy of hatred that is based on race, ethnicity, gender or religion, and results in harm. It remains an open question, however, as to how schools would address hate speech that is not based on one of these prohibitions, or whether school children should be exposed to courts of law due to their cyber-actions.

Possible Solutions

At the top of the wish list of possible solutions would be legislation specifically drafted to protect learners against all forms of cyberbullying, thereby giving effect to the protection granted to our youth through the Constitution, namely the guarantee of a safe learning environment; the balancing of freedom of speech with criteria for intervention; the protection of children from internet exploitation; and the balancing of defamation claims with the right to privacy and the rights of end users. However, the true challenge with regard to cyberbullying does not lie in the application of legislation, but in the actual prevention of cyber-bullying in a school environment, where one would want to limit or prohibit acts that could be construed as leading to civil or criminal action against children.

Secondly, therefore, it is suggested that an “integrated model” from the USA (Couvillon & Ilieva, 2011:99) be replicated locally to ensure that schools utilise “various media” to implement a cyberbullying prevention plan. This is where the value of a legal comparative study lies in the fact that South Africans could borrow from foreign jurisdictions. The Olweus Bullying Prevention Program proposes to be the most researched and best known anti-bullying prevention programme available (Blueprints for Healthy Youth Development, 2015) and ought to be used by not only policy makers, but also by schools in their quest to eradicate cyberbullying. It seems to be of the utmost importance that a whole-school, systems-change programme at different levels be compiled, similar to the Olweus Bullying Prevention Program (Blueprints for Healthy Youth Development, 2015) and that social competence among the youth is increased. Positive action should be taken and training lodged through effective service providers, such as Blueprints Positive action, which is a schools’ based programme designed to effect climate change, (Blueprints for Healthy Youth Development, 2015) added to by training on increased “respect” and the promotion of alternative thinking strategies, could all be tailor-made to curb cyberbullying in South African schools (Blueprints for Healthy Youth Development, 2015). It is clear that further research is needed to tender a successful, integrated programme for schools to alleviate cyberbullying, and South Africa could borrow strate-

gies from the American experience. Although this article is mainly focused on a legal comparative intervention, it is suggested that further research is undertaken to compile an effective solution dealing with cyberbullying in schools and that any anti-cyberbullying solutions should be tailor made for the situations in which South African youth find themselves.

'Safe2Tell' is another avenue to be explored ([http://safe2tell.org/resources/for schools/](http://safe2tell.org/resources/for_schools/)), as these principles of anonymous reporting and the creation of awareness could easily be adapted to prevent cyberbullying in schools since it also advocates an integrated approach. Safe2Tell® provides young people a way to report any threatening behaviors or activities endangering themselves or someone they know, in a way that keeps them safe and where anonymousness is facilitated (Safe2Tell, n.d.:1). This initiative is a state-funded strategic initiative of the Colorado Department of Law, Office of the Attorney General (Safe2Tell, n.d.:2).

Although the main aim of this article is not to tender a ready-made solution to the problem, but to set the stage for further investigations into a specific solution for the South African youth, cognisance need to be taken of "existing solutions" in other jurisdictions, and ought to have a "sound theoretical basis" (Bauman & Yoon, 2014:253).

This basis should incorporate a clear definition of cyberbullying; a demand for compliance with the internet use policy; clear communication to enforce rules for everyone's safety; embark on a prevalence study; and ought to define specific consequences of cyberbullying. A curriculum for cyberbullying should be considered and a trustworthy person appointed to whom incidents may be reported. A response procedure should be developed and properly communicated, and extensive training for all three stakeholder groups should be embarked upon.

Cooperation between schools, parents and the community should be initiated, and they should be informed of the resources available. Research has shown that ongoing discussions about internet safety between learners and parents, caregivers and teachers have reduced "unhealthy social choices" on the internet (Hinduja & Patchin, 2008:151). Students should be engaged as collaborators along with teachers, and student peer-to-peer or school-wide activities should be encouraged. Continuous monitoring of cyberbullying should be initiated, as this will not be a one-off programme. Policies should take cognisance of "personality differences" and "jealousy" as some of the frequently furnished reasons for bullying (De Wet, 2011:74), and proposed interventions for primary and high schools should be differentiated, as the literature shows an "increase in cyberbullying from primary to high school" (Slovak & Singer, 2011:14).

Thirdly, "filtering options for end users"

(Buys & Cronjé, 2004:220) are proposed as a technological tool. "Client-side filters, content-limited internet service providers and server-side filters" can all block access to undesirable material (Buys & Cronjé, 2004:220). Computer software is available to parents to "install on home-based computers" (Hinduja & Patchin, 2008:151), but "over-blocking and under-blocking" remain a problem, and therefore, these types of software have thus far failed to curb cyberbullying. Self-regulation by internet service providers and filtering technologies for non-end users are costly, and are not a sufficient mechanism to prohibit bullying behaviour by children.

Even though no amount of proactive measures will "completely" eliminate bullying, Duncan (2011:2352) argues that "restorative practices" can go a long way towards addressing the negative effects of bullying, which is why the adoption of specifically drafted school policies is proposed as a fourth solution. The proper communication of such policies and ready access to easy-to-understand content are imperative, as is the training of staff and learners in adopting a 'zero tolerance' approach. Only after policy has been adopted, could internal disciplinary action be taken against learners and educators in the absence of specific legislation, provided that the acts do not amount to criminal actions. In this regard, the United Kingdom has developed school anti-bullying resources – such as primary and secondary anti-bullying resource packs, including anti-bullying DVDs, booklets, specially designed 'feeling cards', posters, tip sheets and anti-bullying contact sheets (Actionwork, 2012) – which could be customised for the local context to help curb cyberbullying. Local high schools have also started to address cyberbullying on their websites, which is encouraged as a preventative tool (Fairmont High School, 2015).

In the fifth instance, it is suggested that the Childline Prevention and Training Education Manual (Childline South Africa, 2006) also be expanded to include cyberbullying, as a tool to educate parents, caregivers and children. As some authors have noted (Hinduja & Patchin, 2008:151), research has shown that some individuals are more susceptible to online bullying, and policies should raise awareness among those groups of their particular vulnerability to cyberbullying. Available custom made packs or toolkits as referred to are readily available on the internet, and different toolkits for different ages are proposed (<http://stopcyberbullying.org>).

Finally, *ex post facto* harassment cases could be prosecuted via the new Protection from Harassment Act (Republic of South Africa, 2011), and civil and criminal action could always be instituted, where the seriousness of the offence might warrant it.

Conclusion

Young people, especially learners, inflict harm on one another in cyberspace, which could lead to the suffering of significant “personal damage” by learners (Willard, 2011:125) as well as have far-reaching implications for “school climate” and culture, “day-to-day school operations”, as well as the skills with which teachers and school leaders should be equipped in future. It is thus imperative for school leaders, along with “parents, learners, teachers” and the rest of the education sphere, to address this peril and proactively manage this phenomenon. As far back as 2005 (Li, 2005:1778), it was mentioned that educators, researchers, administrators and authorities should take action against cyberbullying in schools. Where proactive measures fail, *ex post facto* remedies should be employed. It seems that the development of policies prohibiting cyberbullying, along with their proper communication, is of the utmost importance to give effect to the constitutional imperative to guarantee our children an education in a safe environment.

Allowing learners to express themselves through online communication undoubtedly has its merits, but where the content “crosses the line” between harmless and hurtful (Lane, 2011:1811), schools should be equipped to protect victims against emotional harm and educational disruption, to protect the constitutional rights of our learners, and to ensure a safe school environment. Ultimately, the onus of responsibility is not solely placed on the shoulders of parents and guardians. Attenuating the problem of cyber-bullying will necessarily involve contributions from multiple stakeholders, including “counsellors, school teachers, administrators and law enforcement” (Hinduja & Patchin, 2008:151).

Therefore, it is imperative for South African authorities and schools to pay heed to the lessons learnt from the United States in their formulation of state law to address *ex post facto* cyberbullying, the adoption of policies as a preventative measure, and the drafting of action documents to facilitate internal disciplinary action.

Notes

- i. Verbatim quotation was edited for the publication.
- ii. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986).
- iii. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).
- iv. *Hazelwood Sch. Dist. V Kuhlmeier*, 484 U.S. 260, 270 (1988); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986).

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