

# When do parents go too far? Are South African parents still allowed to chastise their children through corporal punishment in their private homes?\*

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## ABSTRACT

With the commencement of the Constitution of the Republic of South Africa 1996, the focus of the private law has increasingly shifted from parents to children. This has not only been the case under South African law but also according to International Law. According to this new legal paradigm, many calls have been made to abolish all forms of corporal punishment by parents of their children. There seems to be wide consensus that the common law authority of reasonable and moderate chastisement has become irreconcilable within a modern value orientated constitutional dispensation. Notwithstanding the fact that political powers are undecided on whether to prohibit all forms of corporal punishment on children and that society is not informed or trained on alternative educational measures, it is submitted that the application of corporal chastisement, even in the private family environment, has become unconstitutional. Such a form of punishment should thus be declared invalid and relegated to a relic of our legal past.

## 1. Introduction

It has been observed that within the broad international community, the focus of the private law in relation to the parent child relationship is increasingly shifting from the rights and powers of parents to the rights and entitlements of children.<sup>1</sup> Many modern national, regional and also international fundamental rights instruments have been enacted in an effort to advance and protect the personal rights of children. Although significant progress has been made, there are still many legal issues concerning the protection and well being of people under the age of 18 years that must be addressed.<sup>2</sup> One such issue of concern, which subsequently has been the subject of a long and often divided

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<sup>1</sup> See DSP Cronje and J Heaton *South African Family law* 2ed (2004) 257.

<sup>2</sup> According to s 28(3) of the Constitution of the Republic of South Africa, 1996 herein after referred to as 'the Constitution', a child is a person under the age of 18 years.

debate, is the question of whether parents should be allowed to chastise their children by means of corporal punishment in their private homes.

There has been a clear international move towards the abolishment of all forms of corporal punishment of children, be that in the public or in the private sphere. In this regard it is reported that up to fourteen countries have already abolished all forms of corporal punishment of children, including such punishment in the home.<sup>3</sup> Following on the international trend, the South African Law Commission has, in its efforts of revisiting and expanding on the protection of children's rights under the new constitutional dispensation, made specific suggestions in recent years in order to regulate the administering of corporal punishment to children by their parents.<sup>4</sup> Notwithstanding new proposals, parents must also respect and protect a child's constitutional rights as are conferred by the Constitution. In view of such constitutional obligations, it is the focus of this research to investigate whether parents should still be allowed to chastise their children in private or whether such practise has become unacceptable in our modern constitutional arena. In order to evaluate this controversial issue one must have due regard to the common law position regarding the chastising of children by their parents as well as to the new constitutional and international demands regarding the protection of children's rights and freedoms.<sup>5</sup>

## 2. The South African common law position regarding the chastising of children by their parents

Prior to the new constitutional order and the new legislative proposals, the legal position concerning the chastisement of children by their

<sup>3</sup> Such countries include Sweden, Norway, Austria, Croatia, Germany, Finland, Cyprus, Denmark, Latvia, Bulgaria, Iceland, Hungary, Romania and also Ukraine. See Community Law Centre UWC Draft Discussion Paper *Children's Bill* (2003). See also P Newell 'South Africa's Childrens Bill, corporal punishment and human rights standards' (2005) *Global Initiative to End All Corporal Punishment of Children* 1. It is also reported that in 1996 the Supreme Court in Italy declared all corporal punishment unlawful. A similar judgment was issued in Portugal in 1994. Other governments such as the Netherlands and Slovenia have confirmed that they intend to introduce legislation that prohibits all forms of corporal punishment. See [www.endcorporalpunishment.org](http://www.endcorporalpunishment.org) accessed on 6 March 2006.

<sup>4</sup> Refer to various draft documents on the proposed new Children's Bill. It is suggested that South Africa has the opportunity to lead the way on the African continent towards respect for and proper protection of children's rights and their equal protection against physical abuse.

<sup>5</sup> Refer to J Burchell and J Milton *Principles of Criminal Law* 3ed (2005) 291 where the learned writers comment that for many centuries, South African courts were under the influence of English law that parents, guardians and school teachers were legally authorised to inflict moderate corporal punishment upon children under their care. South Africa's new supreme constitutional dispensation together with its comprehensive Bill of Rights however dictates a 'fresh appraisal of the hallowed rules on reasonable disciplinary chastisement'.

parents was regulated by the South African common law. In short, corporal punishment was defined as a physical punishment inflicted on the body of another person.<sup>6</sup> Both the South African criminal law and the law of persons provided that a parent or even another person in loco parentis could in the course of maintaining authority and discipline over a child and also to further the interests of a child's education, chastise such child with moderate and reasonable corporal punishment.<sup>7</sup>

In normal instances the authority to chastise was acquired when a child was born from a valid marriage or was legally adopted.<sup>8</sup> It is important to emphasise that any chastisement under the common law had to be reasonable and moderate in order to be lawful. Various factors have been laid down in judicial precedents in order to determine moderation and reasonableness.<sup>9</sup> The following examples provide a broad outline of such factors. In what is generally regarded as the locus classicus regarding the chastising of children, the court in *Rex v Janke and Janke*<sup>10</sup> held the following with reference to the scope and restrictions of a parent's authority to inflict chastisement on a child:

'The general rule adopted both by Roman, the Roman-Dutch law and the English law is that a parent may inflict moderate and reasonable chastisement on a child for misconduct provided that this be not done in a manner offensive to good morals or for objects [other] than correction and admonition. The presumption is that such punishment has not been dictated by improper motives and the Court will not lightly interfere with the discretion of parents ...'

The court also referred to the case of *Regina v Hopley*<sup>11</sup> where it was stated:

'[That] [a] parent ... may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment .... If it be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature or degree, or if it be protracted beyond the child's power of endurance or with an instrument unfitted for the purpose and calculated to produce danger to life and limb, in all such cases the punishment is excessive and the violence is

<sup>6</sup> Refer to the *Collins Concise Dictionary* 21<sup>st</sup> century edition, (2004). Caning is generally regarded as a common example of corporal punishment.

<sup>7</sup> See for example CR Snyman *Criminal Law* 4ed (2002) 135, and also Cronje and Heaton op cit (n1) 265. Parental authority in general refers to rights, powers, duties and responsibilities that parents have towards their children. In the Children's Bill, reference is made to parental responsibility and not authority. There is thus an intentional shift away from authority to responsibility.

<sup>8</sup> See Cronje and Heaton op cit (n1) 265. Extra-marital children fall under the authority of the mother. See also the Natural Fathers of Children Born out of Wedlock Act, 86 of 1997.

<sup>9</sup> It should be noted that under South African common law and statutory law, the South African courts have the authority to interfere with parental powers and authority. Such interference is normally based on the best interests of the child. It is common cause that the South African High Court is entrenched as the upper guardian of all minors.

<sup>10</sup> *Rex v Janke and Janke* 1913 TPD 382.

<sup>11</sup> *Regina v Hopley* 2 FSF 202.

unlawful. The character of the offence, the amount of punishment inflicted, the bodily and mental condition of the child, the nature of the instrument used and the objects purposes and motives of the person inflicting chastisement are all matters which have to be considered. A nervous or highly sensitive child may, for instance, be seriously affected by a whipping, which would be harmless in the case of a more robust constitution. And where the object of the whipping is not really for the purposes of correction or by way of admonition or instruction or the proper vindication of authority those guilty of such conduct may be held liable to the law.<sup>12</sup>

The court further stated as per Mason J that the relations of the parent and child, the frequency of the punishment and the grounds upon which punishment were inflicted are all important elements in determining the state of mind of the parent and the reasonableness of the chastisement with regard to the particular occasion under investigation. Even if the punishment has little effect and if it is constantly inflicted, the question naturally arises whether such repeated chastisement is not unreasonable and excessive and whether the fault may be not so much in relation to the harshness of the punishment. The court concluded that in the particular case, the chastisement of a 13-year-old child was not reasonable and moderate and that the parents were guilty of assault. Although parents are permitted to administer corporal punishment to their children, if such punishment is administered for the gratification of passion or rage, or if it is immoderate or excessive in nature or degree, then such violence is unlawful.<sup>13</sup> It is however the state that bears the onus of proof that the chastisement was unreasonable and excessive.

The principles laid down in the *Janke* decision have been expanded and relied upon for many years. In *Rex v Scheepers*<sup>14</sup> it was held that a principal of a school may administer corporal punishment but only after careful enquiry into the circumstances and that such punishment shall not be cruelly administered. In *Rex v Schoombee*<sup>15</sup> the court held that where a parent or teacher, who are the best judges of the necessity of corporal punishment, use a cane upon a child, a court of law will not lightly interfere but will only do so when it is made clear that the use of the cane was unreasonable and unduly severe. In *Rex v Theron and another*<sup>16</sup> the court held that the discretion, which the common law gives to parents to inflict corporal punishment, is not to be exercised in an arbitrary and capricious manner. It may only be exercised on just and reasonable grounds. Such punishment is also not the appropriate disciplinary punishment for every disobedience of rules or authority. A proper inquiry into the particular wrong doing is necessary. The mere fact that a parent has acted bona fide

<sup>12</sup> *Rex v Janke and Janke* supra (n10) at 386.

<sup>13</sup> *Rex v Janke & Janke* supra (n10) at 392.

<sup>14</sup> *Rex v Scheepers* 1915 AD 337.

<sup>15</sup> *Rex v Schoombee* 1924 TPD 481.

<sup>16</sup> *Rex v Theron* 1936 OPD 166.

will not secure immunity from criminal prosecution. The court confirmed that it is not concerned with the question whether a parent or teacher intended to inflict immoderate punishment but whether he or she actually inflicted such punishment. The sole question for the court was whether the person acting in loco parentis acted reasonably and moderately. An objective investigation and evaluation of all relevant circumstances of each individual case was thus required. The court also confirmed the legal position as was stated in *Janke v Janke* above, but Krause JP also made the additional noteworthy remarks:

‘The science of education is a progressive one and the task of the teacher is not only to impart learning and knowledge to his pupils, but is largely concerned with the formation of their characters. Methods of violence and force may create fear and hatred, but hardly ever respect or affection. The old saying “spare the rod and spoil the child” has long ago been abandoned by educationalists. Our increased knowledge of the operations of the mind has revealed the incontestable fact that in the upbuilding of character the rod should be sparingly, if ever, used.’<sup>17</sup>

The Appellate Division in the case of *Hiltonian Society v Crofton*<sup>18</sup> confirmed the abovementioned position of the common law and further also confirmed that unreasonable corporal punishment could have both criminal and civil liability. In a civil matter the onus is on the child to prove that the punishment was unjustified or excessive. The court also reiterated that it will not lightly interfere with a bona fide exercise or delegation of the discretion to inflict corporal punishment. In *S v Lekgathe*<sup>19</sup> a schoolmaster was convicted of assault since he erroneously believed that he had the authority to chastise an ex-pupil of the school concerned. The court held that parents or persons in loco parentis are only entitled to inflict moderate and reasonable chastisement on children where necessary for the purpose of correction and discipline. The court went further that even if the accused had acted under the erroneous belief that he had the necessary authority to chastise, the circumstances suggested that he had acted with the intent to assault.

According to a leading criminal law commentator, the defence of mistaken belief that moderate corporal chastisement for educational purposes is allowed, could still be available in South African law, even if the defence of disciplinary chastisement were outlawed. The mistake or ignorance of the law would have to be determined in accordance with the

<sup>17</sup> *Rex v Theron* supra (n15) at 172. Since the punishment in the case was manifestly excessive and immoderate, the court held that the infliction of the punishment exceeded the rights under the common law and that the chastiser was guilty of assault. See also the case of *Tsbabalala v Jacobs* 1942 TPD 310 where the court held *inter alia* that a parent is entitled to delegate the execution of corporal punishment but that such delegation is subject to the same limitations and requirements applicable to the parent him or herself. Such punishment had to be moderate and administered in a proper manner.

<sup>18</sup> *Hiltonian Society v Crofton* 1952 (3) SA 130 (A).

<sup>19</sup> *S v Lekgathe* 1982 (3) SA 104 (B).

legal rule established in *S v De Blom*<sup>20</sup>. According to the De Blom case, if [a] mistake or ignorance of the law were genuine, bona fide and essential, it would serve to exclude knowledge of unlawfulness of the conduct.<sup>21</sup> The result of *S v De Blom* thus seems to be that even if corporal punishment is regarded as unlawful, the inflictor could nevertheless escape liability for assault if he or she genuinely believed that he/she was entitled to chastise in a particular instance. The lack of knowledge of unlawfulness could thus exclude criminal liability.

Apart from the decision in the *Lekgathe* case that the schoolmaster acted with the intention to assault, the court also confirmed that in order to determine if the punishment inflicted was reasonable and moderate, regard must be had to various factors, such as the nature of the offence, the age, bodily, physical and mental condition of the child, the amount/severity of punishment inflicted, the nature of the instrument used, the motive of the chastiser and also the effect of the punishment. Finally, in the matter of *Du Preez v Conradie and another*<sup>22</sup> the then Bophuthatswana General Division held that a step-parent may exercise the same rights as a parent of a child if so requested to do by the parent.<sup>23</sup>

In light of the common law provisions it is trite law that parents are allowed to chastise their children by inflicting reasonable and moderate corporal punishment. Such right is however not without limits and various factors have been identified in order to determine whether a particular punishment was indeed reasonable and moderate.<sup>24</sup> This objective evaluation of all the relevant circumstances of each case afforded children at least a minimum protection against physical abuse and maltreatment. In addition, the common law also conferred a uniquely independent authority to parents in rearing their children and thus influenced the courts to be hesitant to interfere with such authority. Although parents have a measure of discretion in determining the nature of corporal punishment it

<sup>20</sup> 1977 (3) SA 513 (A).

<sup>21</sup> Refer to J Burchell and J Milton op cit (n5) 301.

<sup>22</sup> *Du Preez v Conradie* 1990 (4) SA 46 (BG).

<sup>23</sup> See the case of *Heystek v Heystek* 2002 (2) SA 754 (T) and also *Allsop v McCann* 2001 (2) SA 706 (C). The rights of step-parents are however limited to the same limitations as are applicable to the parent. No person is entitled to exceed the bounds of moderate and reasonable chastisement. Similar to previous cases the court also confirmed the various aspects that should be considered as a minimum in order to determine if the punishment was reasonable and moderate.

<sup>24</sup> In view of the jurisprudence under the common law, it has been commented that a court would take at least the following factors into account in deciding whether or not a particular punishment was equitable and fair: (1) the nature of the offence; (2) the physical and mental condition of the child; (3) the motive of the chastiser; (4) the severity, degree and force of the punishment; (5) the object used to administer the punishment; (6) the age and sex of the child; and (7) the build of the child. Refer to S Pete 'To smack or not to smack? Should the law prohibit South African parents from imposing corporal punishment on their children?' (1998) 14 *SAJHR* 431.

is ultimately up to the courts to determine if such punishment was indeed reasonable and lawful. If parents exceeded their authority to chastise then they could be held liable under criminal and even civil law.<sup>25</sup>

Before one evaluates the impact of the new constitutional requirements regarding the lawfulness of corporal chastisement, it is important to briefly name the main objections and reasons in favour of retaining such form of punishment. There are obviously two camps with regards to corporal punishment. On the one side there is the anti-corporal punishment lobby, also known as the 'anti-smackers' and then there are the pro-corporal punishment lobby or the so-called 'pro-smackers'.<sup>26</sup> Pro-smackers mostly submit the following reasons in support of corporal punishment: religious and cultural beliefs and rights; reasonable chastisement does not cause harm; chastisement is an effective deterrent punishment and smacking teaches children respect and discipline which is necessary for their upbringing. This last reason is often referred to as the so-called disciplinary motive. In contrast anti-smackers argue that it is: difficult to distinguish between reasonable and unreasonable forms of corporal punishment;<sup>27</sup> parental discretion often leads to abuse and inhumane treatment; corporal punishment is emotionally damaging; no real evidence exists to show that corporal punishment is an effective form of punishment and there are other forms of punishment that are not as intrusive and harmful as physical punishment. It is further suggested, that if violence against adults is prohibited, how can such violence against children be acceptable? Finally it is argued that modern societies and the protection of international law indicate that the infliction of any form of corporal punishment should be prohibited. Both modern constitutional law and international human rights laws indicate a shift away from all forms of physical punishment.<sup>28</sup>

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<sup>25</sup> The infliction of unreasonable corporal punishment could result in a criminal charge of assault. In essence, the offence of assault constitutes the unlawful and intentional application of force to the person of another or inspiring the belief in another person that such force is to be applied. In such instances, a parent could submit the defence of reasonable chastisement or could argue that he or she did not intend to assault their child. Fault in the form of intention or in the form of negligence could thus be excluded. See J Burchell and J Milton op cit (n5) 301.

<sup>26</sup> Refer to Pete op cit (n24) 431.

<sup>27</sup> It is said that corporal punishment has a uniquely ambiguous and contradictory nature. It is a very personal form of punishment, and the way in which it is perceived depends upon the very relationship between the punisher and the punished. A beating which is regarded as authoritarian and cruel when imposed by the state on an adult, may be seen as loving chastisement when applied by a parent on his or her child.

<sup>28</sup> Op cit (n3).

### 3. Corporal punishment and the new South African constitutional dispensation

The commencement of the Constitution<sup>29</sup> has brought about fundamental changes to the overall South African legal order. The Constitution is now entrenched as the highest law of the state and all other laws or conduct that are inconsistent with the Constitution are invalid. All obligations imposed by the Constitution must further be fulfilled.<sup>30</sup> Apart from being the supreme law in the state, the Constitution also incorporates an extensive Bill of Rights which enshrines the rights of all people in the country and which affirms the democratic values of human dignity, equality and freedom. The state is obliged to respect, protect, promote and fulfil the rights set out in the Bill of Rights.<sup>31</sup> It follows naturally that the common law position regarding the infliction of corporal punishment by parents on their children must be re-evaluated against the provisions of the Constitution and more specifically against the fundamental rights enumerated in the Bill of Rights. It should be obvious that there are two contrasting interests when one considers the constitutionality of corporal punishment by parents of their children. On the one side one finds the rights and interests of parents and on the other, the rights and interests of children. Since there is no hierarchy of rights set out in the Bill of Rights, any competing rights will have to be balanced against one another, which again calls for an objective evaluation of all the relevant circumstances of each individual case. During the balancing of rights our courts will however place more emphasis on the rights of human dignity, equality and freedom, since such rights have been confirmed as being part of the foundational values of our new society. Entitlements based on such values will carry more weight in comparison with other rights or interests.<sup>32</sup>

In relation to the infliction of corporal punishment various competing rights are in conflict with one another. Some parents would argue that since they base their right to chastisement on religious and cultural grounds, and since such rights are protected in the Bill of Rights, their rights should

<sup>29</sup> On 4 February 1997.

<sup>30</sup> See s 2 of the Constitution.

<sup>31</sup> Refer to ss7(1)-(2) read together with the founding provisions of s1 of the Constitution. It should be noted that the South African Bill of Rights does not only apply vertically between the individual and the state, but also horizontally between private persons such as a parent and a child. According to s8(2) of the Constitution, a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. Most children's rights would thus have horizontal application.

<sup>32</sup> See ss 1, 7, 36 and 39 of the Constitution.



take preference.<sup>33</sup> It is important to note however that the Bill of Rights specifically states that the rights to religion and culture may not be exercised in a manner inconsistent with any provision of the Bill of Rights. Children on the other hand also have various rights afforded to them. In the first place they have, as human beings, the general entitlement to the right of equality,<sup>34</sup> the right to human dignity,<sup>35</sup> freedom and security of the person, which includes the right to be free from all forms of violence from either public or *private* sources,<sup>36</sup> freedom and security of the person which also includes the right not to be treated or punished in a cruel, inhuman or degrading way,<sup>37</sup> the right to bodily and psychological integrity,<sup>38</sup> the right to religion<sup>39</sup> and the right to culture.<sup>40</sup> Apart from these general entitlements children alone are also afforded special protection under section 28 of the Bill of Rights. Section 28 specifically states that every child has the right to *inter alia* family or parental care and to be protected from maltreatment, neglect, abuse or degradation.<sup>41</sup> Furthermore, and separate from section 28(1), the Constitution confirms that a child's best interests are of paramount importance in every matter concerning the child.<sup>42</sup>

The protection afforded to children under the Constitution is also expanded upon in various other legislative enactments. See for example the Child Care Act<sup>43</sup> and the Prevention of Family Violence Act<sup>44</sup>. It is evident from the various legal provisions that children are afforded much stronger protection, in comparison with the position before the Constitution came into effect. In general the Constitution has established a new valued based legal system, which system impacts on all aspects of the law. In relation to the issue of corporal punishment the Constitution has already been

<sup>33</sup> According to subssecs 15, 29 and 30 respectively, everyone has the right to freedom of religion, to participate in the cultural life of their choice, and persons belonging to a cultural, religious or linguistic community may not be denied the right, to enjoy their culture, practise their religion and use their language. See also N Smith 'Freedom of religion in the constitutional court' (2001) 118 *SALJ* 1.

<sup>34</sup> Section 9. Since corporal punishment towards adults is prohibited, children could argue that since the law does not protect them against such punishment, they are not afforded equal protection under the law.

<sup>35</sup> Section 10.

<sup>36</sup> Subsection 12(1)(c). Own emphasis added.

<sup>37</sup> Subsection 12(1)(e).

<sup>38</sup> Subsection 12(2).

<sup>39</sup> Section 15.

<sup>40</sup> Sections 30 and 31.

<sup>41</sup> See subssecs 28(1)(b) and (d) of the Constitution. According to South African jurisprudence, the duties under subssecs 28(1)(b) and (c) are primarily placed on parents and other family members. Only when such members cannot provide such entitlements, is there an obligation on the state to intervene. See *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC). Note also that subssecs 28(1)(b) and (c) should be read together and not in isolation.

<sup>42</sup> See s28(2).

<sup>43</sup> Child Care Act 74 of 1983.

<sup>44</sup> Prevention of Family Violence Act 133 of 1993.

used to invalidate such punishment by the state under the criminal justice system and also within the broader educational system. In the case of *S v Williams*<sup>45</sup> the Constitutional Court held that the institutionalised use of violence by the state on juvenile offenders as authorised by the Criminal Procedure Act<sup>46</sup> was a cruel, inhuman and degrading punishment and that a culture of authority which legitimises the use of violence is inconsistent with the values of the Interim Constitution.<sup>47</sup> Since the whipping of juvenile offenders as a form of corporal punishment infringed the rights and values of the Constitution, which infringement could not be justified under the limitations clause of the Constitution, the provisions authorizing such punishment were found to be unconstitutional and thus invalid.<sup>48</sup> The prohibition of corporal punishment was taken a step further in section 10 of the South African Schools Act<sup>49</sup>. According to the Act, no person is allowed to administer corporal punishment at a school to a learner. The specific provision was challenged in the case of *Christian Education South Africa v Minister of Education*<sup>50</sup> on the basis that it violated the rights of parents of children at independent schools who, in line with their religious convictions, had consented to the use of such punishment. In summary the court held that the matter concerned a multiplicity of intersecting constitutional values and interests, some overlapping and others again competing. The court further held that while the relevant parents could no longer authorise teachers to apply corporal punishment in their name pursuant to their beliefs, such parents were not being deprived by the Act of their general right and capacity to bring up their children according to their Christian beliefs. The effect of the Act was limited merely to preventing parents from empowering schools to administer corporal punishment.<sup>51</sup> It was also stated by the court that the prohibition of corporal punishment was part of a national program to transform the educational system, to bring

<sup>45</sup> *S v Williams* 1995 (3) SA 632 (CC).

<sup>46</sup> Criminal Procedure Act 51 of 1977.

<sup>47</sup> Refer to the Constitution of the Republic of South Africa 200 of 1993, hereafter referred to as the 'Interim Constitution'. The values of the Interim Constitution are basically the same as the values under the final Constitution of 1996.

<sup>48</sup> See *S v Williams* op cit (n45) at 658 F-G. Refer also to *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 SA 76 (NS).

<sup>49</sup> South African Schools Act 84 of 1996.

<sup>50</sup> *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

<sup>51</sup> See *Christian Education South Africa v Minister of Education* supra (n 47) at 780 D-E. In actual fact the act limited the common law position that teachers could act in loco parentis and chastise or inflict reasonable and moderate corporal punishment in such a capacity. Notwithstanding the abolishment of corporal punishment in schools, the majority of the Constitutional Court did not offer a view on the lawfulness of corporal punishment in the home by parents. Sachs J however questioned whether or not the common law had to be developed, so as to further regulate or even prohibit caning at home. Although not in question before the court in the matter, his statement does indicate that the constitutionality of the wide discretion bestowed upon parents to chastise their children is questionable in view of the rights enshrined in the constitution. See also the discussion from para 48 at 785.

it in line with the letter and spirit of the Constitution, and to fulfil the state's duty to take steps to help diminish public and private violence and also to protect especially children from maltreatment, abuse or degradation. The court furthermore referred to the best interest of the child principle and confirmed that such a principle was not excluded in cases where the rights of parents were involved. After weighing-up all the relevant factors, the court concluded in favour of upholding the generality of section 10 of the Act.<sup>52</sup> Apart from the South African Schools Act, two other pieces of legislation were enacted in an effort to abolish corporal punishment from South African public life. During March 1997 the Correctional Services Second Amendment Act<sup>53</sup> took effect, which Act deleted all provisions providing for the infliction of corporal punishment within prisons. In September 1997 the Abolition of Corporal Punishment Act<sup>54</sup> came into effect which act repealed all legislative authority authorizing the imposition of corporal punishment as a sentence by a court of law, including any tribal court.<sup>55</sup>

Notwithstanding the new constitutional provisions, some writers still point out that the Constitution does not remove the common law right of parents to chastise their children at home, provided that such chastisement is moderate and reasonable.<sup>56</sup> Private chastisement is thus not outlawed and must fall within the requirements of the common law, as was discussed above. It therefore seems acceptable to argue that corporal punishment by parents at home is still lawful. Many other commentators have, however, objected to the fact that chastisement at home could still be acceptable and have made various calls for such punishment to be eradicated in toto. The question thus finally remains, notwithstanding the proposals set out in the Children's Bill, whether parents are still legally authorized to chastise their children. In order to effectively answer such a question, one must also have due regard to the provisions of international law and possibly the guiding decisions of foreign legal jurisprudence.<sup>57</sup>

<sup>52</sup> *Christian Education South Africa v Minister of Education* supra (n47) at 787 F-G.

<sup>53</sup> Correctional Services Second Amendment Act 79 of 1996.

<sup>54</sup> Abolition of Corporal Punishment Act 33 of 1997.

<sup>55</sup> Refer to Pete op cit (n21) at 443.

<sup>56</sup> See Snyman op cit (n6) at 136. In *Christian Education SA* supra (n47) at 780, the court specifically stated that the Schools Act did not deprive parents of their general right and capacity to bring up their children according to their Christian beliefs. The act only prevented them from empowering schools to administer corporal punishment. Private corporal punishment/chastisement was thus not specifically outlawed.

<sup>57</sup> See s39(1)(b) and (c) of the Constitution. According to s39 of the Constitution, when interpreting the Bill of Rights, a court, tribunal or forum must consider international law and may consider foreign law. The importance of international law and to a lesser extent foreign law is thus self-evident and should not be overlooked.

#### 4. Principles of international law and foreign legal jurisprudence regarding the infliction of corporal punishment

It was mentioned above that internationally the trend is to abolish corporal punishment altogether. Such proposals are in line with various international and regional human rights instruments. From an international point of view the following international human rights instruments are of importance: (a) The Universal Declaration of Human Rights (UDHR)<sup>58</sup>; (b) The International Covenant on Civil and Political Rights (ICCPR)<sup>59</sup>; (c) The Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CATAOP)<sup>60</sup>; and (d) The Convention on the Rights of the Child (CRC)<sup>61</sup>. Both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights provide basic human rights protection to all human beings including adults and children. The various rights and entitlements of parents and children are protected and rights in conflict with one another must be balanced with reference to the prevailing circumstances of each case. Similar to some of the rights protected under the South African Constitution the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights protect rights such as dignity, life, liberty and security of the person, prohibition of torture, cruel, inhuman or degrading punishment, equality before the law, religion, and culture.<sup>62</sup> These rights of international law support and strengthen the rights set out in the South African Constitution. Article 16 of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment furthermore determines that each state party shall undertake to prevent other acts of cruel, inhuman or degrading treatment or punishment. It is however the provisions of the Convention on the Rights of the Child that are of importance with reference to the question of whether corporal punishment may still be inflicted on children. The convention *inter alia* protects the best interests of the child as a primary consideration, the rights of children to religion, protection against abuse, and provides further that state parties shall undertake all appropriate and other measures for the implementation of the rights of the

<sup>58</sup> 1948.

<sup>59</sup> Ratified by SA in 1998.

<sup>60</sup> 1984.

<sup>61</sup> The Convention on the rights of the Child was ratified by SA in 1995. For more detail see M Olivier in Davel (ed) *Introduction to Child Law in South Africa* (2000) 197. The writer mentions that children's rights are an integral part of human rights flowing from the text of the Universal Declaration of Human Rights. The Convention on the rights of the child can however be identified as the single most important instrument in defining and consolidating human rights standards for children.

<sup>62</sup> See articles 1, 3, 5, 7, 18 and 27 of the Universal Declaration of Human Rights and articles 3, 4, 7, 10, 18, 24 and 26 of the International Covenant on Civil and Political Rights respectively.

convention.<sup>63</sup> It is however the specific protection under articles 19 and 37 of the convention that requires special mention. Article 19 protects children against all forms of physical or mental violence and provides that state parties must take legislative and administrative measures to protect children against all forms of violence. The committee on the rights of the child has further indicated that corporal punishment in the family, school or penal system is incompatible with the convention, and that such forms of physical punishment should be prohibited. In addition to article 19, article 37 determines that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. This protection is also echoed in article seven of the International Convention on Civil and Political Rights, which, according to the Human Rights Committee, also prohibits corporal punishment.<sup>64</sup>

Apart from the abovementioned international instruments various regional human rights instruments also play a significant role in the protection and advancement of children's rights and have a subsequent impact on the infliction of corporal punishment on children. The most common of regional instruments are the African Charter on Human and Peoples Rights of 1982, the European Convention on Human Rights of 1950 and also the American Convention on Human Rights of 1970.<sup>65</sup> Since South Africa has acceded to the African Charter on Human and People's Rights in 1996 and has also ratified the African Charter on the Rights and Welfare of the Child in 2000, such regional instruments are of particular importance to the legal discourse in the South African legal system. Both these instruments confirm and entrench rights of inter alia non-discrimination, equality before the law, dignity and freedom from inhuman punishment, as well as rights of religion, and require positive state action to realize and promote such rights.<sup>66</sup> It is submitted that such instruments, with which South Africa must comply, advance and protect the rights mentioned in the South African Bill of Rights. In comparison, the European Convention also protects similar rights. Especially article three, which determines that no one shall be subjected to torture or to inhuman or degrading treatment or punishment, has already been used to argue that all forms of corporal punishment against children should be prohibited.

Apart from the provisions of international and regional human rights

<sup>63</sup> Refer to articles 3, 4, 14, 17, 19 and 37 to name but a few.

<sup>64</sup> A deciding factor regarding the Convention is whether a court would consider reasonable chastisement as a form of physical or mental violence or as a cruel, inhumane and degrading punishment. There seems to be no absolute international consensus on such questions. The general trend in international law seems to regard children as human beings with inalienable rights apart from the rights of their parents.

<sup>65</sup> See PM Mtshaulana (ed) *Documents on International Law* (1996) 1.

<sup>66</sup> See for example articles 2, 3, 5, 8, 19 and 25 of the African Charter on Human and People's Rights and article 16 of the African Charter on the Rights and Welfare of the Child respectively.

law, many countries have determined in their own legal systems that the infliction of corporal punishment is not allowed or should be more strictly controlled. Under Scottish law parents have a right to moderate chastisement in order to control a child. Such a right stems from parental powers but must be exercised reasonably, having regard to all relevant circumstances.<sup>67</sup> In 2002 the Scottish parliament reconsidered the existing law in order to better protect children and to give guidance to their courts in determining what is reasonable chastisement.<sup>68</sup> Notwithstanding growing opposition, the Scottish parliament decided not to ban corporal punishment at home in total but formulated various factors to help determine the reasonableness of such punishment.<sup>69</sup> The main reasoning behind the new changes to the Scottish law of chastisement is that the law must comply with the Convention of the Rights of the Child, the new case law and directives of the European Commission of Human Rights made under the European Convention on the Protection of Human Rights and Fundamental Freedoms and also because the Human Rights Act of 1998 requires stronger protection of human rights as are set out in international and regional laws. Scottish law has to comply with the European Convention and with international law.<sup>70</sup> Although neither the European Court of Human Rights nor the European Commission have sought to absolutely prohibit physical chastisement of children, the European Convention requires stricter requirements in order for corporal punishment to be allowed. Excessive force by parents is prohibited.

In England the position is very similar to that of Scotland. According to English law a parent or person in loco parentis, is not guilty of an offence against the person of a child if moderate physical chastisement was administered. Apart from various factors that must be taken into account, English law is also subject to the protection of human rights under both regional and international human rights instruments. Corporal

<sup>67</sup> For more details refer to P Thomson *FamilyLaw in Scotland* 3ed (1996) 202.

<sup>68</sup> See RKM Smith 'You can't hit me now. Reforming the law of Scotland on the physical punishment of children' (2002) *Scots Law Times* 145-146. Similar investigation was conducted in 1991-1992.

<sup>69</sup> Such factors include (a) the nature of the wrongdoing; (b) duration and frequency of the wrongdoing; (c) the effect of chastisement; and (d) the child's personal characteristics. It was also submitted that a child under three years should never be chastised.

<sup>70</sup> See for example RKM Smith 'Spare the rod and spoil the child' (1999) *Scots Law Times* 140-142. Smith states that chastisement followed from Biblical direction but that after 3000 years opinion on chastising is changing. Such practises must now comply with national and international human rights laws.

punishment at home is thus not illegal but is more strictly circumscribed.<sup>71</sup> Notwithstanding the fact that chastisement is not altogether outlawed, some writers argue that such form of punishment and the quasi-criminal jurisdiction of a parent over a child is unacceptable.<sup>72</sup>

In the United States of America corporal punishment by parents on their children is also not prohibited. In the case of *Ingraham v Wright*<sup>73</sup> the majority of the court held that corporal punishment, even at schools, is not *per se* cruel and unusual punishment. It was reported in 2000 however that approximately 23 states in the United States of America still allow for corporal punishment. The main reasoning seems to be a general fear that order and discipline will decline if corporal punishment is abolished.<sup>74</sup> Strict requirements have however been established. Over the years the common law right to corporal punishment has been replaced by many statutory limitations and restrictions.<sup>75</sup>

In contrast with the United States of America and the United Kingdom, corporal punishment at home is absolutely banned in Sweden and other European countries. During 1979 Sweden became the first European country to prohibit parents by law, from imposing corporal punishment on their children. The prohibition was incorporated in an Act of the Swedish Parliament, which had been preceded by a series of legislative changes over the years. The main aim of the law was to change attitudes towards corporal punishment rather than to secure criminal convictions over parents chastising their children. The law was supported by detailed public awareness programmes and information sessions on how parents could avoid smacking their children. Since the introduction of the ban, it is reported that prosecutions of parents still smacking their children were very rare. A ban on corporal punishment thus seems not to have resulted in major social disruptions of the Swedish society.<sup>76</sup> This position

<sup>71</sup> See J Rogers 'A criminal lawyers response to chastisement in the European Court of Human Rights' (2002) *Criminal Law Review* 98-113. The writer also refers to the case of *A v United Kingdom* [1998] 2 FLR 959 (ECHR) where the court held that the United Kingdom was in breach of article 3 of the European Convention, since it did not take the required protective measures in its own legal system to protect children against inhuman or degrading treatment or punishment.

<sup>72</sup> Refer to J Eekelaar 'Corporal punishment, parents religion and children's rights' (2003) *Law Quarterly Review* 370-375. The writer submits that although parents base their right to chastisement often on biblical grounds and thus their right to religion, children also have human rights which in such circumstances should be afforded stronger protection. See also the case of *R v Secretary of State for Education and Employment* [2003] 1 All ER 385 (CA).

<sup>73</sup> *Ingraham v Wright* 430 US 651 (1977).

<sup>74</sup> For more on this, see Steyn et al 'n Internasionale perspektief op leerderdisipline in skole' (2003) 23(3) *EASA SAJOE* 225.

<sup>75</sup> For more on this see A Kahn 'Corporal Punishment in Schools' (1995) *Education and the Law* 1 and SA Pete 'Spare the rod and spoil the nation?: trends in corporal punishment abroad and in its place in the new South Africa' (1994) 1 *SACJ* 295.

<sup>76</sup> See Pete op cit (n21) 458-459.

is also echoed in other countries such as Italy and even in Israel. An Israeli Supreme Court decision in 1998 held that corporal punishment has detrimental psychological effects on a child and since such punishment violates a child's dignity, it should be impermissible.<sup>77</sup> In view of both international law and foreign legal experiences, it seems safe to conclude that there is a clear tendency to move away from the old common law position regarding the infliction of corporal punishment at home.

## 5. Final comments and conclusion

It is against the background of the South African Constitution and international law, that the question of whether parents should still be allowed to chastise their children by means of corporal punishment at home, should be considered. Apart from the guiding factors determined under the common law, a court must also have due regard to the new constitutional provisions and international law. Parents will obviously not act unlawfully if they chastise their children at home as long as such actions fall under the provisions of the South African law. Whether such actions are still legally permissible, has not been finally decided. In the absence of clear legislative provisions, judicial guidance seems to be required to address the position once and for all.

Many writers and commentators feel that in light of all the relevant factors, all forms of corporal punishment, even at home, should be banned.<sup>78</sup> Such argument against any form of corporal punishment is further supported with reference to children's rights under the Constitution, international law and other legal jurisdictions.<sup>79</sup> It is further submitted that if parents could still legally chastise their children, albeit in a more restricted legal framework, such authority would not provide our children with

<sup>77</sup> Refer to J Burchell and J Milton op cit (n5) 296 where the writers refer to the case of *Plonit v Attorney-General, Israeli Supreme Court* (1998) 54 (1) PD 145. The position in Italy is also similar. See also [www.endcorporalpunishment.org](http://www.endcorporalpunishment.org) accessed on 6 March 2006.

<sup>78</sup> See for example J Burchell and J Milton op cit (n5) at 296 where the writers argue that the defence of parents regarding disciplinary punishment should be relegated to the status of an historical relic. Refer also to S Pete and M Du Plessis 'A rose by any other name: biblical correction' in South African schools' (2000) 16 *SAJHR* 119. The writers mention that the aim of the ban on corporal punishment in South African schools was to protect the right of pupils not to be subjected to a violent and potentially harmful form of punishment. The potentially harmful nature of corporal punishment, coupled with the special protection afforded to children under the Constitution provide powerful arguments in favour of limiting the right of parents to impose such a punishment.

<sup>79</sup> Refer to B Clark 'From rights to responsibilities? An overview of recent developments relating to the parent/child relationship in South African common law' (2002) 35 *CILSA* 223. The writer argues that the continued right of SA parents to inflict corporal punishment on their children is possibly incompatible with the full implementation of the CRC, and probably violates the South African constitution. See also Newell op cit (n3) 1.



the necessary protection they deserve and should not be allowed in an already violent society.<sup>80</sup> In contrast with the calls for a total ban, some traditionalists still believe that reasonable and moderate chastisement of children has a role to play in the modern day upbringing of children.<sup>81</sup>

In conclusion, regarding the current South African legal position regarding the chastisement of children by their parents, the writer is in agreement that current and proposed legislative provisions do not sufficiently protect our children. Although the smacking debate is controversial and since it involves issues of parenting on which the general

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<sup>80</sup> It is interesting to note that according to a recent national survey, more than 20% of men and women in South Africa have experienced violence in one form or another. Over 1000 parents participated in the survey of which 57% confirmed using corporal punishment. Although younger parents are less likely to use corporal punishment, most children between the ages of two and five are exposed to physical parental discipline. It was further commented that research conclusions on mild forms of corporal punishment, such as occasional smacking, are equivocal on whether it is good or bad. While physical punishment does produce short-term compliance with parental authority, frequent and repeated severe forms of corporal punishment do have negative outcomes on a child's emotional development. See A Dawes 'Partner violence high in SA' *HSRC* available at [www.bsrc.A.4a/partner\\_violence.html](http://www.bsrc.A.4a/partner_violence.html) accessed on 24 February 2005. Although the SALC discussion paper on the review of the Child Care Act did not produce a clear mandate to support an outright ban and public opinion was divided on the issue, many commentators believe that the imposition of any physical punishment on any person is wrong and should not be tolerated. It is suggested that a total ban on corporal punishment is necessary to protect children and to encourage people to respect the physical integrity and dignity of children. Many argue that a change in mindset by parents and caregivers is needed and that alternative methods of positive discipline should be employed in order to create a non-violent society.

<sup>81</sup> See J Dobson *Dare to Discipline* (1992). Dobson, a careful supporter of chastisement, is a world-renowned writer and psychologist especially on family related matters. Corporal punishment is thus suggested as a punishment of last resort. Dobson commented that corporal punishment when executed without careful consideration and guidelines, is very dangerous. The fact, however, that chastisement is incorrectly administered does not mean that it should be abolished. Reasonable chastisement is often the shortest and most effective punishment in order to effect a change in behaviour. Such punishment is the most effective deterrent for unacceptable conduct. Dobson also mentions that a child without love will resent and reject most forms of discipline, and that alternative forms of punishment could often be more harmful to children and could also be more difficult to detect and to prosecute. Psychological forms of punishment could have long term effects while the effects of reasonable and moderate punishment are short lived. He however cautions that physical punishment should be strictly regulated/controlled. Clear safeguards and guidelines should be put in place. All in all Dobson emphasises that one should look at the total relationship between parent and child and that controlled corporal punishment should be permitted in instances where other forms of discipline were unsuccessful.

public seem to hold strong views,<sup>82</sup> the South African government is under constitutional and international law obligations to advance, protect and fulfil the special rights and needs of all children in our society. Although a total ban on corporal punishment would probably not find favour in the public domain, will be difficult to enforce and could result in parents enforcing different forms of punishment that could have more negative effects than reasonable and moderate chastisement, new legal proposals should include stronger safeguards to protect children against physical abuse, maltreatment and inhuman and degrading punishment. In this respect it is argued that the nature of corporal punishment does not change simply because it is administered at school or somewhere else.<sup>83</sup>

Notwithstanding the fact that current legislative proposals do not seem to provide for an outright ban or stricter curtailment of corporal punishment at home, it is submitted that if an attack on the constitutionality of the common law authorization of corporal chastisement is made, our courts will in light of the constitutional rights of children and also the international law provisions, have no option but to declare such a punishment to be contrary to the Constitution and therefore invalid.<sup>84</sup> If our courts uphold the defence and common law right of reasonable and moderate chastisement, they will in actual fact condone a form of violence which is not permitted under our new constitutional order. In weighing up the rights and interests of parents and society against the rights and needs of children, it is hard to imagine a situation where children's rights will be afforded less importance in comparison with their adult counterparts. As human beings, in need of special protection, and armed with the supreme

<sup>82</sup> Most parents regard an attack on their right to chastise their children as an attack on their sovereignty as parents to bring up their children as they see fit. It has been commented in the past, that it would indeed require a brave politician to propose an absolute ban on corporal punishment in an already violent society. It is submitted that there seems to be a lack of political will and leadership to take a firm stand on corporal punishment and that the relevant politicians do not want to take a decision themselves but would rather have the issue developed by judicial interpretation.

<sup>83</sup> See M Du Plessis "Doing damage to freedom of religion" (2000) *Stell* LR 303.

<sup>84</sup> There is no doubt that physical punishment limits certain rights of children. Both the *Williams* and the *Christian Education* cases confirmed this position. Such limitations will only be lawful, if they comply with the requirements of the limitation clause of the constitution. See s 36 of the Constitution. Limitations will only be permitted if done in terms of a law of general application, if reasonable and justifiable in an open and democratic society based on the values of human dignity, equality and freedom and after consideration of various factors. After careful consideration of the factors mentioned in s 36, it is submitted that corporal punishment should not meet the standards of reasonableness and justifiability. The nature, extent and purpose of the limitation in relation to the applicable rights in question, coupled with possible less restrictive methods of punishment, should fail the limitation test. The writer agrees with the viewpoint of Burchell and Milton *op cit* (n5) at 293 where they comment that the tenor of the South African constitutional court judgments apply to all forms of corporal punishment, whether sanctioned by the common law or customary law. Since such punishment cannot be saved by the limitation clause of the Constitution, it must be unconstitutional.

constitutional safeguards such as equality before the law, the right to freedom and security of the person, human dignity, the right to freedom from public or private violence, the right to care and protection from maltreatment, abuse or degradation, the paramountcy of the best interest's of the children principle, coupled with the protection under international law, any constitutional attack on the common law right of reasonable and moderate chastisement must succeed.<sup>85</sup> Although smacking may vary in intensity and degree, it still remains a violent form of punishment.<sup>86</sup> It is submitted that with the commencement of the Constitution all forms of corporal punishment have become redundant and contrary to the spirit and purport of a new constitutional dispensation. Since the Constitution requires all courts, forums or tribunals to develop the common law to conform to the constitutional values, corporal chastisement, even in the private family home, has become a legal relic of the past.<sup>87</sup>

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<sup>85</sup> See also M Clarke, Children's Rights Project of the University of the Western Cape 'Article 19' Vol 1 no 2 (2 September 2005) at 6.

<sup>86</sup> It is not proposed that even the smallest of slap-on-the-wrist-cases should be prosecuted. Parents will often not comply with the requirements of criminal liability in such instances and could rely on the principle of *de minimus non curat lex*. The law should not trouble itself with trifling matters. The prosecution of trifling matters could prove more damaging in respect of family relationships. Sound judicial/prosecutorial discretion and guidance is needed in such instances.

<sup>87</sup> See s 39(2)-(3) of the Constitution. If called upon, our courts will have to develop the common law to bring it in line with the Constitution. If such development is not possible, then the common law will be in conflict with the Constitution and thus invalid. It must be noted however that even if it is accepted that corporal punishment is contrary to the Constitution, such a position does not automatically invalidate such punishment. Only after a competent court has declared such punishment contrary to the Constitution, will it become unlawful and therefore invalid. Refer also to ss2 and 172 of the Constitution. Refer also to J Burchell and J Milton *op cit* (n 5) at 300 and A Friedman and A Pantazis 'Children's Rights' in Woolman *Constitutional Law of South Africa* 2ed (2005) at 47-8.