UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

The Navi Pillay Research Group
UKZN SCHOOL OF LAW

THE SCHOOL OF LAW CORDIALLY INVITES YOU

TO THE COLLOQUIUM: CHILDREN AT THE HEART OF SOCIAL JUSTICE

INSPIRING GREATNESS

Children at the Heart of Social Justice Colloquium

SPEAKER 1: ***Ms Nicci Whitear-Nel*** holds an LLB, LLM (UKZN). She is a senior lecturer with the School of Law, Pietermaritzburg, University of KwaZulu-Natal. She teaches mainly labour and the law of evidence. She has long been interested in children's issues – particularly those relating to them being witnesses in criminal cases. She has published and commented extensively on these topics. She is a PHD candidate.

Abstract: The admissibility of a child's evidence in court – new developments?

The general presumption of competence and compellability does not apply to children. In order for a child's evidence to be admissible in a court of law, they must be found to be competent. There is a three-fold test for establishing a child's competence. First, the child must have sufficient intelligence to be able to record events and store them accurately in their memory. Second, the child must be able to communicate effectively, which means being able to understand questions put to them, and to formulate rational answers thereto (which may be communicated by way of gestures, or demonstrations). Third, the child must be able to distinguish between truth and lies.

A competent child must then be sworn in. A child who does not understand the nature and import of the oath or affirmation may be admonished to tell the truth.

If the child has not been properly found to be competent, and/or not properly been found to qualify for the admonishment, and/or if the admonishment was not properly administered; any testimony given by that child is inadmissible.

Where a conviction is based on inadmissible evidence of a child witness, the conviction will be set aside by the reviewing court.

This presentation will considering the development of the test to establish the competence of a child witness, and the nature of the admonishment given to the child witness.

THE PRESENTATION WILL REFER, INTER ALIA, TO THE FOLLOWING CASES:

Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development 2009 (2) SACR 130 (CC).

S v Raghubar 2013 (1) SACR 398 (SCA).
S v Matshiva 2014 1 SACR 29 (SCA).
S v Mhlongo [2015] ZAKZPHC 16 (AR 272/1427; February 2015).
S v Machaba 2016 (1) SACR 1 (SCA).
S v Sangweni 2019 (1) SACR 672 (KZP).
S v Dlamini 2019 (1) SACR 467 (KZP).

Email: whitearnel@ukzn.ac.za

SPEAKER 2: ***Ms Willene Holness*** is a senior lecturer at the School of Law, Howard College Campus, University of KwaZulu-Natal. She holds a BA, LLB (Rhodes), LLM (UKZN). She practiced with the Legal Resources Centre as an attorney before joining academia. She teaches Constitutional Law and Gender and the Law at LLB level and in an interdisciplinary masters programme (LLM and Mphil) in Child Care and Protection as well as in the Constitutional Litigation LLM programme. She published in disability law, child law and gender. She is a Doctorate in Laws candidate at the Centre for Human rights, exploring access to justice for mothers with intellectual disabilities in Children's Courts.

Abstract: Children's Courts: accessibility and procedural accommodation for children and adults with disabilities

Access to justice require states to take measures to ensure persons with disabilities are able to fully participate in proceedings, including investigative and preliminary stages, through the use of procedural, age and gender appropriate accommodations. The child's right to be heard in proceedings, including those of children with disabilities is also articulated in international and regional law treaties, together with recognition of legal capacity on an equal basis with others. Such recognition requires, if necessary, provision of support to exercise capacity and procedural accommodation to fully participate. These may include recognition of diverse communication methods, provision of sign language interpretation and other assistive methods.

The regulations to the Children's Act 38 of 2005 are currently being redrafted in the form of proposed rules regulating the conduct of proceedings of the Children's Courts of South Africa. Neither provide adequately for accessibility and procedural accommodation measures for children and adults with disabilities. The Committee on the Rights of Persons with Disabilities, civil society and academic literature have consistently called for more accessible and accommodative procedures in the judicial process and the removal of discrimination, stigma and barriers that impede equal participation.

The paper identifies the constitutional and international law requirements on the South African state to ensure access to justice for persons with disabilities, including obligations in relation to equality, legal capacity and accessibility. The need for rules articulating participation on aspects such as guidance to professionals on appropriate questioning techniques for children and adults with disabilities, as well as intermediaries that act as communication assistants, is explored. It is submitted that while the children's court procedures are inquisitorial in nature, which theoretically enables the presiding officer discretion to allow evidence to be led in an informal way, it does not provide sufficient guidance on the accessibility and accommodation measures that may be needed. Relevant training for presiding officers and other stakeholders is currently lacking. The paper concludes with recommendations on the elements that these rules must include to meet with international law and constitutional obligations.

Email: holnessw@ukzn.ac.za

SPEAKER 3: ***Mr Clement Maromoagae*** holds a LLB LLM (WITS) LLM (NWU)

Abstract: The Need to Legislate Judicial Interviews of Minor Children in Care, Residency and Contact Disputes in South Africa: Lessons from Ohio.

This paper argues for the legislative recognition of judicial interviews in care, contact and residency disputes in South Africa. Judicial interview is method of interaction which can be adopted by our courts to enhance minor children's participation in court cases which impact on their lives as mandated by the Convention on the Rights of the Child. This paper demonstrates that the adoption of this method will provide minor children in South Africa with a platform to adequately express their feelings about living with one or another parent, the time they spend with each parent and their general wellbeing. It is argued in this paper that South Africa should draw lessons from the United States of America' State of Ohio where the need to conduct judicial interviews has been legislated.

Email: Clement.Marumoagae@wits.ac.za

SPEAKER 4: ***Dr Brigitte Clark*** holds a BA LLB, (Rhodes), LLM (Cantab), and PhD (Rhodes). She was a senior lecturer at the University of Cape Town, Rhodes University and lectured at the University of East Anglia and at Oxford Brookes. She has published extensively in South African, English and International Law journals in Family Law, child law, women's rights and jurisprudence. She has also written chapters for several books published in this country and in the United Kingdom. She has a Master's Degree from Cambridge and a Doctorate from Rhodes University. She is also an admitted Attorney and Conveyancer of the High Court of South Africa. She returned to South Africa in April this year after 17 years of lecturing and research at English Universities.

Abstract: 'Why can't I discipline my child properly? Banning corporal punishment and its consequences'.

In Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others, [2019] ZACC 34 the Constitutional Court declared that the common law defence of reasonable and moderate parental chastisement was inconsistent with the right of the child to dignity, to freedom and security of the person, including the right to be free from all forms of violence and that the defence operated adversely to the paramount importance of the best interests of the child.

This paper aims to examine this case in the light of recent research into the effects of corporal punishment in the home on children and subsequent developments in those countries where a legislative ban has been placed on this practice in the home. It was hoped that, on appeal, and in the light of the mixed reception given to the High Court judgment, that the Constitutional Court would provide full, convincing justification for criminalising parental corporal punishment. Criticism, with respect, will be levelled, not against the decision itself, but against the paucity of evidence of research into justificatory material in the social sciences for the removal of the defence of reasonable chastisement in South African Law. When the legislature deals with the removal of the ban, the public should be educated about the harmful effects and conscientious parents reassured. In such educative programmes, the connection between gender based violence and corporal punishment of children should be stressed. Legislative bodies should incorporate means of educating parents as to alternate methods of discipline and for different methods of legislative control of parents who breach such a ban.

Email: clarkb@ukzn.ac.za

SPEAKER 5: ***Mr Stanley Malematja*** holds an LLB degree from the University of Johannesburg and LLM in Child Law from the University of Pretoria. He is a practising attorney at the Right2Protest Project based Centre for Applied Legal Studies at the Witwatersrand University. He also lectures Jurisprudence on a part-time basis at the Witwatersrand University.

Abstract: Children with disabilities: the need for an Inclusive Education Act in South Africa

The right to basic education as stipulated in section 29(1) (a) of our Constitution is afforded to everyone. The Constitutional Court also found that the right to basic education is an unqualified right and it is immediately realisable. The word "everyone" is inclusive of children with disabilities. Furthermore, the South African Schools Act 84 of 1996 obliges public schools to admit children without any form of discrimination. It is therefore astonishing that there is more than half a million children with disabilities who do not have access to basic education.

In 2006 the Department of Basic Education introduced the White Paper 6: Special Needs Education with the tone of establishing an inclusive education system. The White Paper 6 set a 20 year period to achieve an inclusive education system and clearly time has run out. The plight faced by children with disabilities in respect of access to basic education continues.

South Africa ratified a number of international treaties which entrench the right to basic education for children with disabilities in an inclusive education system. Despite the existing laws children with disabilities remain excluded from the education system. This is attributed to the fact that their right to inclusive education is policy based. It is time the government takes a legislative measure and consider enacting an Inclusive Education Act to provide for the right to inclusive education. This would lead to the government complying with its constitutional and international law obligations.

Email: Stanley.Malematja@wits.ac.za

SPEAKER 6: ***Ms Thandeka Duma*** holds and LLB from UKZN and is a practising attorney and Provincial Manager of the Refugee and Migrant Rights project of Lawyers for Human Rights.

Abstract: A social cohesion programme with no legal framework can only result in failure: the case of separated and unaccompanied refugee minors.

The *Refugee's Act* is ranked as one of the most progressive pieces of legislation in the world. However, the refugee system is riddled with challenges. The greatest obstacle for refugees is a social service legal framework that does not correspond to the presence of refugees. Article 34 of the 1951 *Convention Relating to the Status of Refugees* states that ensuring human rights and dignity for refugees leads to their integration in the host society. Integration cannot occur without access to social services, which requires a legal framework that helps integrate refugees into society. The issue of separated and unaccompanied children illustrates the gap between social services and refugees in South Africa. This paper seeks to demonstrate that an effective social cohesion programme for unaccompanied and separated refugee children depends on an institutionalized legal framework which protects the rights of refugee children.

Currently, the Department of Education refuses to enrol separated and unaccompanied refugee children lacking permits. The Department of Home Affairs does not process their asylum applications due to the age and requires foster care orders. The Department of Social Development also refuses to investigate their cases for lack birth and death certificates. The Children's Court insists on the same documents before finalisation of children's court enquiries. This demonstrates a system of laws that is a barrier to social assistance and does not promote the rights of refugees. There appears to be a divide between the approaches in the *Refugee's Act* and the *Children's Act*.

It is submitted that the Children's Court has wide-ranging powers, under Sections 45 and 48 of the *Children's Act*, to make orders. To exercise these powers in favour of separated and unaccompanied children, the court and social workers must be committed to serving the refugee community in the spirit and purpose of the *Refugees Act*.

Email: thandeka@lhr.org.za

SPEAKER 7: ***Dr Lee Swales*** is a consultant attorney and law lecturer at the School of Law, University of KwaZulu-Natal. He holds a Bachelor of Laws (LLB) degree from the University of KwaZulu-Natal (*summa cum laude*), a Master of Laws (LLM) degree from the University of the Witwatersrand, and a Doctor of Philosophy (PhD) degree from the University of Cape Town. After completing articles of clerkship at Webber Wentzel at the end of 2008, Lee was admitted as an attorney of the High Court in 2009, and after several years in full-time practice, commenced his academic career in 2012. In addition to lecturing cyber-law, contract law, and professional legal training at UKZN, Lee primarily practices in the Media, Telecommunications and Technology environment, including all aspects of cyber-crime, information technology related law and electronic media related litigation. From time to time Lee also facilitates lectures for the South African Judicial Education Institute on electronic evidence, and for the Law Society of South Africa on contract and legal practice.

Abstract: Cyberbullying and sexting by minors – an overview of the South African legal position, and suggestions for amendment

More than half of South Africa's population has some form of access to the internet. Taken together with advances in technology, communication norms have evolved significantly over the past two decades, and this dynamic environment has drastically changed the manner in which minors communicate and interact. Bullying is no longer confined to school hours and the classroom; and sexual conduct between teenagers has evolved to include digital intimacy. Recent research suggests that one in seven adolescents are sexting (sharing sexually explicit images or videos), and that one in three internet users globally are minors. Given this environment, internet safety for minors has become a paramount concern for many parents and educators.

No one piece of legislation regulates social media and internet related safety for minors, and the aim of this research is to provide an overview of cyberbullying and sexting, and review the relevant legislative environment in the context of minors in South Africa, with a view to providing analysis on the applicable offences and remedies.

In relation to cyberbullying, South Africa has made great strides in the recent past, and the Protection from Harassment Act 2011, provides relief for harassment related issues where the Domestic Violence Act 1998 does not apply; and provides specific relief for cyberbullying.

In the context of sexting, both the Criminal law Amendment Act 2007, and the Films and Publications Act 1996, provide specific offences for the distribution and solicitation of child pornography – whether with the consent of the minor, or without.

For both cyberbullying and sexting, although different considerations apply, in addition to the legislative framework, common law remedies may be applicable in both civil and criminal law, including defamation, criminal defamation, extortion, and crimen injuria.

This contribution will conclude the analysis with suggestions for amendment in order to facilitate greater protection for minors.

Email: swalesl@ukzn.ac.za

SPEAKER 8: ***Ms Dusty-Lee Donnelly*** is a lecturer in the School of Law, University of KwaZulu-Natal, Howard College campus. She holds a BA, LLB (UD) and LLM from UKZN. She is an admitted advocate of the High Court of South Africa, and joined the School of Law after practicing first as an attorney and then as a member of the KwaZulu-Natal Society of Advocates in the areas of civil litigation and maritime law. She teaches in the LLM Maritime law and for the LLB programme in civil procedure and insurance. She is currently undertaking a PhD study on data privacy in the cloud: a comparative analysis of legal and regulatory responses in South Africa and the European Union to the position of SMMEs developing mobile applications in South Africa.

Abstract: Protecting the Personal Data of Children is (App)solutely Essential

The objective of this article is to inform professionals, academics and civil society organisations working in the field of child care in South Africa about why it is vitally important to protect the personal data of children and to set out the legal framework for such protection.

Personal data is now being collected about individuals, including children, on an unprecedented scale. While some data is collected directly by governments and NGOs, vast amounts of data is being collected by the private sector. The article focusses on the collection of personal data by mobile applications (apps) directed at children.

The 'data revolution' holds powerful potential as a force for good, but there are significant risks. Mobile apps permit collection of sensitive data such as location, speech, photographs, calendar entries and contact information. The data collection can take place covertly, without the knowledge and consent of the child or their parents.bThese risks are considered with reference to Federal Trade Commission reports on children and mobile apps, and 2019 enforcement actions in the United States against mobile applications directed at children.

The article will set out the provisions for the protection of the personal information of children in three jurisdictions; the Protection of Personal Information Act 4 of 2013 (POPIA) in South Africa General Data Protection Regulation (GDPR) 2016/679 in Europe, and the Children's Online Privacy Protection Act (COPPA) USC 6501-6505 in the United States. As digital data collection practices are borderless, a supra-national approach is essential.

The article will make reference to the United Nations' Global Pulse initiative, which aims to develop humanitarian uses for the data collected by the private sector, and proposed safeguards. Based on this analysis the article will make recommendations for regulators enforcing data protection laws, for organisations processing the personal information of children and for parents and caregivers.

Email: donnellyd@ukzn.ac.za

SPEAKER 9: ***Dr Norah Msuya*** is a post-doctoral student with the School of Law, University of KwaZulu-Natal, Howard College campus. She holds an LLB, LLM and PhD (UKZN). She is an academic and Advocate of High Court of Tanzania and Subordinate Court. She is also a coordinator and founder member of the Tanzania Legal Aid Organization for Women and Children, a non-governmental organisation that provides legal assistance and education to women and children in Tanzania. Her academic writings centre on the protection of women and children's rights in Africa.

Abstract: Child marriage: An obstacle to social-economic development of Africa.

Africa is amongst the regions with high rates of child marriage preference in the world. The minimum legal age of marriage for girls in many countries in Sub-Saharan Africa is still below 18 years. Although ending child marriage is now part of the Sustainable Development Goals, the investments to end the practice remain limited across Africa. Apart from its negative impact on physical growth, health, mental and emotional development of a girl child, is also linked to the unequal position of women in society, limits their access to property ownership, formal employment, and education. Girls who marry young are more likely to be poor and remain poor. Child marriage affects entire society as it reinforces a cycle of poverty and perpetuates illiteracy, malnutrition as well as high infant and maternal mortality rates. Further, child marriage undermined the achievement of six of the eight Millennium Development Goals (MDGs). This article examines the socioeconomic impact of child marriage preference in Africa. The study looks at five domains of impacts: (i) lost growth opportunity; (ii) costs for health care systems; (ii) lost education and earnings; (iv) lower growth potential and the perpetuation of poverty. It frames a link between child marriage practices and social- economic status in the African States. The study argued that women and girls constitute more than 50 percent of the African population and give birth to the other 50 percent. As such, their interests must be protected, to ensure the development of Africa as a continent.

Email: msuyan@ukzn.ac.za

SPEAKER 10: ***Prof Ann Strode*** is an Associate Professor at the School of Law, University of KwaZulu-Natal, Pietermaritzburg campus. Ann has a keen interest in children's rights to health. In the last five years she has worked extensively on the role law can play in ensuing that adolescents are able to access sexual and reproductive health services. This work has included qualitative research with social workers on their mandatory reporting practices and how feminist theories can be used to critique current legislative approaches to sexual and reproductive health rights.

Abstract: Bench marking South Africa's adolescent sexual and reproductive rights framework against international norms

The World Health Organisation (WHO) regards adolescents as persons between the ages of 10 and 19 (WHO, 2010). During this period they undergo sexual maturity and this results in various significant biological and emotional changes to their bodies (*Teddy Bear Clinic for Abused Children, and Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) v Minister Of Justice And Constitutional Development And Another,* 2012). Some form of sexual experimentation or activity is normative in this period (*Teddy Bear Clinic for Abused Children, and Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) v Minister Of Justice And Constitutional Development And Another,* 2012). Globally, states have introduced legislation regulating the sexual conduct of adolescents and adults in relationships with them. In some countries there are also laws relating to access to sexual and reproductive health services for adolescents.

The Convention on the Rights of the Child (CRC) read with General Comment No. 4 of 2003 provides a framework to guide states in this task of setting sexual and reproductive norms for adolescents. The most significant of these norms are that states should:

(i) pass laws setting an age at which children consent to sex, marriage and access to medical treatment without parental consent;
(ii) ensure legal equality between boys and girls in the ages of consent;
(iii) legislate a right to access information on amongst others; family planning, contraceptives, the prevention of HIV/AIDS and the prevention and treatment of sexually transmitted diseases (STDs);
(iv) ensure legislative protection of the child's right to privacy regarding health matters;
(v) facilitate access to appropriate goods, services and information for the prevention and treatment of STDs, including HIV/AIDS; and
(vi) where legal , safe abortion services.

This paper uses these norms to review the South African legal framework. It concludes by scoring our progress towards these goals and making recommendations for future reforms.

Email: strodea@ukzn.ac.za

The Organising Committee would like to thank Juta & Co, the School of Law, the College of Law and Management Studies for their generous support.