



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

**Critical reflection of the application of ‘reasonable chastisement’ in South Africa:
a case analysis of Freedom of Religion SA v Minister of Justice and constitutional
development and others.**

By

Comfort Raisibe Phasha

14141184

Submitted in fulfilment of the requirement for the degree

LLM (Child Law)

In the Faculty of Law,

University of Pretoria

October 2020

Supervisor: Zita Hansungule

Co-supervisor:



SUMMARY

The issue of corporal punishment has always been a controversial issue in South Africa and abroad. South Africa prohibited all forms of corporal punishment except at home where the law provided that a parent or any other person acting in *loco parentis* could in the course of maintaining authority and discipline over a child chastise such a child with moderate and reasonable corporal punishment. However that changed in the case of *YG v S* where the defence of reasonable chastisement was declared unconstitutional by the High Court Pretoria that held that the defence violates rights afforded to children by the Constitution. These decisions subsequently lead to an appeal in the Constitutional Court the court declared the defence unconstitutional. The effect of this decision was that the defence of reasonable and moderate chastisement use by parents is no longer part of the law, if the child is assaulted and the matter goes to court the defence of reasonable chastisement cannot be raised. There must be a balance between the child right and that of the parent. Outlawing corporal punishment remains a positive move that any civilised democratic society should take towards the advancement of children's rights. Some may however question whether this decision places the rights of children at a pedestal that is unreasonably unsustainable and impractical to maintain. This dissertation will examine the decision taken by the Constitutional Court in light of international and regional law, Global trends and the principle of the best interest of the child.



DECLARATION OF ORIGINALITY

Comfort Raisibe Phasha, Student No 14141184

Declaration

1. I understand what plagiarism is and aware of the University's policy in this regard.
2. I declare that this Mini dissertation is my own original work. Where other people's work has been used (either from a printed source, internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.
3. I have not used work previously produced by another student or any other person to hand in as my own.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

Signature of Student: Phasha CR

Signature of Supervisor:



ACKNOWLEDGMENT

Undertaking this Master's degree has been a challenging journey for me. It would not have been possible to do this without the support and guidance that I received from many people. I will happily like to take this opportunity to express my profound gratitude to the following people:

First and Foremost I thank God for the strength that he had given me throughout the period of writing this mini-dissertation. Thank You Lord for all the blessings you have bestowed upon me. *Re Leboga Mangeloi le Modimo wa Thaba Sione.*

Secondly I would like to express my utmost appreciation to my Supervisor Ms Zita Hansungule, without your guidance, constant feedback, and critical comment, all this would not have been achievable, it has truly been a privilege to work and learn from you.

Great appreciation to my friends, especially Kamogelo Magana I thank you for all the times you had to talk me off the edge as well as your never-ending support, patience and encouragement. My lovely family and siblings Lenslord and Shirley Phasha thank you for your prayers and moral support, we bagged another one.

Lastly to my parents Matsatsi and Ngwanatlala Phasha, Thank you for the never-ending love and support and of course funding!!!! Without you this would not have been possible. Words alone seem inadequate to express my gratitude for all you have done.

Ka Leboga!!!!



Table of Contents

SUMMARY	i
DECLARATION OF ORIGINALITY	ii
ACKNOWLEDGMENT	iii
Chapter 1: Introduction.....	1
1.1. Introduction	1
1.2. Problem statement	4
1.3. Research question	4
1.4. Research methodology	5
1.5. Literature Review	5
1.6. Chapter outline.....	7
Chapter 2: The history and effects of reasonable chastisement	8
2.1. Introduction	8
2.2. Definition and nomenclature of key concepts	9
2.3. Historical background.....	10
2.4. The effects of reasonable chastisement	14
2.4.1. Rejection of the use of corporal punishment.	14
2.4.2. Support of the use of corporal punishment.	16
2.5. Conclusion	18
Chapter 3: The impact of reasonable chastisement on the rights of the child	19
3.1. Introduction	19
3.2. Impact of reasonable chastisement on children's right	20
3.2.1. Dignity	21
3.2.2. Equality.....	24
3.2.3. Freedom and Security	28
3.2.4. Children's rights.....	30
3.3. Conclusion	32
Chapter 4: South Africa and Foreign case law, and international law evaluation	34
4.1. Introduction	34
4.2. International and regional human rights law on corporal punishment in the home setting...35	
4.2.1. United Nations Convention on the Rights of the Child.....	35



4.2.1.1. General Comment by the United Nations Committee on the Rights of the Child on corporal punishment.	35
4.2.2. African Charter on the Rights and Welfare of the Child	37
4.3. Foreign Jurisdictions' approaches to Corporal Punishment in the home	38
4.3.1. Israel: Plonit v Attorney General 54 (1) PD 145 (Criminal Appeal 4596/98).....	38
4.3.2. Canada: Canadian Foundation for Children, Youth and the law v Attorney General in Right of Canada 2004 SCC 4.	41
4.4. South Africa's Approach to the use of corporal punishment in the home	44
4.4.1. Freedom of Religion South Africa v Minister for Justice and Constitutional Development and Others [2019] ZACC 34.	44
4.5. Can the defence of Reasonable chastisement be justified under our Constitutional era? ...	50
4.5.1 The nature of the right.	51
4.5.2. The importance of the purpose of the limitation	51
4.5.3. The nature and extent of the limitation	52
4.5.4. The relation between the limitation and its purpose	52
4.5.5 Less restrictive means to achieve the purpose	53
4.6. Conclusion	53
Chapter 5: Conclusion and Remarks.....	55
5.1. General	55
5.2. Conclusion	55
5.3. Remarks.....	57
BIBLIOGRAPHY	58



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA



Chapter 1: Introduction

1.1. Introduction

The legal rule pertaining to children are not only multi-disciplinary in nature, but also ever changing.¹ The South African Constitution² has been internationally acclaimed for the exceptional protection and development of children's rights.³ It is a sovereign state, meaning that the Constitution is the cornerstone of democracy.⁴ The fundamental human rights are set out in Chapter 2 of the Constitution and are known or referred to as the Bill of Rights. The rights are given special protection due to the fact that they apply directly to a person, it is important to note that the rights in this chapter are subject to limitation.⁵ South Africa even went further by enacting a statute that regulates children's rights, to set out principles to give effect to certain rights of children.⁶ It is also important to point out that the High Court is the upper guardian of the children and has a duty to act in the best interest of the child in any matter relating to the children. Due to children's lack of maturity and consequent vulnerability, minor children need protection, meaning that if parents harm the child the state can step in. This study is on the rights of children, it is pivotal to note that children lack maturity to can stand on their own, the High Court as the Upper guardian has to step in and see to it that the children's best interests are safeguarded.

Corporal Punishment is a common practice and remains socially acceptable in most societies.⁷ It has always been socially, culturally and legally an acceptable form of discipline of children.⁸ However, the issue of corporal punishment has always been controversial. The issue was whether the use of physical force against children should

¹ Boezaart *Child Law in South Africa* (2017) 3-4.

² Chapter 2 of the Constitution of the Republic of South Africa, 1996.

³ Alston & Tobin *Laying the Foundation for Children's Rights* (2005) 7.

⁴ Section 1 of the Constitution of the Republic of South Africa.

⁵ Section 36 of the constitution.

⁶ Children's Act 38 of 2005.

⁷ Lubaale "Reconceptualising "Discipline" To Inform an Approach to Corporal Punishment That Strikes A Balance Between Children's Rights And Parental Rights"(2019) at 36.

⁸ Kleynhans "Considering The Constitutionality Of The Common Law Defence Of Reasonable and Moderate chastisement"(Unpublished LLM dissertation, University of Pretoria) 2011 49.



be wholly abolished or a room should be left for parents to use force to discipline.⁹ Some of the society members vouch for the total abolishment of corporal punishment at home while some argue that corporal punishment is the most ideal way of teaching and disciplining children.¹⁰ When it comes to some social issues the law will never be in the same page as public opinion, the courts have the power to set down laws even though the laws set down may cause controversy.

The South African courts are progressive when it comes to the protection of children against corporal punishment at the hands of teachers, parents and guardians. In *Christian Education South Africa v Minister of Education*,¹¹ the Constitutional Court upheld the law that prohibited the use of corporal punishment in schools. The decision was primarily premised on protecting children against all forms of violence from a public source. Recently, the same Court in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others*¹² has abolished the defence of reasonable chastisement that was available at common law to parents when administering corporal punishment to discipline recalcitrant children. The effect of this decision is that the defence of reasonable and moderate chastisement use by parents is outlawed, if the child is assaulted and the matter goes to court the defence of reasonable chastisement cannot be raised. The abolishment was said to be in the best interest of the children. The decision of the Constitutional Court caused more controversy, it is said that the defence was inconsistent with the provisions of Section 10 and 12 of the Constitution,¹³ and that the reasonable and moderate chastisement defence affords children less protection from assault under the law than it affords adults.¹⁴ In terms of the Children's Act, parental rights and responsibility include care.¹⁵ Care includes guiding and directing the child's upbringing in a manner which is appropriate to the child's age, maturity and stage of development;¹⁶ guiding the child's

⁹ Lubaale 36.

¹⁰ *Ibid.*

¹¹ *Christian Education South Africa v Minister of Education 2004(4) SA 757(CC).*

¹² *Freedom of Religion South Africa v Minister of Justice and Constitutional development and Others [2019] ZACC 34.*

¹³ *YG v S 2018(1) SACR 64(GJ).*

¹⁴ Kleynhans 49.

¹⁵ Section 8(2) Of Children's Act.

¹⁶ Section 1(1)(e) children's Act



behaviour in a humane manner;¹⁷ and ensuring that the child's best interest are to paramount concern in all matters affecting the child.¹⁸

In the case of *YG v S* the following was submitted with regards to parental rights and responsibilities and children's best interest:

"Parental discipline is an important part of the parent's duty to ensure that the child is brought up in a socially acceptable manner. This forms part and parcel of what the Constitution recognises to be the parental care which parents are obliged to provide. It is also an important element of the duty on parents under the Children's Act to guide and direct the child's upbringing. Thus, parental discipline is something that is aimed at ultimately inuring to the benefit of the child and contributing to his or her best interests"¹⁹

Foreign law and international law are a very useful mechanism when dealing with Constitutional problems in the South African jurisdiction. International law that have been considered and applied in Children's matters *range* from treaties, guidelines and general comments.²⁰ South Africa has ratified a host of international human treaties, many which have a bearing on children's right. In 2000 and 2001, the United Nations Committee on the child held general discussion on violence against children, the committee issued a general comment on the "the rights of the child to protection from corporal punishment and other cruel or degrading forms of punishment".²¹ Mogoeng CJ in the case of *Freedom of Religion SA* upheld the 2017 High Court ruling²² which made it illegal for parent to spank their children at home. This meaning parents can no longer spank or chastise their children for disciplinary purposes. There is accelerating progress now across all regions, challenging this very common form of violence against children, to date 54 states including eight in Africa have achieved prohibition in all setting, including the home.²³

¹⁷ Section 1(1)(f) children's Act.

¹⁸ Section 1 (1)(j) children's Act.

¹⁹ *YG v S* 30 *par* 65.

²⁰ Ngidi *in killander* (ed) (2010) 174.

²¹ UN Committee on the Rights of children, General Comment no 8: the Rights of The Child To Protection from Corporal Punishment And Other Cruel Degrading forms of Punishment CRC/C/GC/8.

²² *YG v S* 2018(1) SACR 64(GJ).

²³ The seven African states are Benin, Cabo Verde, Kenya, Republic of Congo, South Africa, Togo and Tunisia, see www.endcorporalpunishment.org.za.



This study intends to place into perspective ways of finding an approach that strikes a balance between children's rights and parental right. In giving meaning to children's rights it is important to accommodate the status of the child as an individual and as a member of the family.²⁴ Children need discipline and particularly need to learn self-discipline. There are many alternative forms of discipline but some are not effective for instance it is very difficult and impossible to negotiate with a child below the age of 5 to see reason to their actions.

1.2. Problem statement

The primary objective of this study is to show the impact of the abolishment of the defence of reasonable and moderate chastisement on children's rights. When giving meaning to children's rights it's important to accommodate the status of the child as an individual and the rights of other members of the family. It is upon this basis that this study calls for the same rule to be applied when dealing with the best interest of the child. There must be an approach to strike a balance between the children's rights and parental right within a family unit. This study seeks to analyse the decision of the Constitutional Court in the case *Freedom of Religion SA v Minister of Justice and constitutional Development*.

1.3. Research question

This study seeks to establish:

1. History and effects of reasonable chastisement
2. The impact of reasonable chastisement on the rights of the child
3. Court's decision in domestic, foreign and international law
4. Whether reasonable chastisement can be justified under the Constitution

²⁴ Austin *children: stories the law tells* (1994) 147-148.



1.4. Research methodology

The research methodology adopted in this study is the doctrinal approach. This means that the research is library based. Information is attained from case law, legislation, journal articles and books.

1.5. Literature Review

This study acknowledges that there is much literature available on the abolishment of corporal punishment but limited on the issue of abolishing the defence of reasonable and moderate chastisement defence available to parents and for practicality, it only reviews the work of prominent authors on this topic. Further the literature in this study does not intent to weaken the work of the other reviews, but seek to make a contribution to this area of the law.

Gershoff and Bitensky point out that corporal punishment occurs when a parent or educator hits a child with the purpose of educating him.²⁵ Further points that it consists of a light blow with the open hand on the buttocks or hand because the child misbehaved, deviated from the right path, failed to comply with the authority's wishes and instruction.²⁶ Lubaale also points out that for many years the use of corporal punishment or physical force to inflict pain has been considered as the most ideal way of teaching and disciplining children.²⁷ She continues to emphasise that traditionally punishment has been considered to be inseparable from the notion of discipline.²⁸ The study agrees that corporal punishment is widely accepted as a method which enhances moral character development in children and children get to respect authority.²⁹

Dziva argues that outlawing corporal punishment remains a positive move that any civilised democratic society should take towards the advancement of children's rights.³⁰

²⁵ Gershoff & Bitensky "The Case Against Corporal Punishment of Children: Converging Evidence from Social Sciences Research and International Human Rights law and Implications for US public Policy" 2007 231.

²⁶ *Ibid* at 232.

²⁷ Lubaale 43.

²⁸ *Ibid*.

²⁹ [https://www.apa.org/accesed\(11](https://www.apa.org/accesed(11) June 2020)

³⁰ Dziva "The 2013 Constitution of Zimbabwe: A Positive Step Towards Ending Corporal Punishment Against Children" 2013 at 1.



Vohito also submits that corporal punishment breaches children's rights to respect for human dignity and physical integrity and to equal protection under the law.³¹ Klecker submits that corporal punishment amounts to lack of respect for human being, and its constitutionality cannot depend on the age of a human being.³²

Snyman highlights that for the chastisement to be moderate the child must have acted wrongfully or threatened to act wrongfully, the child must have deserved the chastisement.³³ He further states that a parent who gives a child a hiding merely to ensure beforehand that the child will always be obedient acts unreasonable and unlawfully. The study contends that parents must chastise children for purposes of correcting them not merely to give vent to rage or out of sadism. Kleynhans however says the defence of reasonable and moderate chastisement defence affords children less protection from assault under the law than it affords adults.³⁴

Gershoff indicate that corporal punishment of children might result in immediate compliance, but does not necessarily "facilitate moral internalization because it does not teach children the reasons for behaving correctly, does not involve communication of the effects of children's behaviours on others, and may teach children the desirability of not getting caught."³⁵ Beinisch states that punishment which causes hurt or humiliation as a system of education is likely to injure not only the body of the minor but also his spirit. The child will feel humiliated, his self-image will be damaged, and intensified anxiety and anger are likely to adopt a violent mode of behaviour, so that the cycle of violence will follow him or her throughout his or her life and he or she is likely to be transformed from a victim of violence to a violent person in adulthood.³⁶ The use of punishment which causes hurt and humiliation does not contribute to the child's personality or education, but instead damages his or her human rights.

Gershoff states that while physical punishment is often not regarded as harmful but as a normal part of disciplining children, physical punishment is linked to severe forms of

³¹ Vohito Using the Courts To End Corporal Punishment –The International Scorecard 2019 1.

³² *Campbell & Cosans v United Kingdom* [1980] 3 EHRR 531 566.

³³ Snyman *Criminal law* (2002) at 136.

³⁴ Kleynhans 49.

³⁵ Gershoff 541.

³⁶ *Plonit v Attorney General* 10 & 11.



child abuse.³⁷ Edelstein points out that when corporal punishment is used children essentially grow up with an understanding of violence as an effective tool as a means to an end.³⁸

Gunnoe spanking is a powerful yet dangerous tool that can provide desired results effectively. Further spanking a child helps nurture respect between a parent and child and ensure that the child understand what is expected of them and adhere to rules.³⁹ In comparison to other forms of punishment spanking is a milder yet appropriate act to get your point across. Porteus and Ruth argue that corporal punishment works against the process of ethical development. It teaches children not to engage in a particular behaviour because they will be beaten. It does not teach them to consider the reasons and ethics for not behaving in a particular manner.⁴⁰

1.6. Chapter outline

The study shall consist of six chapters, chapter one shall be the general introduction to the study in form of proposal.

Chapter 2 shall discuss the history of reasonable chastisement and its effects.

Chapter 3 seeks to determine the impact of reasonable chastisement on children's rights.

Chapter 4 analyse the decisions of the courts, domestic, foreign and international law and also establish whether reasonable chastisement can be justified under the constitutional era

Chapter 5 summarise the study and furnish remarks and recommendations.

³⁷ Gershoff *Corporal Punishment by Parents and Associated Child Behaviour and Experiences: Antisocial Behaviour Decrease Quality of Relationship Between Parents and Child* (2002) at 544.

³⁸ Edelstein "Pathways To Violence Propensity: Results from a Two-Wave Study of Young Males in South Africa" 2018 33.

³⁹ Gunnoe, see <https://healthunits.com>.accessed(20 March 2020)

⁴⁰ Porteus & Ruth, *Alternatives to Corporal Punishment, Growing Discipline and Respect in our Classrooms* (2001).



Chapter 2: The history and effects of reasonable chastisement

2.1. Introduction

The act of disciplining a child is a fundamental parental responsibility benefiting both the parent and the child when exercised appropriately.⁴¹ Parents and guardians are responsible for promoting children's behaviour and to respond to unavoidable misbehaviour in a manner that will attempt to prevent the child's behaviour from occurring again and to also teach the child appropriate and acceptable behaviour. In terms of the Children's Act, parental rights and responsibility include care.⁴² Care includes guiding and directing the child's upbringing in a manner which is appropriate to the child's age, maturity and stage of development;⁴³ guiding the child's behaviour in a humane manner;⁴⁴ and ensuring that the child's best interests are of paramount concern in all matters affecting the child.⁴⁵ Physical punishment or corporal punishment is one of the methods used by parents to manage the child's behaviour in the home setting.⁴⁶ Corporal punishment has, however, been abolished in the educational setting, the justice system and alternative care in South Africa. Despite corporal punishment being abolished from the public life, it still retained a strong foothold within family life, until recently when the Constitutional Court⁴⁷ declared the defence of reasonable chastisement unconstitutional.

The definition of corporal punishment is important for this study for one to understand how the defence of reasonable chastisement applies. The study will give a brief historical background of the defence of reasonable and moderate chastisement in South Africa. The study will further discuss the effects of reasonable and moderate chastisement. I discuss these issues in turn.

⁴¹ Rhona "Hands-off Parenting? Towards a Reform of the Defence of Reasonable Chastisement in UK" 2004 *Child and Family Law Quarterly* 16(3) 261.

⁴² Section 8(2) Of Children's Act 38 of 2005.

⁴³ Section 1(1)(e) children's Act.

⁴⁴ Section 1(1)(f) children's Act.

⁴⁵ Section 1 (1)(j) children's Act.

⁴⁶ Clark "Why Can't I Discipline My Children Properly? Banning Corporal Punishment and Its Consequences" 2020 *SALJ* 335.

⁴⁷ *Freedom of Religion South Africa v Minister of Justice and Constitutional development and others* [2019] ZACC.



2.2. Definition and nomenclature of key concepts

Corporal punishment is defined as a disciplinary technique applied to the body with the intention of causing some degree of pain or discomfort, however light.⁴⁸ This includes spanking, slapping, pinching, paddling or hitting a child with a hand or with an object, denying a child the use of the toilet, meals, drink, pushing or pulling a child with force.⁴⁹ UNICEF in 2014 defined corporal punishment or physical punishment broadly as a form of violence because it includes other forms of physical punishment beyond spanking such as kicking, shaking, biting and forcing a child to stay in an uncomfortable position.⁵⁰ Corporal punishment is said to be a very personal form of punishment, and the way in which it is administered depends upon the relationship which exists between the punisher and the punished. It may be demonstrated by parental anger and authority, but at the same time expresses affection and concern.⁵¹ There is a conflation and confusion amongst the general public when it comes to punishment and discipline; decision makers fear that the prohibition of corporal punishment equates to the prohibition of discipline.⁵² It is important to differentiate between the two: punishment comes from the Latin concept of *punier* which means to correct, chastise, take vengeance for, inflict a penalty on, or cause pain or some offence.⁵³ Discipline on the other hand is based on the Latin concept of *Disciplina* meaning instruction given, teaching, learning, and knowledge.⁵⁴ According to Pete:

“Corporal punishment is interwoven in to the way patterns of power were established and entrenched historically in South African Society. Authoritarian systems tend to be ideologically based on the notion that discipline must come in the form of punishment because most members of the society are incapable of

⁴⁸ United Nations Committee on the Rights of the Child Convention on the Rights of the Child: General Comment No 8 (2006).

⁴⁹ Veriava and Power” Basic Education Rights Handbook-Education Rights in South Africa Chapter 19: Corporal Punishment” 333.

⁵⁰ UNICEF Report hidden in plain sight: a Statistical Analysis of Violence against children (2014), available at www.unicef.org/publications/index-74864.html accessed on 11 July 2020.

⁵¹ Pete “To Smack or not to Smack? Should the Law Prohibit South African Parents from Imposing Corporal Punishment on their Children?” 1998 14 SAJHR 442.

⁵² See Bower Prohibition of Corporal and Humiliating Punishment in the Home. The PAN: children 1. <http://children.pan.org.za/> accessed on 12 July 2020.

⁵³ Ibid

⁵⁴ As Above.



critical thinking and self-discipline and thus need to be taught to fear obedience".⁵⁵

Corporal punishment can be likened with assault.⁵⁶ Burchell defines Assault as the unlawful and intentional application of force to the person of another, or inspiring a belief in that other person that force is immediately to be applied to him or her.⁵⁷ Like any other offence, assault has defences that exclude unlawfulness, such as private defence, necessity, consent and reasonable chastisement.⁵⁸ For the purpose of this study, the first three defences are not relevant and shall therefore not be discussed any further. The latter defence, however, forms the integral part of this study.

2.3. Historical background

Reasonable chastisement is a defence that allows parents to argue on the charge of assault that corporal punishment was not unlawful. The origin of child law reveals that parents (fathers) were in absolute control of their children's lives and that children had virtually no rights or remedies against them.⁵⁹ In early Roman law, the power of the *pater familias* (oldest living male in the household) over his dependents was absolute and virtually unregulated by law.⁶⁰ The pater had so called *ius vitae necisque*, a divine right of life and death which entailed he could, after complying with certain formalities, condemn to death and execute his own children.⁶¹ It was only Constantine who ruled that to kill one's child constituted the crime of *parricidium* (the homicide of one's parents or another relative within the family).⁶² Later on Justinian reduced the *ius vitae necisque* to the power of inflicting reasonable chastisement.⁶³ Blackstone, in his commentaries on the law of England wrote that a parent has sufficient power to keep the child in order and obedience; he continued to say a parent may lawfully correct the

⁵⁵ Pete "A practice that smacks of abuse. Children First" 1999 3-6.

⁵⁶ Own emphasis.

⁵⁷ Burchell *Principle of Criminal Law* (2016) 591.

⁵⁸ *Ibid.*

⁵⁹ Pappas *Law and the Status of the Child* (1983) 2000 THRHR 201.

⁶⁰ Robinson "An Introduction to the International Law on the Rights of the Child Relating to the Parent-child Relationship" 2002 Stell LR 309.

⁶¹ Pappas *Law* 203.

⁶² Robin 310.

⁶³ *Ibid.*



child being under age, in a reasonable manner for this is for the benefit of his education.⁶⁴ This did not only apply to children but also applied to wives.⁶⁵ In his commentaries, Blackstone stated that a man may beat his wife in the same way that he can beat his servants or children because he is responsible for the misdemeanours; this power was however confined within reasonable bounds.⁶⁶ In 1891 in the case of *R v Jackson*⁶⁷ the defence of reasonable chastisement in relation to a wife was abolished. This defence was then properly stated in the case of *Regina v Hopley*⁶⁸, where the COK burn C.J stated the following:

“A parent may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment always however with this condition that it is moderate and reasonable. If it be administered for the gratification of passion or rage or if it is immoderate and excessive in its nature or degree or it be protracted beyond the child’s power of endurance or with an instrument unfitted for the purpose and calculated to procedure danger to life and limb, in all such cases that the punishment is excessive and violence is unlawful” .⁶⁹

The common law defence of reasonable chastisement did apply to wives at an earlier time in South African law and prior to the decision of the Constitutional Court in the decision of *Freedom of Religion South Africa v Minister of Justice and Constitutional development and others*⁷⁰ it only applied to children.⁷¹ This defence was inherited in South Africa through English common law.⁷² South Africa’s common law articulated in the case of *R v Janke and Janke*⁷³ where the court stated the following:

“[T]he general rule adopted by the Roman, the Roman-Dutch law and the English law is that a parent may inflict moderate and reasonable chastisement on a child

⁶⁴ Blackstone *The Commentaries on the Law of England* (1761-1769).

⁶⁵ See Skelton “S v Williams: A Springboard for Further Debate about Corporal Punishment” 2015 ACTA 337.

⁶⁶ *Ibid.*

⁶⁷ *R v Jackson* (1891) 1 QB 671.

⁶⁸ *Regina v Hopley* 1860 (2F.F.202).

⁶⁹ See *R v Janke and Janke* 385.

⁷⁰ *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* [2019] ZACC 34.

⁷¹ Skelton 337.

⁷² *Ibid.*

⁷³ *R v Janke and Janke* 1913 TPD 382.



for misconduct provided that this be not done in a manner offensive to good morals or other objects than correction 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 or those empowered with similar authority.”⁷⁴

The approach in *R v Janke and Janke*⁷⁵ continued to be followed in various judgements. In the case of *R v Schoombee*⁷⁶ the court held that where a parent or teacher, who are the best judges of necessity of corporal punishment, use of a cane upon a child the court will not lightly interfere but will only do so when it is made clear that the use of the cane was unreasonable and duly severe.⁷⁷ Again in the case of *Du Preez v Conradie and Another*⁷⁸ the court stated that it is settled law that parents have the right and power to administer punishment to their minor children for the purpose of correction and education further that the chastisement must be moderate and reasonable.⁷⁹

In the case of *Rex v Theron and another*⁸⁰ the court held that the discretion which common law gives parents to inflict corporal punishment is not to be exercised in an arbitrary and capricious manner.⁸¹ It may only be exercised on just and reasonable grounds, and that such punishment is not appropriate disciplinary punishment for every disobedience of rules or authority.⁸² The mere fact that a parent acted *bona fide* will not secure immunity from criminal prosecution.⁸³ On determining what is reasonable or moderate much will depend on the facts of each case. In the case of *Du Preez v Conradie*⁸⁴ it was stated that the court will take at least the following factors into account in deciding whether or not the punishment is equitable and fair:

⁷⁴ *R v Janke and Janke* 385.

⁷⁵ *R v Janke and Janke* 1913 TPD 382.

⁷⁶ *R v Schoombee* 1924 TDP 481.

⁷⁷ *Ibid.*

⁷⁸ *Du Preez v Conradie* 1990(4) SA 46(B).

⁷⁹ *Du Preez v Conradie* at 51.

⁸⁰ *Rex v Theron and another* 1936 OPD 166.

⁸¹ *Rex v Theron and another* 172.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Du Preez v Conradie* 1990(4) SA 46(B).



- a) The nature of the offence
- b) The condition of the child, physically and mentally;
- c) The motive of the person administering the punishment
- d) The severity of the punishment i.e. degree of force applied
- e) The object used to administer the punishment
- f) The age and sex of the child
- g) The build of the child⁸⁵

A parent who gives a child a hiding, not because the child did anything wrong, but merely to “ensure beforehand that the child will always be obedient”, acts unreasonably and unlawfully.⁸⁶ The parent must chastise the child in order to educate the child or to ensure or correct the child for an actual misdeed.⁸⁷ If she punishes the child merely to give vent to rage or out of sadism, her conduct is not justified.⁸⁸ A parent or any person acting in *loco parentis* could in the course of maintaining authority and discipline over a child, chastise such a child with moderate and reasonable corporal punishment.⁸⁹ This defence allows parents to delegate the authority to chastise to a person in *loco parentis*.⁹⁰

The right to delegate has in recent times been subject to various legislative restrictions. For example, corporal punishment has been outlawed in schools in terms of the South African Schools Act.⁹¹ Parents cannot delegate the authority to administer corporal punishment to a child’s teacher since this form of punishment is outlawed in schools.⁹² However, parents can delegate such authority to a step-parent.⁹³ The decision whether to chastise and how to chastise may also be delegated.⁹⁴ The person, whom the right

⁸⁵ *Du Preez v Conradie* 51-52.

⁸⁶ *Snyman Criminal Law* (2002) 136.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Snyman Criminal Law* (2002) 136.

⁹⁰ *Du Preez v Conradie* 52.

⁹¹ South African School Act 84 of 1996.

⁹² *Pete* 44.

⁹³ *Du Preez v Conradie* 52.

⁹⁴ *Du Preez v Conradie* 53.



of chastisement has been delegated to, does not have any greater rights of chastisement than the custodian parent.⁹⁵

2.4. The effects of reasonable chastisement

There is no universally accepted blueprint for the way in which children should be raised, because of the variety of qualities of children and also because every generation has its own ideas about who children are, what they ought to be, and how to best ease their passage into adulthood.⁹⁶ The power a parent has over a child exists primarily to enable the parent to discharge his duty of maintenance, protection, and education until the child reaches such an age as to be able to look after himself or herself and make their own decisions.⁹⁷ A failure to provide guidance and setting proper boundaries amounts to a form of neglect that can be very damaging to a child.⁹⁸ On the other side, discipline that is harsh can be damaging to a child both physically and emotionally.⁹⁹ There is evidence that indicate that, particularly for many children growing up in poorer urban homes in South Africa, corporal punishment is an everyday experience.¹⁰⁰

There are two schools of thoughts on the effects of corporal punishment on children. There are those that advocate against the use of corporal punishment and those that support the use of corporal punishment. I discuss them in turn.

2.4.1. Rejection of the use of corporal punishment.

The global movement to reverse the culture of corporal punishment and other forms of humiliating and degrading punishment of children is gaining momentum.¹⁰¹ It is based on growing understanding of children as holders of rights and the growing body of

⁹⁵ *Ibid.*

⁹⁶ Lenta "Corporal punishment: A Philosophical Assessment" 2018.

⁹⁷ *Gillick v West Norfolk and Wisbech Area Health Authority [1986] 1 AC 112 185.*

⁹⁸ Protecting Children, Supporting Parents, A Consulting Document on the Physical Punishment of Children 1.

⁹⁹ *Ibid.*

¹⁰⁰ Dawes et al "Corporal Punishment of Children: A South African National Survey 'Human Science Research Council Child Youth and Family Development Report" 2005.

¹⁰¹ <http://endcorporalpunishment.org>.



evidence from medical, educational and psychological authorities on the negative effects of corporal punishment and its ineffectiveness as a method of discipline.¹⁰² Corporal punishment is said to be working against the process of ethical development.¹⁰³ It teaches children to not engage in a particular behaviour because they will be beaten.¹⁰⁴ It does not teach them to consider the reasons and ethics for not behaving in a particular manner.¹⁰⁵ Parental discretion in most cases leads to abuse and inhumane treatment.¹⁰⁶ Corporal punishment may be emotionally damaging.¹⁰⁷ Dawes submits that Children who are spanked more often exhibit more socio-emotional problems in the form of hyperactivity, aggression and low self-esteem regulations.¹⁰⁸ He further points out that it is not clear whether these are the causes or the results of corporal punishment.¹⁰⁹ Behavioural theorists have determined that physical punishment for unwanted behaviour is ineffectual in preventing that behaviour in the long term.¹¹⁰ Skinner a behavioural psychologist, found that although punished behaviour will disappear temporarily, it is likely to reappear after contingencies are withdrawn, and that once the person doing the punishing is no longer around, the undesirable behaviour will manifest itself again.¹¹¹ Corporal punishment is ineffective as a long-term solution to dysfunctional or undesirable behaviour.¹¹² When corporal punishment is administered, children grow up with an understanding of violence as an effective tool and as a means to an end.¹¹³ Gershoff pointed the following with regards to corporal punishment:

¹⁰² Soneson "Ending Corporal Punishment of Children in South Africa" 2005 5.

¹⁰³ Porteus et al "Alternatives to Corporal Punishment- Growing Discipline and Respect in our Classrooms"2001.

¹⁰⁴ *Ibid.*

¹⁰⁵ *ibid.*

¹⁰⁶ Bekink "When Do Parents Go Too Far? Are South African Parents Still Allowed to Chastise their Children through Corporal Punishment in their Private Homes" 2006 SACJ 2 179.

¹⁰⁷ *Ibid.*

¹⁰⁸ Dawes et al "Corporal Punishment of children: A South African National survey" 2005 11.

¹⁰⁹ *Ibid.*

¹¹⁰ Pete 452.

¹¹¹ See Sarkin "Corporal Punishment" 1996 SALJ 80 at 83.

¹¹² *Ibid.*

¹¹³ Edelstain "Pathways to Violence Propensity: Results from Two-wave Study of Young Males in Urban South Africa" 2018 Journal of Psychology in Africa 28(1) 33.



“The main effects of corporal punishment are that it evokes certain negative feelings in the children such as anger, anxiety and fear. Apart from that, children will end up fearing their own parents and therefore avoiding them. This will reduce the chances of children enjoying parental love and guidance as there will be no good relationships between them. Some of the parents can become emotional when they use corporal punishment to correct the children. If parents suffer from high levels of emotions such as frustration, anger and stress, they end up reacting to their children in a harsh manner. The parents will end up applying corporal punishment in a manner that can harm their children. In general, child abuse researchers have found that if corporal punishment can be applied to the children in an excessive manner, it will result in physical abuse”.¹¹⁴

Corporal punishment of children breaches their right to respect for human dignity and physical integrity and to equal protection under the law.¹¹⁵

2.4.2. Support of the use of corporal punishment.

Schaffer supports the retention of the power to administer reasonable punishment. He points out that there is little evidence to show that corporal punishment was harmful if justly administered in a consistent manner and within the context of affectionate family relationship.¹¹⁶ He further points out that it could be harmful if administered on a frequent, harsh and erratic basis and it was likely to occur within families characterised by conflict and strained relationship.¹¹⁷ He argues that physical punishment is not to blame for the increased aggression or delinquency of children but rather the circumstances within which such punishment was applied.¹¹⁸ Generally many adults in South Africa approve of corporal punishment and considerable blame for the current indiscipline in school is laid at the door of prohibition of corporal punishment within educational institutions.¹¹⁹ It is argued that a right to discipline a child is a fundamental parental right

¹¹⁴ Gershoff (2002) 539 *Psychological Bulletin* at 540-547.

¹¹⁵ Vohito “Using the Courts to End Corporal Punishment-the International Scorecard” 2019 *De Jure Law Journal*.

¹¹⁶ See Scottish law reform 1992 par 2.76.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ Morrell “Corporal Punishment in South African Schools: A Neglected Explanation for its Persistence” 2001 *South African Journal of Education* at 292.



benefiting both the parent and the child when exercised appropriately.¹²⁰ It is argued that since the ban of corporal punishment in schools, learners are behaving poorly and they are even ill disciplined.¹²¹ Section 10(1) South African School Act¹²² provides that “no person may administer corporal punishment at a school against a learner. A person who contravenes this provision is guilty of a criminal offence, and if convicted, can receive a sentence that can be imposed to assault.

Baumrind is of the view that mild corporal punishment, if administered in a reasonable manner is beneficial to a child as it does not only correct bad behaviour but also prepares the child for the future.¹²³ Corporal punishment in its mildest form is not a precursor of violence in children.¹²⁴ Further, mild spanking has no effect whatsoever on children’s emotional and mental wellbeing.¹²⁵ Corporal punishment makes the punished to take the offence seriously, allows the child to reflect on his or her wrongful conduct.¹²⁶ Corporal punishment has positive outcomes, such as ensuring compliance.¹²⁷ Reasonable corporal punishment does not cause harm; chastisement is an effective deterrent punishment and smacking teaches children respect and discipline which is necessary for their upbringing.¹²⁸ Spanking is a powerful tool that provides desired results effectively, spanking a child helps nurture respect between a parent and a child and ensures that the child understands what is expected of them and adhere to rules.¹²⁹ Corporal punishment alters a child’s unfavourable behavioural patterns.¹³⁰

¹²⁰Rhona “Hands-off Parenting? Towards a Reform of the Defence of Reasonable Chastisement in UK” at 261.

¹²¹ Veriava and Power “Basic Education Rights Handbook- education Rights in South Africa- Chapter 19: Corporal punishment” 336.

¹²² South African School Act 84 Of 1996.

¹²³ Baumrind” Parenting: the Discipline Controversy Revisited” 1996 Family Relations 45(4) 413.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ Scarre “Corporal Punishment” 2003 ethical theory and moral practice 311.

¹²⁷ Gershoff et al “Spanking and Child Outcomes: Old Controversies and Now Meta-analyses”2016 30 Journal of Family Psychology 457.

¹²⁸ Bekink at 179.

¹²⁹ <https://healthunits.com> accessed on 22 June 2020.

¹³⁰ *Ibid.*



2.5. Conclusion

Parents have a duty to raise and mould their children in a way that will make them responsible adults in the future, failure to do that will mean that parents forsake the parental responsibility placed on them by the Children's Act¹³¹ to care for the child and guide them until they are matured. Corporal punishment has been used for many years as a form of discipline in families. It is said to have negative effects such that leads to depression, anxiety and other forms of anti-social behaviours, on the other hand it is also said to have positive effect such as compliance from the child who was corporally punished. Corporal punishment cannot be wholly blamed for the child's behaviour, the environment in which the child grows in plays a vital role in the upbringing of the child and the kind of person they turn out to be. The actions which make them feel guilty and stupid and impotent are probably far more destructive. The ban of corporal punishment has been blamed for the undisciplined and ill manners of learners in Schools. Section 10 of the school Act regulates that corporal punishment of a learner amount to assault. The study further submit that as much as it is evident from above that corporal punishment has negative effects on the children, it also have positive effects such as immediate compliance and children learning to respect authority.

¹³¹ Children's Act 38 of 2005.



Chapter 3: The impact of reasonable chastisement on the rights of the child

3.1. Introduction

The Constitution of the Republic of South Africa, 1996 (henceforth “the Constitution”) represents a notable break-through in the realisation of human rights for South African’s of all ages, class and colour.¹³² The advent of the Constitution brought, *inter alia*, recognition and respect for a particularly vulnerable and often ignored group in our society, namely children.¹³³ The Constitution has been internationally acclaimed for the exceptional protection and development of children’s rights.¹³⁴ The focus of private law in relation to the parent-child relationship is increasingly shifting from the rights and powers of parents to the rights and entitlement of children.¹³⁵ The Bill of Rights enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.¹³⁶ This simply implies that both adults and children alike are bearers of rights. Section 28 of the Constitution has been included to provide protection for the rights of children, especially in situations where they are considered to be vulnerable.¹³⁷ South Africa even went further by enacting a statute that regulates children’s rights, namely the Children’s Act.¹³⁸ The aim of the Children’s Act as set out in the long title is to supplement and give effect to certain rights guaranteed in the Bill of Rights and to set out principles relating to the care and protection of children.¹³⁹

¹³² *Shabalala v Attorney General of the Transvaal* 1996(1) SA 725 (CC) para 26.

¹³³ Du Plessis, Van der Walt, Govindjee “The Constitutional Rights of Children to Bodily Integrity and Autonomy” 2014 1.

¹³⁴ Alston & Tobin *Laying the Foundation for Children’s Rights* (2005) 7.

¹³⁵ Heaton *South African Family Law* (2004) 257.

¹³⁶ Section 7(1) of the Constitution of the Republic of South Africa.

¹³⁷ See Section 28 of the Constitution.

¹³⁸ Children’s Act 38 of 2005.

¹³⁹ See the long title in the Children’s Act.



The Bill of Rights does not have a hierarchy of rights; any competing rights have to be balanced against one another.¹⁴⁰ This balancing approach calls for an objective evaluation of all the relevant circumstances of each individual case.¹⁴¹ Eleven years before we became a constitutional democratic state, South Africa already saw the need to pass legislation that limited parental authority and provided that parental ill-treatment of a child constituted a punishable offence.¹⁴² Much progress has since been made in that the Children's Act provides for a wide range of protective measures for children. South African parents derive their rights to use corporal punishment on their children from the common law.¹⁴³ Several authors have raised the question whether corporal punishment in the home complies with children's constitutional rights.¹⁴⁴

What follows henceforward is an in-depth analysis of the defence of reasonable chastisement on children's rights, together with its impact on children's rights. I further analyse the affected children's rights in terms of the limitation clause.

3.2. Impact of reasonable chastisement on children's right

The matter of reasonable chastisement has a long history, at its heart it raises issues of fundamental importance relating to children and their rights. These range from issues relevant to the protection of human rights in domestic and international law, specifically the question of whether children should have the same rights as adults. It is pivotal to note that constitutional rights do not mature and come into effect magically when a child attains the state-defined age of majority, being 18 years.¹⁴⁵ Children and adults are all protected by the Constitution and possess constitutional rights.¹⁴⁶ Although children often depend on adults on account of their age, they are autonomous individuals with

¹⁴⁰ Bekink "When Do Parents Go Too Far? Are South African Parents still allowed to chastise their children through corporal punishment in their private homes" 2006 SACJ 2 180.

¹⁴¹ *Ibid.*

¹⁴² Section 50(1) and (2) of the Child Care Act 74 of 1983.

¹⁴³ Pete "To smack or not to smack? Should the law prohibit South African Parents from imposing Corporal Punishment on their children?" 1998 14 SAJHR 448.

¹⁴⁴ See Dziva 'the 2013 Constitution of Zimbabwe: A Positive Step towards ending corporal punishment 2019 at 30 , Lubaale "Reconceptualising "discipline" to inform an approach to corporal punishment that strikes a balance between children's rights and parental rights' 2019 and the case of YG v S 2018(1) SACR 64 (GJ).

¹⁴⁵ *Planned parenthood v Dan forth (1976) 428 US 52.*

¹⁴⁶ (Own emphasis).



individual rights warranting protection.¹⁴⁷ This was made plain in the case of *Teddy Bear Clinic for Abused Children*¹⁴⁸ where Khampepe J stated strongly that:

“...Children enjoy each of the fundamental rights in the [C]onstitution that are granted to everyone as individual bearers of human rights. This approach is consistent with the constitutional text and gives effect to the express distinction that the [B]ill of [R]ights makes between granting rights to ‘everyone’ on the one hand and to adults only on the other hand. For instance the right to vote is expressly limited to adult citizens in terms of section 19 of the [C]onstitution, whereas there is no limitation in relation to the right to dignity [and equality].¹⁴⁹”

The study seeks to determine the effect of the defence of reasonable chastisement on the rights of the children. The Constitution together with the Children’s Act, are silent on the issue of physical force in the home setting. However, there are several rights that could be relied on to determine the effects of reasonable chastisement on the rights of children, namely the right to equality, dignity, freedom and security, and children’s specific rights. I shall now proceed to discuss the effect of reasonable chastisement with regards to these rights.

3.2.1. Dignity

Section 10 of the Constitution states that everyone has the right to dignity and the right to have their dignity respected and protected. The right to human dignity, together with the right to life, are said to be the source of all other rights.¹⁵⁰ The right to dignity is not only a right in itself, but is also a value that guides the interpretation of other rights.¹⁵¹ Human dignity is said to be a central value of the ‘objective, normative value system’.¹⁵² O’ Regan in *S v Makwanyane*¹⁵³ mentioned that the ‘recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new

¹⁴⁷ Lubaale “Reconceptualising “Discipline” To Inform an Approach to Corporal Punishment That Strikes A Balance Between Children’s Rights And Parental Rights”2019 37.

¹⁴⁸ *Teddy Bear Clinic for Abused children v minister of Justice and Constitutional Developments* 2013 (12) BCLR 1429 (CC).

¹⁴⁹ *Teddy Bear Clinic Abused Children* at para 38.

¹⁵⁰ *S v Makwanyane* 1995(3) SA 391(CC) para 144.

¹⁵¹ Skelton” *S v Williams: A Springboard for Further Debate about Corporal Punishment*”2015 ACTA 348.

¹⁵² *Carmichele v Minister of Minister of Safety and Security* 2001(4) SA 938 (CC) SA 56.

¹⁵³ *S v Makwanyane* 1995(3) SA 391(CC).



Constitution'.¹⁵⁴ Dignity covers a wide number of different values.¹⁵⁵ Dignity lies at the heart of the right not to be tortured or punished in a cruel, inhuman or degrading way, to be free from all forms of violence and not to be unfairly discriminated against.¹⁵⁶ It also plays an important role in the balancing exercise to bring different rights and values into harmony.¹⁵⁷

Dignity in our Constitution aims to repair, to renounce humiliation and degradation, and to vest full moral citizenship to those who were denied it in the past.¹⁵⁸ Human dignity is one of the three “conjoined, reciprocal and covalent values” which are foundational in this country.¹⁵⁹ It is important to note that dignity requires us to acknowledge the value and worth of all individuals as members of our society. This was properly acknowledged in the case of *S v M*¹⁶⁰ where Sachs J stated the following in relation to the need to protect children’s own dignity:

“Every child has his or her own dignity and that a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as miniature adults waiting to reach full size, they cannot be treated as a mere extension of their parents, umbilical destined to sink or swim with them.”¹⁶¹

The value of dignity within equality entails the notion of equal moral worth and respect.¹⁶² No one should be treated as mere objects of the will of others.¹⁶³ In *President of the RSA v Hugo*¹⁶⁴ the court provided that:

“At the heart of the prohibition of unfair discrimination lies recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal *dignity* and respect regardless of their membership of particular groups that is the goal of the

¹⁵⁴ *Ibid* 329.

¹⁵⁵ *Le Roux v Dey* 2011(3) SA 274 (CC) 138.

¹⁵⁶ *S v Makwanyane* 111.

¹⁵⁷ *S v Makwanyane* 1995(3) SA 391(CC) 14.

¹⁵⁸ See McCrudden *Understanding Human Dignity* (2012) 476.

¹⁵⁹ *S v Mamabolo* 2001(3) SA 409 (CC) *par* 41.

¹⁶⁰ *S v M* 2008(3) SA 232(CC).

¹⁶¹ *S v M* 18.

¹⁶² Woolman, Roux & Bishop *Constitutional law of South Africa* (2002).

¹⁶³ Kleynhans 54.

¹⁶⁴ *President of RSA v Hugo* 1997(4) SA 1(CC).



Constitution should not be forgotten or overlooked. Equality means that our society cannot tolerate legislative distinctions that treats certain people as second-class citizens, that demeans them or that otherwise offends fundamental dignity.”¹⁶⁵

In *S v Maisa*¹⁶⁶ the Court expressed the view that whipping should be a measure of last resort because it is a punishment that injures the dignity of a person.¹⁶⁷ Corporal punishment does not only cause pain to the person but also their dignity. The UN Committee on the Rights of the Child specifically highlight that the United Nations Convention on the Rights of the Child (henceforth UN CRC) builds on the foundation of everyone’s rights to respect for his or her human dignity.¹⁶⁸ The dignity of each and every individual is the fundamental guiding principle of international human rights law.¹⁶⁹ The UNCRC Committee made it clear that corporal punishment directly conflicts with equal and inalienable rights of children to respect for their human dignity and physical integrity.¹⁷⁰

It is clear that dignity emphasizes that people, including children, should not be treated as a mere object of the will of others.¹⁷¹ When the state fails to protect children against corporal punishment and treats them as second class citizens, it infringes their right to human dignity.¹⁷²

In the case of *Freedom of Religion South Africa v Minister of Justice and Constitutional Development*,¹⁷³ Freedom of Religion South Africa (FORSA) argued that their contention is not that children don’t have the right to dignity or that it should not be protected and neither that parents have greater dignity than children.¹⁷⁴ FORSA further contended that children should be chastised in order to be disciplined and that

¹⁶⁵ President of RSA v Hugo 41.

¹⁶⁶ *S v Maisa* 1968(1) SA 271 (T).

¹⁶⁷ Ibid.

¹⁶⁸ CRC/C/GC/8 at para 16

¹⁶⁹ Ibid.

¹⁷⁰ Ibid at para 21.

¹⁷¹ Own emphasis.

¹⁷² 5th to 7th Respondent in the FORSA Case.

¹⁷³ *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* [2019] ZACC 34.

¹⁷⁴ FORSA’s Head of Arguments in the Case of Freedom of Religion South Africa v Minister of Justice par 29.



chastisement applied for the benefit of the child and their interest, gives dignity to the child.¹⁷⁵

The common law defence of reasonable chastisement violates the children's right to dignity, its symbolic effects is to state that in the eyes of our law all children are treated as second class citizen, deserving less protection from the law. There can be no doubt that the existence of a law which allows parents to physically punish their children, and them not being given the same protection as adults degrades and devalues the right of children. The right to dignity is centrally affected by the chastisement.

3.2.2. Equality

The South African Constitution in section 9 in the Bill of Rights guarantees everyone the right to equality and reads as follow:

9. "(1) everyone is equal before the law and has the right to equal protection and benefit of the law.

(3) State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, cultural language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

Equality is a deeply controversial social ideal.¹⁷⁶ Its formal idea is that people who are similarly situated in relevant ways should be treated in the same way.¹⁷⁷ The Constitution requires the state to achieving the goal of equality.¹⁷⁸ This guarantees every citizen protection from unfair discrimination. It is crucial to note the fact that the

¹⁷⁵ Ibid par 30.

¹⁷⁶ Currie & De waal *The Bill of Right Handbook* (2018) 210.

¹⁷⁷ *Ibid.*

¹⁷⁸ Section 1(a) of the Constitution.



law treats individuals in like circumstances alike.¹⁷⁹ In the case of physical punishment adults have full protection against violence from any source, through both criminal and civil law; however, children are protected from public source of violence but not from private source when their parents chastise them.¹⁸⁰ The defence affords children less protection from assault under the law than it affords adults.

The law often differentiates between children and adults.¹⁸¹ It is trite law that the mere differentiation does not necessarily infringe the right to equality if the differentiation is rational.¹⁸² In the case of *President of RSA v Hugo*¹⁸³ the Constitutional Court held the following:

‘ we need...to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in different context’.

There are three categories in which a law or conduct might differentiate between categories of people. Firstly, mere differentiations which while it does treat some people differently to others, it does not amount to discrimination,¹⁸⁴ e.g. All South African Adults can vote however children as they lack the mental capacity to exercising political choice are not allowed to vote.¹⁸⁵ Secondly there is differentiation which amounts to unfair discrimination, e.g. being denied to access to health care facilities based on race or age.¹⁸⁶ Lastly the category of law or conduct that can be called fair discrimination; law or conduct that discriminates but which does not do so unfairly

¹⁷⁹ Own emphasis.

¹⁸⁰ Respondent heads of arguments in the FORSA case14.

¹⁸¹ Skelton at 347.

¹⁸² *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC).

¹⁸³ *President of Republic of South Africa v Hugo* 1997(4) SA 1.

¹⁸⁴ Currie & De Waal at 217.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*



taking into account the impact of the discrimination on the complainant and others in his or her situation.¹⁸⁷

A three stage test for establishing whether the differentiation of rights amount to unfair discrimination was set out in the case of *Harksen v Lane NO*.¹⁸⁸ The test is as follow:

- a) Does the provision differentiate between people or categories of people? If so does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of S 9(1).¹⁸⁹
 - b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:¹⁹⁰
 - I. (i) Does the differentiation amount to discrimination? If it is on a specific ground, then discrimination will have been established. If it is not on a specific ground, then whether or not there is discrimination will depend upon whether, objectively the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of a person as beings or to affect them adversely in a comparably serious manner.
 - II. (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, the unfairness will be presumed. If on an unspecified ground unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others.
- If, at the end of this stage of the enquiry, the differentiation is found to not to be unfair, then there will be no violation of s 9(3) and (4).
- c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause.¹⁹¹

Applying the test enunciated by the court on the matter at hand, the first enquiry is to establish if whether there is differentiation. Section 9(3) of the Constitution stipulates

¹⁸⁷ *Ibid.*

¹⁸⁸ *Harksen v Lane NO 1998(1) SA 300 (CC).*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*



grounds of when discrimination amount to unfair discrimination. Children and adults are not treated equally when it comes to the issue of physical punishment so there is differentiation based on the ground of age.¹⁹² Age is one of the grounds regulated by section 9(3) it is plain that the defence of reasonable chastisement discriminates against children on the basis of age.

The second enquiry is whether there is unfair discrimination, which consists of two stage analysis; whether the differentiation amount to discrimination and if the differentiation amounts to unfair discrimination. In the case of *National Coalition for Gay & Lesbian*¹⁹³ the Constitutional court held there is no need to perform both stages of the enquiry¹⁹⁴ in situations where the first stage inquiry would be unnecessary in cases which the court find that the a law or conduct unjustifiably infringes section 9(3) or (4). The first analysis is already established the differentiation amount to discrimination. The second analysis is whether the differentiation is unfair. Women are free from violence at work and home, if they were to be chastised in the home environment it would amount to an infringement of their human rights.¹⁹⁵ However, children, the most vulnerable individuals in our society, are protected from the public environment yet not protected at home.¹⁹⁶ The defence of reasonable chastisement affords children less protection under the law than it affords adults.¹⁹⁷ The law protects every adult against any form of assault including common assault. The study submits that the differentiation amount to unfair discrimination prohibited by Section 9 (3) & (4) of the Constitution as they are only discriminated based on the ground of age. FORSA argued that the law differentiates between children and adults in a number of circumstances in order to protect children, and that this does not necessarily infringe the right to equality if the differentiation is rational.¹⁹⁸ However their argument did not carry much weight as it is evident from above that the differentiation is prohibited by section 9 (3) & (4) of the Constitution.

¹⁹² Own emphasis.

¹⁹³ *National Coalition for Gay and Lesbian v Minister of Justice* 1991(1) SA 6 (CC).

¹⁹⁴ *Ibid* 18.

¹⁹⁵ Own emphasis.

¹⁹⁶ Skelton 347.

¹⁹⁷ Kleynhans "Considering The Constitutionality Of The Common Law Defence Of Reasonable and Moderate chastisement"(Unpublished LLM dissertation, University of Pretoria) 2011 49.

¹⁹⁸ FORSA Head of argument in FORSA Case.



The third enquiry requires a determination of whether the provision can be justified under the limitation. Section 36 holds that a right may be limited if such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Whether the provision can be justified under the limitation clause will be discussed later in the chapter in detail

3.2.3. Freedom and Security

Section 12 of the Constitution regulates freedom and security of the person and reads as follows:

“(1) everyone has the right to freedom and security of the person, which includes the rights-

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) To be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) Not to be treated or punished in a cruel, inhumane or degrading way.”

In the case of *S v Williams* the court stated that the rights contained in this section are of considerable importance as generally these rights are guaranteed in absolute, non-derogable and unqualified terms; justification in those instances is not possible.¹⁹⁹ Section 12(1)(c) of the Constitution aims to put a stop to all forms of violence that inevitably would violate the security of a person.²⁰⁰ It explicitly prohibits all forms of violence from both public and private sources.²⁰¹

In *Christian Education* it was stated, - in relation to corporal punishment in private schools, that section 12(1)(c) obliged the state to take appropriate steps to reduce violence in public and private life.²⁰² Further that the state is coupled with the special

¹⁹⁹ *S v Williams at par 21.*

²⁰⁰ Skelton at 349

²⁰¹ Own emphasis.

²⁰² *Christian Education v Minister of Education para 47.*



duty to protect children; this represents ‘a powerful requirement on the state to act’.²⁰³ The Constitutional Court in the case of *S v Baloyi*²⁰⁴ has held in respect of domestic violence that “specific inclusion of private source emphasises that serious threats to security of the person arise from private sources...[and] has to be understood as obliging the state directly to protect the right of everyone to be free from private or domestic violence”.²⁰⁵ The study submits Section 12(1) is breached by the chastisement defence because it permits corporal punishment, a form of violence, delivered from a private source.

Section 12(1)(e) guarantees everyone the right not to be treated or punished in a cruel, inhumane or degrading way. This section denotes three disjunctive concepts.²⁰⁶ It therefore holds that if a “punishment has any one of these three characteristics” the punishment would violate section 12.²⁰⁷ Corporal punishment in the home varies and defenders of the reasonable chastisement defence argue that the type that is protected by the defence is not cruel or inhuman as the chastisement is reasonable.²⁰⁸ Even if the court could be persuaded by such an argument, the fact remains that punishment that is protected by the defence might often be degrading.²⁰⁹

The Committee of the Convention on the Rights of the Child submitted that ‘there is no ambiguity: all forms of physical or mental violence does not leave room for any level of legalised violence against children. Corporal punishment and other cruel and degrading forms of punishment are forms of violence and state must take all appropriate legislative, administrative, social and educational measures to eliminate them’.²¹⁰ Section 12(1) read together with section 7(2) of the Constitution obliges the state to protect the rights of everyone to be free from any form of private abuse. Physical

²⁰³ *Ibid.*

²⁰⁴ *S v Baloyi (Minister of Justice and another) 2002(2) SA 425 (CC).*

²⁰⁵ *Ibid para 11.*

²⁰⁶ *S v Dodo 2001 (3) SA 382 (CC) at para 35.*

²⁰⁷ *Ibid.*

²⁰⁸ Skelton 352.

²⁰⁹ *Ibid.*

²¹⁰ CRC/C/GC/8 par 18.

punishment involves measures of violence against the child and it also breaches the physical integrity of the child.

3.2.4. Children's rights

Section 28 of the Constitution guarantees that:

“(1) every child has the right –

- a) to a name and nationality from birth;
- b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
- c) to basic nutrition, shelter, basic health care services and social services;
- d) To be protected from maltreatment, neglect, abuse or degradation;
- e) To be protected from exploitative labour practice;

(2) A child's best interests are of paramount importance in every matter concerning the child

(3) In this section 'child' means a person under the age of 18 years.

Section 28 sets out a range of rights that provide protection for children that is additional to the protection they are given by the remainder of the Bill of Right.²¹¹ Section 28(1)(d) affords every child the right 'to be protected from maltreatment, neglect, abuse or degradation'. In General Comment 8, the UNCRC Committee made it clear that the existence of any defence in cases of corporal punishment of children does not comply with the principles and provisions of the UNCRC, since it will suggest that some forms of corporal punishment are acceptable.²¹² In the case of *Grootboom*²¹³ the court stated that “the State is directly responsible for ensuring fulfilment of the child's right to protection from maltreatment, abuse and degradation, whether children are in parental, family, or alternative care”.²¹⁴

Section 28(2) of the Constitution provides that: “A child's best interests are of paramount importance in every matter concerning the child. It has helped to develop the

²¹¹ Currie & De Waal at 599

²¹² CRC/C/GC/8 par 40.

²¹³ *Government of the Republic of South Africa & Others v Grootboom & Others 2001 (1) SA 46 (CC).*

²¹⁴ *Ibid.*



meaning of some of the other rights in the bill of rights and help determine the ambit, and to limit other competing rights.²¹⁵ This is in uniformity with, and is premised on, articles 2 and 3 of the UNCRC.²¹⁶ In *Minister of Welfare and Population Development v Fitzpatrick and Others*²¹⁷ the Constitutional Court, in respect of the best interest of the child, succinctly stated that:

“Section 28(2) requires that a child’s best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1).”²¹⁸

The paramountcy principle has been said to cast an individual and bossy image of the child as to suggest that when decisions affecting children are made, nothing except the best interest of the child matters.²¹⁹ This right is a right in itself and has been used to determine the scope of, and to limit, other competing rights.²²⁰ The right is a right in itself and not merely a guideline as it has been demonstrated by the Constitutional Court in several cases.²²¹ Cameron J in *Centre for Child Law v Minister of Justice and Constitutional Development and Others*²²² stated that the constitutional injunction of a child’s best interest being of “paramount importance” does not override every other right; what it means is that the child’s best interest are “more important than anything else, but not that everything else is unimportant”.²²³ The paramountcy principle does not automatically trump other rights, ‘it calls for appropriate weight to be given in each

²¹⁵ Currie & De Waal 619.

²¹⁶ *Ibid.*

²¹⁷ *Minister of Welfare and Population v Fitzpatrick and others* 2000 (3) SA 422 (CC).

²¹⁸ *Minister of Welfare and Population v Fitzpatrick* 17.

²¹⁹ See Moyo 143

²²⁰ Skelton “*The Role of the Courts in Ensuring the Right to a Basic Education in a Democratic South Africa: A Critical Evaluation of Recent Education Case Law*” 2013(1) *De Jure* 619.

²²¹ *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 2 SACR 477 (CC), the child’s best interest are of paramount importance to mean that the child’s interests are more important than anything else. However there are a wide spectrum of factors relevant in determining the interest of the child.

²²² *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 2 SACR 477 (CC).

²²³ *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 29.



case to a consideration to which the law attaches the highest value, namely the interests of children who may be concerned”.²²⁴

FORSA argues that while reasonable and moderate correction may not be in the best interest of one child, it may very well be in the best interest of another.²²⁵ It is clear that corporal punishment is not in the best interest of children and that the state has a duty to ensure that children – being the most dependant and most vulnerable people in our society – have at least no less protection than any other person does against violence from a private source.²²⁶

3.3. Conclusion

Parents derive their right to subject children to corporal punishment from the common law defence of reasonable chastisement. Physical punishment of the child takes different forms and may lead to criminal charge of assault if not administered by the parent. The defence was said to be implicating some of the rights of the children. South Africa is a sovereign democratic state founded on human dignity and equality. It has been submitted by some authors that the defence of reasonable chastisement affords children less protection from assault than it affords adults. However, it is trite to differentiate between children and adults when it is in the best interest of the child if the differentiation is fair. The differentiation between adults and children with regards to corporal punishment is unfair as it discriminates on the child based on the ground of age. If the physical force was applied to adults in private space it will amount to assault, however that is not the case with children in the private sphere.

The purpose of the defence is to allow parents to be able to discipline their children and teach them good behaviour. However, it has been argued that “the use of punishment which causes hurt and humiliation does not contribute to the child’s personality or education, but instead damages his or her human rights. Such punishment injures his or her body, feelings, dignity and proper development. Such punishment distances us

²²⁴ *S v M* par 42.

²²⁵ FORSA’s head of argument.

²²⁶ Own emphasis.



from our goal of a society free of violence.”²²⁷The study submits that any form of violence including the defence of reasonable chastisement constitutes a criminal act of assault.

²²⁷ 5th and 7th Respondent in FORSA case at Par 134.



Chapter 4: South Africa and Foreign case law, and international law evaluation.

4.1. Introduction

After decades of the use of corporal punishment, the dawn of the new era in the history of South Africa in 1994, changed the admissibility of corporal punishment. In the case of *S v Williams*²²⁸ whipping as a form of punishment for a crime was deemed to be a severe affront to any person's dignity as a human being, and was declared unconstitutional as a result.²²⁹ On the other hand, corporal punishment in schools was prohibited by the Schools Act 84 of 1996.²³⁰ The Constitutional Court in the case of *Christian Education South Africa v Minister of Education*²³¹ ruled that outlawing of physical punishment in schools was intended to promote respect for the dignity and physical and emotional integrity of all children.²³²

Since the first complete prohibition of corporal punishment of children in all settings in Sweden in 1979, other States followed suit.²³³ Section 39(1)(b) of the Constitution regulates that when interpreting the Bill of Rights, a court, tribunal or forum must consider International law. It is clear from the above section that South African courts should utilise international law as an integral part of South African law and as an aide in the interpretation of human rights.²³⁴ South Africa is a member state to a number of treaties that protect children's rights. International law that have been considered and applied in children's matters range from treaties, guidelines and general comments.²³⁵ Courts have been grappling with the issue of reasonable chastisement as a defence. This study evaluates some court decisions pertinent to the defence of reasonable chastisement. When interpreting the right of children, there is an obligation to consider applicable international law. The cases will be measured against international law.

²²⁸ *S v Williams* 1995(3) SA 632 (CC).

²²⁹ *Ibid* at para 28.

²³⁰ Section 10(2) of the Schools Act 84 of 1996.

²³¹ *Christian Education South Africa v Minister of Education* 2000(4) SA 757(CC).

²³² *Ibid*.

²³³ The other states are Kenya, South Sudan, Congo, Tunisia and South Africa was recently added. See www.endcorporapunishment.org.

²³⁴ Ngidi in Killander (ed) (2010) at 177.

²³⁵ *Ibid* 174.



4.2. International and regional human rights law on corporal punishment in the home setting.

4.2.1. United Nations Convention on the Rights of the Child

South Africa has ratified a host of Human Rights treaties, which have a bearing on children's right. The United Nations Convention on the Rights of the Child (UNCRC) adopted in 1989 is the first binding global instrument with a specific focus on a wide range of rights for children.²³⁶ Before the adoption of the UNCRC children's rights were viewed a quest for charity, they were viewed as the property of their parents without their own individual rights.²³⁷ South Africa Ratified to the UNCRC in 1995.

Corporal punishment is tantamount to violence, inhumane and degrading treatment in human rights lenses, which is prohibited by international rights instrument. The child's best interests are primary consideration in all actions concerning children in the UNCRC.²³⁸ It is crucial to note that the UNCRC respect the rights and duties of the parents to provide direction to the child in a manner consistent with the evolving capacities of the child.²³⁹ The UNCRC is clear that all forms of violence from a smack to a beating should not be allowed. Article 19 provides that "state parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child".²⁴⁰ Article 37 provides that "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."²⁴¹

4.2.1.1. General Comment by the United Nations Committee on the Rights of the Child on corporal punishment.

The CRC and other international human rights instrument recognize the right of the child to respect for the child's dignity and physical integrity and equal protection under the law. The Committee on the Rights of the Child (CoRC) issued a general comment to

²³⁶ Boezaart *Child Law in South Africa* (2017) 404.

²³⁷ Ibid 403

²³⁸ Article 3(1) of the UN Convention on the Rights of the Child.

²³⁹ Ibid at Article 14(2).

²⁴⁰ Article 19(1) of the UNCRC.

²⁴¹ Article 37(a) UNCRC.



highlight the obligation of all state parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of children and to outline the legislative and other awareness raising and educational measures that state must take.²⁴² The CoRC made it clear that addressing the widespread acceptance or tolerance of corporal punishment of children and eliminating it in the family, school and other settings, is not only an obligation of states parties under the UNCRC. It is also a key strategy for reducing and preventing all forms of violence in societies.²⁴³ Furthermore the committee issued a general comment that:

There is no ambiguity: 'All forms of physical or mental violence' does not leave room for any level of legalised violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them.²⁴⁴

The CoRC believes that the use of reasonable chastisement allows treatment and punishment of children involving physical and mental violence.²⁴⁵ It has noted that in many state there are explicit provisions in criminal and or civil (family) codes that provide parents and other carer with a defence or justification for using some degree of violence in "disciplining" children. For example, the defence of lawful or reasonable chastisement or correction has formed part of the English common law for centuries.²⁴⁶ The CoRC emphasizes that the UNCRC requires the removal of any provisions that allows some degree of violence against children in their homes/ families or in any setting.²⁴⁷ The CoRC does not approve any form of violence, in general comment no 13 the committee issued a comment that:

The committee has consistently maintained the position that all forms of violence against children, however light are unacceptable; "All forms of physical or mental violence" does not leave room for any level of legalized violence against children. Frequently, severity of harm of harm and intent to harm are not perquisites for the definitions of any violence. State parties may refer to such factors in intervention strategies in order to allow proportional response in the best interest of the child,

²⁴² CRC/C/GC/8 at para 2.

²⁴³ CRC/C/GC/8 at para 3.

²⁴⁴ CRC/C/GC/8 at para 18.

²⁴⁵ CRC/C/GC/8 at para 31.

²⁴⁶ *Ibid.*

²⁴⁷ CRC/C/GC/8 at par 31.



but definitions must in no way erode the child's absolute right to human dignity and physical and psychological integrity by describe some forms of violence as legally and / or socially acceptable.²⁴⁸

It is clear that the CoRC is against all form of violence and any defence that protect justifying the use of physical force.

The CoRC made observations to South Africa that while it is aware that corporal punishment is prohibited by law in schools, care institutions and the juvenile justice system; it remained concerned that corporal punishment is still permissible within families and that it is still regularly used in some schools and care institutions as well as generally within society. The CoRC recommends that the State party take effective measures to prohibit by law corporal punishment in care institutions.²⁴⁹ The CoRC recommended that South Africa reinforce measures to raise awareness on the negative effects of corporal punishment and change cultural attitudes to ensure that discipline is administered in a manner consistent with the child's dignity and inconformity with the UNCRC.²⁵⁰ It is also recommended that the State party take effective measures to prohibit by law the use of corporal punishment in the family and, in this context, examine the experience of other countries that have already enacted similar legislation.²⁵¹

4.2.2. African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the child (ACRWC) is the first comprehensive regional children's rights treaty for the promotion and protection of children's rights in Africa.²⁵² It came into force in 1999 and South Africa ratified in 2000.²⁵³

The ACRWC is not silent on the issue of violence against children. Article 11(5) provides that "state parties to the present charter shall take all appropriate measures to ensure that a child who is subjected to school or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child in conformity with the

²⁴⁸ CRC/C/GC/13 at para 17.

²⁴⁹ CRC/C/15/Add.122 at para 28.

²⁵⁰ *Ibid.*

²⁵¹ CRC/C/15/Add.122 at para 28

²⁵² Boezaart 426.

²⁵³ *Ibid.*



present Charter”.²⁵⁴ Parents have the primary responsibility for the upbringing and development of the child and to ensure that discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.²⁵⁵ Article 16 provides that “state parties to the present charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or ,maltreatment including sexual abuse, while in the care of the child”.

4.3. Foreign Jurisdictions’ approaches to Corporal Punishment in the home

A reading of the UNCRC and ACRCW clearly show that the two instruments do not promote in any way the spanking or chastisement of a child and that state parties should prohibit corporal punishment in all settings and to also remove all provisions that allows for the use of violence. In Sweden corporal punishment is prohibited in all settings, this jurisdiction is aligned with international law as they both don’t allow the use of force. Other Countries also have prohibited Corporal punishment in all settings although they align with international law the Court’s reasoning and approach is not the same.²⁵⁶

Jurisprudence from Israel and Canada will be examined. Israel took an approach similar to South Africa, and Canada on the other hand took a totally different approach from that of South Africa, making it possible to analyse the defence from two different perspectives.

4.3.1. Israel: Plonit v Attorney General 54 (1) PD 145 (Criminal Appeal 4596/98)

In this case, the appellant, the mother of two minor children was convicted in the District Court of assaulting her children and abusing them. The appellant was found to have hit her two children on various occasions, she was then charged with hitting her daughter with a vacuum,²⁵⁷ and for also hitting her son in his face with her fist breaking one of his

²⁵⁴ Article 11(5) of the ACRWC.

²⁵⁵ Article 20(1)(c).

²⁵⁶ The other states are Kenya, South Sudan, Congo, Tunisia and South Africa was recently added. See www.endcorporapunishment.org.

²⁵⁷ *Plonit v Attorney General* [2000] IsrLR 5-6.



teeth.²⁵⁸ The children's kindergarten teacher testified that the boy on two occasions came to the kindergarten with signs of violence next to his eye.²⁵⁹ The appellant did not deny hitting her children, she even admitted that the method of education by her was harsher than the norm but claimed to only hit her children when necessary and added that she regards the hitting as a deterrent.²⁶⁰ She did not express regret for hitting the children; she even went further by refusing to stop hitting the children.²⁶¹ The appellant was convicted for the act of offence of assault under S 379 of the *Pena* law.²⁶² The appellant argued before the trial court that even if the factual elements of the said offence were proved her acts did not amount to assault or abuse, since punishing her children with corporal punishment in order to educate them to obey does not breach any legal norm.²⁶³ The trial court rejected this argument, and it held that imposing punishment on children on a regular basis does not pass the test of reasonableness and is wrong from a legal and moral viewpoint.²⁶⁴

On appeal, two central questions were raised that the Supreme Court had to address. Firstly, whether the crime of abuse took place and secondly whether the physical punishment inflicted by a parent on his children was legitimate.²⁶⁵ With regard to the first question the court pointed out that the Penal law does not define the concept of abuse.²⁶⁶ With that being said the court further stated that the offence of abuse is an offence of behaviour and not an offence of consequence and for that reason, the prosecution does not need to prove that actual damage has been caused when it seeks to prove that an offence of abuse has been committed.²⁶⁷ The court pointed out that when examining the elements of the offence of abuse in the relationship between children and parents, we must remember that there are disparities of strength; that the parent has the power of authority and control, whereas the child does not.²⁶⁸ The court held that there is no doubt that the violence directed by them against the children had

²⁵⁸ *Ibid* at 6.

²⁵⁹ *Plonit v Attorney General* 9.

²⁶⁰ *Plonit v Attorney General* 10.

²⁶¹ *Ibid* at 11.

²⁶² *Plonit v Attorney General* 13.

²⁶³ *Ibid*.

²⁶⁴ *Plonit v Attorney General* 13.

²⁶⁵ *Plonit v Attorney General* 23.

²⁶⁶ *Plonit v Attorney General* 21.

²⁶⁷ *Ibid*.

²⁶⁸ *Ibid*.



the potential to damage them.²⁶⁹ The court endorsed the contention of the trial court where the trial court stated as follows:

“The court that determines judicial and ethical norms must decry the violence of parents against their children, even when they are dressed up as “educational philosophy”; and root out these phenomena once and for all”²⁷⁰

The Court pointed out that the issue of the legitimacy of parents inflicting corporal punishment on children is not only affecting their country but other countries too.²⁷¹ The Court further stated that over the years, English case law has held that the ‘reasonableness’ of the punishment will be examined in accordance with all the circumstances of the case, taking into account the age, physical condition, level of understanding and emotional maturity of the child.²⁷² The court adopted an approach that is in contrast with the English common law approach, according to this approach, corporal punishment as an educational method does not merely fail to achieve its goal, but also causes the child physical and emotional harm, which may leave its mark on him when he becomes an adult.²⁷³ The court stated that there can never be a justification in law based on an accepted social norm for an act of abuse.²⁷⁴ The court further stated the following:

“The rights of parents to raise and educate their children are not absolute rights. The relative nature of these is reflected in duty of the parents to care for the child, his welfare and his rights. Painful and humiliating punishment as an educational method not only fails to achieve its purpose and causes the child physical and emotional damage, but it also violates the basic rights of children in our society to dignity and the integrity of body and mind”.²⁷⁵

The court with regard to the rights of the child and nature of these referred to the remarks of Pres Shumgar where he pointed out that:

²⁶⁹ *Plonit v Attorney General* 23.

²⁷⁰ See *Plonit case v Attorney General* 24

²⁷¹ *Plonit v Attorney General* 24.

²⁷² *Plonit v Attorney General* 25.

²⁷³ *Plonit v Attorney General* 29.

²⁷⁴ *Ibid.*

²⁷⁵ *Plonit v Attorney General* 35.



“...the concept “rights of the child” tell us that the child has rights. The concept “rights of the child” in effect extends the canopy of constitutional protection over the child. It is expressed in recognition of his rights and in that all of the rights are also a surety that guarantees his welfare”²⁷⁶

The court held that corporal punishment of children or their humiliation and degradation by their parents as an educational method is totally improper, and it is a relic of socio-educational outlook that is absolute.²⁷⁷

The Israel court made reference to the rights of the child especially the right to dignity and protection. They emphasised the need for protection from defences such as reasonable chastisement. Israel is in line with its international obligation by making it clear that all forms of violence from a smack to a beating should not be contended. They fulfilled their obligation as a state party under the UN convention by preventing all forms of violence in societies as it is inhuman and degrading treatment.

4.3.2. Canada: Canadian Foundation for Children, Youth and the law v Attorney General in Right of Canada 2004 SCC 4.

Section 43 of the criminal code of Canada legally provides a justification for the use of force by parents and teachers against children by way of correction.²⁷⁸ Section 43 of the criminal code provides that:

“Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction towards a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances”²⁷⁹

The appellant being the Canadian Foundation for Children in this case requested the Supreme Court to declare that section 43 violates section 7, 12, and 15(1) of the Canadian Charter of Rights and Freedom.²⁸⁰ The Canadian Foundation for Children argued that section 43 violates section 7 of the Canadian Charter of Rights and freedom because it fails to give procedural protection to children, does not further the best

²⁷⁶ CA 2266/93 A v B at 253-254

²⁷⁷ Plonit v Attorney General 38.

²⁷⁸ Criminal Code (R.S.C 1985. C.C-46).

²⁷⁹ Section 45 of the Criminal code.

²⁸⁰ sections 7 provides the right to life, liberty and freedom, 12 provides for protection against cruel and unusual treatment or punishment or 15(1) provides for the right to equality of the Canadian Charter of Rights and Freedoms.



interest of the child, and is both over broad and vague; violates section 12 of Charter because it constitutes cruel and unusual punishment or treatment; and violates section 15(1) of the charter because it denies children the legal protection against assault that is accorded to adults.²⁸¹

The Court did not agree with the appellant, the Court stated that section 43 provides adequate procedural safeguards to protect those interests, since the children's best interests are represented at trial by the crown.²⁸² Secondly the Court analysed the application of the best interest of the child, the court pointed out that the principle is recognized as a "legal principle", but not an issue of "Fundamental Justice" in Canada.²⁸³ The Court went further by indicating that "Fundamental Justice" implies three criteria:

- (i) that it must be a legal principle,
- (ii) that there must be sufficient consensus that alleged principle is "vital or fundamental to our societal notion of Justice", and
- (iii) That the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results.²⁸⁴ The court relying on the tripartite criteria decided that though the principle of best interest constitute a legal principle, in its view did not measure up with the other two elements.²⁸⁵

Thirdly, the Court stated that section 43, if properly construed, is not unduly vague; it sets real boundaries and delineates a risk zone for criminal sanction and avoids discretionary law enforcement.²⁸⁶ The Court stated that the force applied must have been intended to be for educative or corrective purposes, relating to restraining, controlling or expressing disapproval of the actual behaviour of a child capable of benefiting the correction.²⁸⁷ The Court held that section 43 does not extend to an

²⁸¹ *Canadian Foundation for Children, Youth and the law v Attorney General in Right of Canada* 2004 SCC 4 at 90.

²⁸² *Ibid* 77.

²⁸³ *Ibid*.

²⁸⁴ *Ibid* 77.

²⁸⁵ *Canadian Foundation v Attorney General in Right of Canada* 91.

²⁸⁶ *Canadian Foundation v Attorney General in Right of Canada* 77.

²⁸⁷ *Ibid*.



application of force that result in harm or the prospect of harm.²⁸⁸ The Court held that the conduct permitted by section 43 does not involve “cruel and unusual” treatment or punishment by the state and therefore does not offend section 12 of the charter and that Section 43 permits only corrective force that is reasonable, further conduct cannot be at once both reasonable and an outrage to standard of decency.²⁸⁹

The Court held that while children need a safe environment, they also depend on their parents and teachers for guidance and discipline, to protect them from harm and to promote their healthy development within the society.²⁹⁰ The Court went further to state that section 43 is Parliament’s attempt to accommodate both of these needs, by providing parents and teachers with the ability to carry out the reasonable education of the child without the threat of sanction by the criminal law.²⁹¹

The Supreme Court rejected the Foundation’s contentions and refused to issue the declaration that section 43 violates section 7, 12, and 15(1) of the Canadian charter of rights and freedoms. The Court pointed that the decision not to criminalize such conduct is not grounded in devaluation of the child, but in a concern that to do so risks ruining lives and breaking up families.²⁹²

Canada took a different approach from that of Israel, with the Supreme Court invoking an approach leaving a room for parents to still physically chastise their children for educative and discipline purposes. Corporal punishment remains legal and the defence of reasonable chastisement still suffices subject to certain parameters. It is important to note that the best interests of the child are only seen as a legal principle and not a constitutional right in and of itself in Canada. The Canadian Court did not take into consideration its international obligation to prohibit all form of physical punishment and to remove all legal provisions which allows some degree of violence against children.

²⁸⁸ *Ibid.*

²⁸⁹ *Canadian Foundation v Attorney General in Right of Canada* 78.

²⁹⁰ *Ibid.*

²⁹¹ *Canadian Foundation v Attorney General in Right of Canada* 78.

²⁹² *Ibid.*



4.4. South Africa's Approach to the use of corporal punishment in the home

Outlawing corporal punishment remains a positive move that any civilised democratic society should take towards the advancement of children's rights.²⁹³ Corporal punishment in the home has been powerfully entrenched as a disciplinary tool in South African society.²⁹⁴ In October 2017, in the case of *YG v S* the High Court handed a judgment that declared the common law defence of reasonable or moderate chastisement unconstitutional. The matter landed in the Constitutional Court where the Court handed a landmark judgement that declared that the High Court was correct in declaring the defence unconstitutional.

4.4.1. Freedom of Religion *South Africa v Minister for Justice and Constitutional Development and Others* [2019] ZACC 34.

This study briefly summarises the facts of the above case, with particular interest being given to the salient points arising from the case. A father (YG) was tried in the Johannesburg Regional Court on two charges of assault. The first charge of assault pertained to the beating of his 13 year old son and the second one related to his alleged assault of his wife. For the purpose of the current matter, focus shall be put on the first charge. YG alleges that he found his son M, in the room watching pornographic material on the iPad. M denied the allegation.²⁹⁵ After M denied the allegation on numerous times his father then allegedly hit him. According to M's version the alleged hitting included punches and kicking's and that all this transpired when he was raging with anger.²⁹⁶ YG's version was, however, different as he testified that he hit M on the back of the thighs and that this happened when M tried to twist away from his blow. He claimed that he did not intend to assault M. At the trial his defence was that he had done nothing more than to exercise his rights as a parent to chastise his son, he said: "I just intended to discipline him (M) out of concern to show him in the future what is right and what is wrong".²⁹⁷ He raised the defence of reasonable and moderate

²⁹³ Dziva "A positive step towards ending corporal punishment against children" 2013 .

²⁹⁴ Clark "Why can't I discipline my children properly? Banning corporal punishment and its consequences" 2020 SALJ 336.

²⁹⁵ *YG v S* 2018(1) SACR 64(GJ) 2.

²⁹⁶ *Ibid.*

²⁹⁷ *YG v S* at 3.



chastisement.²⁹⁸ The Court held that his conduct in respect of his son was of such a reprehensible nature that its merits are beyond reasonable doubt and that his conduct was unlawful. The accused exceeded the boundaries of chastisement by hitting his son with a fist and by kicking him.²⁹⁹ He was convicted of common assault.

As a result, YG then proceeded to appeal to the High Court. At the heart of the matter before the High Court the issue was whether the defence of moderate chastisement to the charge of assault, which is based on the common law right of a parent to inflict corporal punishment on his children, is compatible with the Constitution.³⁰⁰ Freedom of Religion South Africa (FORSA) as the 4th *amicus curiae* explained that its interest in the matter lied that millions of believers believe that the scripture command reasonable and appropriate correction of their children. Thus for millions of believers, child correction, including physical chastisement at times, is central to their faith.³⁰¹ FORSA submitted that the court has a duty to respect and protect the religious convictions and beliefs of those believers who flow this tenet.³⁰² They advocated for the retention of the common-law defence of Reasonable Chastisement on basis that is compatible with the Constitution. The judge rehashed that the South African Constitution “imagines children as their own constitutional beings. The Court went further by stating that children are entitled under the Constitution and legislation like the Children’s Act to require their parents to protect their rights. If their parents fail in this regard, the state bears the overarching obligation to ensure that children’s rights are respected, protected and enforced.³⁰³ The Court highlighted that the Constitution is very explicit in its exposition of rights, It gives protection from all form of violence whether public or private sources.³⁰⁴ The court stated that one of the difficulties with the defence of reasonable chastisement is that it permits a parent to inflict some level of violence on a child, and to breach their right to bodily and psychological integrity for disciplinary purposes.³⁰⁵ Even if the level of chastisement is adjudged to be “reasonable” under the defence, physical

²⁹⁸ *Ibid.*

²⁹⁹ YG v S 16.

³⁰⁰ YG v S 10.

³⁰¹ YG v S 7.

³⁰² *Ibid.*

³⁰³ YG v S 29.

³⁰⁴ *Ibid* 32

³⁰⁵ YG v S 33.



chastisement inevitably involves a measure of violence.³⁰⁶ The Court stated that the defence in relation to the child's right to dignity points to a further constitutional deficiency in the defence. The court articulated that the defence treats child victims of assault by their parents differently to adult victims of assault.³⁰⁷

The Court had to consider whether the violation can be justified. The court found that the limitation imposed by the reasonable chastisement defence are not Constitutionally justifiable under section 36, the court held that " it is time for our country to march in step with its international obligations under the CRC by recognising that the reasonable chastisement defence is no longer legally acceptable under our constitutional dispensation".³⁰⁸ The High Court held that the trial Court was correct in its findings that the appellant had exceeded the bounds of moderate chastisement.³⁰⁹ The appeal was dismissed and the Court declared the defence to be unconstitutional. An application for leave to challenge the invalidity of the common law defence of moderate and reasonable chastisement was lodged in the Constitutional Court.

In the Constitutional Court

An application for leave to challenge the declaration of constitutional invalidity of parents to administer reasonable and moderate chastisement to her child was lodged by Freedom of Religion South Africa in the Constitutional Court. Before the YG decision it was a valid defence used by parents against a charge of assault throughout South Africa.³¹⁰ This legal entitlement of parents to discipline their own children exists only within the confines of moderation and reasonableness.³¹¹

In the Constitutional Court, submissions were made from both the Appellant and the Respondents. Freedom of Religion South Africa (FORSA) being the Applicant in this matter, pointed out that parental discipline is an important part of the parent's duty to ensure that the child is brought up in a socially acceptable manner.³¹² Based on this point they submitted that the court a quo misdirected itself and that it confused or

³⁰⁶ *Ibid.*

³⁰⁷ YG v S 33.

³⁰⁸ YG v S 40.

³⁰⁹ *Ibid* 43.

³¹⁰ FORSA v Minister of Justice and Constitutional Development [2019] ZACC 34 para 4.

³¹¹ Burchell and Milton *Principle of Criminal Law* (1991) 163.

³¹² FORSA's Head of Arguments 10.



conflated reasonable and moderate chastisement with physical violence or abuse, and that the two are not comparable.³¹³ They further pointed out that although South Africa has ratified and is bound by the UN Convention on the Rights of the Child (UNCRC) and African Charter on the Rights and Welfare of Children (ACRWC), they highlighted that the CRC and the ACRWC are silent on the issue of physical correction and that as far as they have made recommendations for the abolition of physical chastisement in the home.³¹⁴ It is trite law that comments issued by treaty are not legally binding on the state parties.³¹⁵ Based on this reason they submitted that the court a quo erred by effectively finding that South Africa has an international obligation in terms of the CRC to abolish physical correction in the home. FORSA respectfully requested the Honourable Constitutional Court to set the judgement aside, alternatively refer the matter to parliament to be dealt with accordingly.

Various government departments namely; Department of Justice and Constitutional Development, Department of Social Development and National Director of Public Prosecution acting through their ministers, were the respondents and they pointed out that the absence of the defence will expose well-meaning parents to being criminalized is out of step with the underlying objectives to the Children's Act 38 of 2005, which are to promote positive parenting and positive discipline, rather than criminalizing errant parental behaviour.³¹⁶ They submitted that removal of the reasonable chastisement defence will not prevent believers from disciplining their children. Parents who are believers may have to adapt their mode of discipline to one that better gives expression to the best interests of the child.³¹⁷ They further submitted that the reasonable chastisement defence fails to protect and promote numerous rights of the child under the Constitution.³¹⁸ They submitted further that the common law should be developed in line with the jurisprudence of this Court.³¹⁹

Children's Institute, Quaker Peace Centre and Sonke Gender Justice being the 5th to 7th Respondent, pointed out that unlike the Applicant, they argue that the promotion of

³¹³ Ibid Para 32.

³¹⁴ FORSA's Head of Arguments 25.

³¹⁵ *Ibid.*

³¹⁶ Ministers Head of Arguments in the FORSA case 14.

³¹⁷ *Ibid* at 14-15.

³¹⁸ *Ibid* 23.

³¹⁹ *Ibid* 24.



positive parenting introduces additional disciplinary approaches that are beneficial to parents and children and their relationship, as well as providing the foundation for impulse regulation and self-control. They further argued that the inclusion of private source in section 12(1)(c)³²⁰ makes it a highly persuasive argument against any form of violence in the home and that corporal punishment in the home is arbitrary and a context in which making complaints is equally difficult, if not more or so.³²¹ They submitted that the common law defence of reasonable chastisement is unconstitutional and no longer applies and that the development of the common law referred to above of this order shall be applicable only to conduct which takes place after the date of the judgement in this matter.³²²

The Constitutional Court stated that chastisement does by its very nature entail the use of force or a measure of violence; it went further to state that we must ask why it is necessary to resort to chastisement in the first place.³²³ The court rightly posed the question: “why is it necessary to resort to chastisement in the first place? Is it not the actual or potential pain or hurt that flows from it that is believed to be more likely to have a greater effect than any other reasonably available method of discipline? Otherwise, why resort to it?”³²⁴ It was said that since punishment by the application of force to the body of a child by a parent is always intended to hurt to some degree, moderate and reasonable chastisement indubitably amount to legally excusable assault.³²⁵ The court highlighted that:

“We have a painful and shameful history of widespread and institutionalised violence and section 12 exists to help reduce and ultimately eradicate that widespread challenge. “All forms” is so all-encompassing that its reach or purpose seems to leave no form of violence or application of force to the body of another person out of the equation. To drive the point home quite conclusively, the

³²⁰ Provides that everyone has the right to freedom and security, which includes the right to be free from either public or private source.

³²¹ 5th to 7th respondent’s head of Arguments in the FORSA 17.

³²² 5th to 7th respondent 65.

³²³ *FORSA v Minister of Justice and Constitutional Development at para 39.*

³²⁴ *Ibid.*

³²⁵ *FORSA v Minister of Justice and Constitutional Development para 41.*



Constitution extends the prohibition to violence from “either public or private sources”.³²⁶

The court pointed out that there is sense of shame, a sense that something has been subtracted from ones human whole and a feeling than before, that comes with the administration of chastisement to whatever degree.³²⁷ The court held that the defence impairs the dignity of a child and limits her section 10 constitutional rights.³²⁸ The court stated that the primary responsibility to mould and discipline children into future responsible citizens is that of parent.³²⁹ The court rehashed that the state is obliged to respect, protect and fulfil a child’s section 28 protection and that that the judiciary is thus bound by the provisions of section 28.³³⁰ This means that in the approach to a parent’s entitlement to chastise a child reasonably and moderately, of paramount importance should be the best interest of the child in respect of protection from potential abuse and the need to limit the right because of the good a child and society stand to derive from its retention as a disciplinary tool.³³¹ The purpose of moderate and reasonable chastisement is to mould a child into a responsible member of the society. The court then posed a question: “What then is in her contextual best interest?”³³² In answering the question the court stated the following:

“To achieve the same laudable objective without causing harm or unduly undermining the fundamental rights of the child. In other words, if there exists a disciplinary mechanism or measure that is more consistent with love, care, the more balanced protection of the rights and advancement of the well-being of a child and another that is less so, the former must be preferred for it gives expression to what is in the best interest of the child. It recognises, in a practical way, the paramount importance of a child’s best interest.”³³³

³²⁶ *FORSA v Minister of Justice and Constitutional Development para 42.*

³²⁷ *FORSA v Minister of Justice and Constitutional Development para 48.*

³²⁸ *Ibid.*

³²⁹ *FORSA v Minister of Justice and Constitutional Development para 51.*

³³⁰ *FORSA v Minister of Justice and Constitutional Development Para 56.*

³³¹ *Ibid.*

³³² *FORSA v Minister of Justice and Constitutional Development para 66.*

³³³ *FORSA v Minister of Justice and Constitutional Development para 66.*



The court concluded that the High Court was correct in its conclusion that the common law defence of reasonable and moderate chastisement is unconstitutionally invalid and that this declaration be prospective in its operation.³³⁴

This serves as a touchstone for the possible expansion of the protection of the rights of children against all forms of violence. Unlike Canada the South African Constitutional Court considered international law, and fulfilled its international obligation of preventing all form of violence against children in all setting.

4.5. Can the defence of Reasonable chastisement be justified under our Constitutional era?

Constitutional rights are not absolute; they have boundaries set by the rights of others and by important social concerns such as public order. A consideration of the rights infringements is the first stage of the Bill of Rights inquiry. Having established the infringement of rights, the court will then consider whether those infringements can be justified.³³⁵ Section 36 of the Constitution is the limitation clause and it reads thus:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) The nature of the right;
- (b) The importance of the purpose of the limitation;
- (c) The nature and extent of the limitation;
- (d) The relation between the limitation and its purpose; and
- (e) Less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

³³⁴ *Ibid* at para 73.

³³⁵ Skelton 357.



A limitation of a right refers to whether there is a justifiable infringement in violating of a particular right. So, any law or conduct that limits a right infringes that right, however, not every infringement of a right is unconstitutional as long as it can be justified in terms provided for in section 36 above.³³⁶ Thus, a limitation of a right that accords with the provisions of section 36 will be constitutional and therefore valid. Having found that the reasonable chastisement defence infringes some of the children's rights, it is trite to determine whether this violation can or cannot be justified in terms of section 36. I now proceed to analyse the five factors specified by s 36 in turn.

4.5.1 The nature of the right.

This involves weighing up the harm done by a law, the infringement of a fundamental right against the benefit that the law seeks to achieve or the purpose.³³⁷ The common law defence of reasonable and moderate chastisement suffices for parents when charged with assault. Parents can physically punish their children and raise the defence of reasonable chastisement when facing charges of assault. It is pivotal to note that if this defence did not exist in law, parents would be liable for assault when they physically punish their children. Corporal punishment causes harm, and thus infringes the children's rights to freedom of security and free from violence. The defence treats children with less protection under the law and discriminates against them based on the ground of age.

4.5.2. The importance of the purpose of the limitation

In order to be justifiable, the limitation must serve a purpose which positively contributes to the establishment of an open and democratic society based on human dignity, equality and freedom.³³⁸ A limitation of rights that serves a purpose that does not contribute to an open democratic society cannot be justified.³³⁹ The indicative purpose of the defence of reasonable and moderate chastisement is to enable parents to provide discipline and correction to their children, teaching them what is right and wrong. *In the*

³³⁶ Currie & De Waal *the Bill of Rights Handbook* (2013) 151.

³³⁷ Currie & De Waal 164.

³³⁸ Skelton at 357-358.

³³⁹ Currie & De Waal 166.



case of *S v Lekgathe*³⁴⁰ the court confirmed that “a parent or one placed *in loco parentis* ... [is] entitled to inflict moderate and reasonable chastisement on children where necessary for purposes of correction and discipline.”³⁴¹ The sole purpose of physical punishment is to correct children. Corporal punishment serves a purpose that could be served by other alternative forms of discipline.

4.5.3. The nature and extent of the limitation

The nature and extent of the limitation considers how extensive the infringement is.³⁴² It must be determined whether the limitation does more damage to rights than is reasonable for achieving its purpose.³⁴³ The nature of the reasonable chastisement defence is such that it provides parents with grounds of justification in law when charged with an act of assault. Parents are afforded protection from both private and public areas; however, children are only protected from the public area. This results in children being offered less protection by the law. The defence serves the purpose of correcting the child; however the chastisement causes harm by infringing the right of children to be free from cruel and degrading punishment and affords children less protection when it comes to assault.

4.5.4. The relation between the limitation and its purpose

The limitation must serve a purpose which positively contributes to the establishment of an open and democratic society based on human dignity, equality and freedom. To serve a legitimate limitation of a right, a law that infringes the right must be reasonable and justifiable.³⁴⁴ If the law does not serve the purpose it is designed to serve it cannot reasonably limit a right.³⁴⁵ Children who are spanked more often exhibit more socio-emotional problems in the form of hyperactivity, aggression and low self-esteem regulations.³⁴⁶ On the other hand, physical punishment guarantees immediate compliance. Corporal punishment does not effectively ensure that children will never

³⁴⁰ *S v Lekgathe* 1982 (3) SA 104 (B).

³⁴¹ *Ibid* 109.

³⁴² Skelton at 358.

³⁴³ Currie & De Waal at 168

³⁴⁴ Currie & De Waal at 169

³⁴⁵ *Ibid*.

³⁴⁶ Dawes et al “Corporal Punishment of children: A South African National survey” 2005 11.



misbehave. Even if corporal punishment does contribute to some extent towards achieving its purpose, in order to be justifiable the degree to which it achieves that purpose must be adequate. With regard to corporal punishment it still shows that the degree of proportionality is insufficient.

4.5.5 Less restrictive means to achieve the purpose

The limitation will not be proportionate if other means could be employed to achieve the same ends that will either not restrict rights at all, or will not restrict them to the same extent.³⁴⁷ The purpose of the defence of reasonable and moderate chastisement is to enable parents to provide discipline and correction to their children, teaching them what is right and wrong. A range of alternative child disciplining methods exist as alternatives to corporal punishment, which are equally or less restrictive and more conducive to children's rights than corporal punishment. Parents can discipline their children by sending them to naughty corners, grounding them by taking their cell phone or not allowing them to watch the television for certain days. They can correct them by sitting down with them and explain that their behaviour is unacceptable and teach them the right ways without having to chastise them.

The study submits that the defence does not meet the requirements of justification as regulated by section 36. In my opinion, the Constitutional Court in the case of *Freedom of Religion South Africa v Minister of Justice and Constitutional development* was correct in declaring the defence unconstitutional.

4.6. Conclusion

The study compared the Constitutional Court decision with the Canadian and Israel decision. Since the new constitutional era in South Africa, corporal punishment has been prohibited in schools and alternative cares however dragged to prohibit Corporal punishment in the home setting. Corporal punishment has recently been prohibited in the home sphere by the Constitutional Court in the Case of *Freedom of Religion v*

³⁴⁷ Currie & De Waal 170



*Minister of Minister of justice.*³⁴⁸ The decision of the Constitutional Court declaring the common law defence of reasonable and moderate chastisement unconstitutional, serves as a benchmark for the possible effective protection of the rights of children against all forms of violence.

The Israel Court took a similar approach to that of South Africa; on the other hand Canada took a different approach from that of South Africa. South Africa and Israel declared the Common law defence of reasonable chastisement unconstitutional and infringing the children's constitutional right, this decision consequently prohibits the use of physical force as a means of discipline. On the other hand, in Canada corporal punishment remains legal and the defence of reasonable chastisement still suffices subject to certain parameters. It is important to note that in Canada the best interest of a child is a legal principle that carries power in many contexts, however, is not a principle of fundamental justice. The South African legal system sees the best interest of the child as being of paramount importance in every matter concerning the child. The Canadian approach is more focused on protecting the family unit than protecting the children's fundamental rights. The decision took by the South African Constitutional Court to declare the defence unconstitutional addresses and provides the necessary Protection for children in line with South Africa's international and Constitutional obligations.

³⁴⁸ *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and others* [2019] ZACC 34.



Chapter 5: Conclusion and Remarks.

5.1. General

Since the coming into operation of the Constitution of the Republic of South Africa in 1996, the focus of the private law has increasingly shifted from parents to children.³⁴⁹ Parents derived their rights to subject children to corporal punishment from the common law. The general rule is that parents may inflict moderate and reasonable chastisement on a child for misconduct, provided that this is not done in a manner offensive to good morals or other objects than correction and admonition.³⁵⁰ Even though the common law crimes such as assault do exist in South Africa, parents charged with the crime of assault against children could raise the defence of reasonable and moderate chastisement to avoid being held liable for physically punishing children. One of the most convincing reasons for many parents to resort to the use of corporal punishment in the home is that it ensures immediate compliance.³⁵¹

5.2. Conclusion

The fundamental issue which this study sought to establish was whether the Constitutional Court was correct in declaring the defence unconstitutional. Corporal punishment is against human rights norms and standards, in human rights lenses corporal punishment is equivalent to violence, and degrading treatment, which is prohibited by international human instruments including the UNCRC and ACRWC which South Africa is member state to.³⁵² Corporal punishment amounts to a total lack of respect for the human being and therefore cannot depend on the age of the human being. In the case of *YG v S* corporal punishment was found to be in violation of a host of some fundamental human rights, including the right to dignity, equality and to be free from all forms of violence.³⁵³

³⁴⁹ Boezaart *Child Law In South Africa* (2017) 1.

³⁵⁰ *Rex v Janke and Janke* 1913 TPD at 385-386.

³⁵¹ Gershoff et al "Spanking and Child Outcomes: Old Controversies and Now Meta-analyses" 2016 30 *Journal of Family Psychology* 457.

³⁵² see UN Convention on the Rights of the Child in Chapter 4 above

³⁵³ *YG v S* 2018(1) SACR 64 (GJ).



Regardless of the force applied when physically punishing a child, whether severe or mild, corporal punishment is both morally impermissible and in violation of children's constitutional rights.³⁵⁴ Children may be different from adults because they are fragile, still depend on their parents and are still developing, but that does not mean they should get less protection from the law. There is no hierarchy of rights in the Bill of Rights, meaning rights have to be balanced.³⁵⁵ The defence of reasonable and moderate chastisement affords children less protection from assault under the law than it affords adults. Children are discriminated based on the ground of age. In addition to the violation of human rights, corporal punishment is harmful to the healthy development of children. Physical punishment carries the message that violence is the answer or solution to every problem, and children grow with it.³⁵⁶ Corporal punishment cannot be deemed the only effective alternative means of discipline. More disciplinary methods that take children's fundamental rights into consideration can be used.

Outlawing the defence of reasonable chastisement is the first step towards ending child abuse. After decades of the use of corporal punishment in the home setting, the South African Constitutional Court outlawed the admissibility of corporal punishment by declaring the defence of reasonable chastisement as unconstitutional.³⁵⁷ This sends a message that physical force is violation of rights that cannot be tolerated as it infringes the children's human rights. This serves a touching stone to teaching children that violence is not a solution. The decision of the Constitutional Court constitutes a good legal precedent for South Africa and gives children protection from assault. International law treaties such as the UNCRC and ACRWC made it clear that all forms of violence from a smack to a beating should not be allowed.³⁵⁸ The UN Committee on the right of the child is advocating for removal of physical chastisement from national laws.³⁵⁹ South Africa fulfilled both its international and Constitutional obligation by prohibiting all forms of violence and protecting children from any form of violence and outlawing the common

³⁵⁴ See Chapter 3 above on Dignity.

³⁵⁵ See Bekink in Chapter 3 above.

³⁵⁶ See Edelstain in Chapter 2 above.

³⁵⁷ See the Case of Freedom of Religion South Africa v Minister of Constitutional Justice in Chapter 4 above.

³⁵⁸ See article 2 and 37 of the UNCRC and also Article 11 and 16 of the ACRWC in Chapter 4 above.

³⁵⁹ see CRC/C/GC/8 at par 31 in Chapter 4 above.



law provision of reasonable chastisement that allowed some degree of violence against children in their home.

5.3. Remarks

Declaring the defence of corporal punishment unconstitutional is the first step towards ending child abuse, however, the legal ban is not sufficient. What we learned from the ban of the use of corporal punishment in schools is that a legal ban without proper introduction of alternatives means of discipline and programmes is problematic. A legal prohibition is not sufficient, much more is needed. It will be essential to develop parenting programmes. Parents must be taught about alternative means of discipline and the long term effects of using corporal punishment on their children. Furthermore, make parents aware of the connection of chastising children and the cycle of abuse. The government must use the media to convey a message that the use of corporal punishment is illegal. The government can use media to send a strong message about the effects of corporal punishment by creating documentaries that address child violence and how children feel and having them broadcasted on the most watched channels. Parenting lessons must be included in school programmes so that children can see the importance of building a relationship with their children and not resort to physical punishment from an early age. The purpose of declaring the defence of reasonable chastisement is not to disempower parents and ruin the family relation, there must be alternative ways to deal with parents who breach the ban of reasonable chastisement other than the criminal way, parents need therapy as most were subjected to physical punishment as children and grew with the mentality that physical force is the only way. There must be a statute or the Children's Act must be amendment to cover the issue of the use of force against children.



BIBLIOGRAPHY

LEGISLATION

Children's Act 38 of 2005.

Child Care Act 74 of 1983.

Constitution of the Republic of South Africa Act 108 of 1996.

South African School Act 84 of 1996.

CASE LAW

Carmichele v Minister of Minister of Safety and Security 2001(4) SA 938 (CC) SA

Centre for Child Law v Minister of Justice and Constitutional Development and Others 2009 2 SACR 477 (CC).

Christian Education South Africa v Minister of Education 2004(4) SA 757(CC).

Du Preez v Conradie 1990(4) SA 46(B).

Freedom of Religion South Africa v Minister of Justice and Constitutional development and Others [2019] ZACC 34.

Government of the Republic of South Africa & Others v Grootboom & Others 2001 (1) SA 46 (CC).

Harksen v Lane NO 1998(1) SA 300 (CC).

Le Roux v Dey 2011(3) SA 274 (CC).

Minister of Welfare and Population v Fitzpatrick and others 2000 (3) SA 422 (CC).

National Coalition for Gay and Lesbian v Minister of Justice 1991(1) SA 6 (CC).

President of RSA v Hugo 1997(4) SA 1(CC).



Prinsloo v Van der Linde 1997 (3) SA 1012 (CC).

R v Janke and Janke 1913 TPD 382.

R v Schoombee 1924 TDP 481.

Rex v Theron and another 1936 OPD 166.

S v Bhulwana 1996(1) SA 388 (CC).

S v Baloyi (Minister of Justice and another) 2002(2) SA 425 (CC).

S v Dodo 2001 (3) SA 382 (CC).

S v Kumalo and others 1965(4) SA 565 (N).

S v Lekgathe 1982(3) SA 104 B

S v M 2008(3) SA 232(CC).

S v Maisa 1968(1) SA 271 (T).

S v Makwanyane 1995(3) SA 391(CC)

S v Mamabolo 2001(3) SA 409 (CC)

S v Williams 1995(3) SA 632 (CC).

Shabalala v Attorney General of the Transvaal 1996(1) SA 725 (CC)

Teddy Bear Clinic for Abused children v minister of Justice and Constitutional Developments 2013 (12) BCLR 1429 (CC).

Van der Burg and Another v Director of Public Prosecution 2012 (2) SACR 331 (CC)

YG v S 2018(1) SACR 64(GJ).

Foreign Case Law

Campbell & Cosans v United Kingdom [1980] 3 EHRR 531 566.

Canadian Foundation for Children, Youth and the Law v Canada (Attorney General) 2004 SCC 4.

Gillick v West Norfolk and Wisbech Area Health Authority [1986] 1 AC 112 at 185.

Planned Parenthood v Danforth (1976) 428 US.

Plonit v Attorney General 54 (1) PD 145 (Criminal Appeal 4596/98).



R v Jackson (1891) 1 QB 671.

Regina v Hopley 1860 (2F.F.202)

BOOKS

Alston P & Tobin J *Laying the Foundation for Children's Rights* UNICEF (2005)

Austin G *children: stories the law tells (1994)*

Blackstone W *The Commentaries on the Law of England* Clarendon press: Oxford (1765-1770).

Boezart T *Child Law in South Africa (2nd ed)* Claremont:Juta (2017).

Burchell M & Milton J *Principle of Criminal Law* Claremont: Juta(1991).

Burchell M *Principle of Criminal Law* Claremont: Juta (2016).

Currie I & De waal J *The Bill of Right Handbook* Claremont: Juta (2018).

Heaton J *South African Family Law* Durban: LexisNexis (20.04).

McCrudden C *Understanding Human Dignity* (2012).

Ngidi R *The Role of International Law in the Development of Children's Rights in South Africa: A Children's Rights Litigator's perspective* in Killinder M (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010).

Porteus K, Vally S & Ruth T *Alternatives to Corporal Punishment, Growing Discipline and Respect in our Classrooms* Sandown: Heinemann (2001).

Snyman CR *Criminal Law (4th ed)*Durban: LexisNexis (2002).

Woolman S, Roux T & Bishop M *Constitutional law of South Africa*(2002).

Veriava F & Power T" *Basic Education Rights Handbook-Education Rights in South Africa Chapter 19: Corporal Punishment*".



JOURNAL

Armstrong A “A Child Belongs to Everyone: Law, Family and the Construction of the Best Interests in Zimbabwe”(1995) 11 *Child Rights Series* 5.

Baumrind D “Parenting: the Discipline Controversy Revisited” (1996) 45 *Family Relations* 405.

Bekink B “When Do Parents Go Too Far ? Are South African Parents Still Allowed to Chastise their Children through Corporal Punishment in their Private Homes” (2006) 2 *SACJ* 173.

Clark B “Why Can’t I Discipline My Children Properly? Banning Corporal Punishment and Its Consequences “(2020) 137 *SALJ* 335.

Du Plessis E, Van der Walt G & Govindjee A “The Constitutional Rights of Children to Bodily Integrity and Autonomy” (2014) 35.

Dziva C “The 2013 Constitution of Zimbabwe: *A positive step towards ending corporal punishment against children*” (2013) 20 *South African Journal* 28.

Edelstein I “Pathways To Violence Propensity : Results from a Two-Wave Study of Young Males in Urban South Africa” (2018) 28 *Journal of Psychology in Africa* 33.

Gershoff E & Bitensky S “The case against corporal punishment of children: Converging Evidence From Social Science Research and International Human Rights Law and Implications for U.S. Public Policy” (2007) 13 *Psychology, Public Policy, and Law* 231.

Gershoff E “Corporal Punishment by Parents and Associated Child Behaviours and Experiences: A Meta-Analytic and Theoretical Review” (2002) 128 *Psychological Bulletin* 539.

Gershoff T & Grogan-Kaylo A “Spanking and Child Outcomes: Old Controversies and Now Meta-analyses” (2016) 30 *Journal of Family Psychology* 453.

Kleynhans D “*Considering The Constitutionality Of The Common Law Defence Of Reasonable and Moderate chastisement*”(Unpublished LLM dissertation, University of Pretoria) 2011.

Lenta P “Corporal punishment: A Philosophical Assessment” (2018).



Levy S “*Criminal Liability for the Punishment of Children: An Evaluation of Means and End*” (1953) 43 *The Journal of Criminal Law and Criminology* 719

Lubaale E “Reconceptualising “Discipline” To Inform an Approach to Corporal Punishment That Strikes A Balance Between Children’s Rights And Parental Rights”(2019) 20 *South African Journal* 36.

Morrell R “Corporal Punishment in South African Schools: A Neglected Explanation for its Persistence” (2001) 21 *South African Journal of Education* 292

Moyo A ‘*Reconceptualising the ‘Paramountcy Principle’ Beyond the Individualistic Construction of the Best Interest of the Child*’ (2012) 12 *African Human Rights Law Journal* 142

Pappas A “Law and the Status of the Child” (1983) 2000 *THRHR* 201.

Pete S “A practice that smacks of abuse, Children First” (1999).

Pete S “To Smack or not to Smack? Should the Law Prohibit South African Parents from Imposing Corporal Punishment on their Children?” (1998) 14 *SAJHR* 442.

Robinson J “An Introduction to the International Law on the Rights of the Child Relating to the Parent-child Relationship” (2002) *Stell LR* 309.

Rhona S “Hands-off Parenting? Towards a Reform of the Defence of Reasonable Chastisement in UK” (2004) 16 *Child and Family Law Quarterly* 261.

Sarkin J “Corporal Punishment (1996) 113 *SALJ* 71.

Scarre G “Corporal Punishment” (2003) 6 *ethical theory and moral practice* 295.

Simon L, Simon R and Su X “*Consequences of Corporal Punishment Amongst African American: The Importance and Theoretical Review*” (2013) 42 *Journal of Youth And Adolescent* 1273.

Skelton A “S v Williams: A Springboard for Further Debate about Corporal Punishment” (2015) ACTA 337.



Skelton “*The Role of the Courts in Ensuring the Right to a Basic Education in a Democratic South Africa: A Critical Evaluation of Recent Education Case Law*” (2013) 1 *De Jure* 619.

Vohito S “Using the Courts to End Corporal Punishment –The International Scorecard” (2019) 52 *De Jure Law Journal* 597

INTERNATIONAL INSTRUMENTS

African Charter on the Rights and Welfare of the Child.

United Nations Convention on the Rights of the Child

United Nations Convention on the Rights of the Child, General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment, CRC/C/GC/8.

United Nations Convention on the Rights of the Child, General Comment NO.13 (2011): The Right of the Child to Freedom From all Forms of Violence, CRC/C/GC/13.

United Nations Convention on the Rights of the Child, Concluding observations of the Committee on the Rights of the Child: South Africa,(2000) CRC/C/15/Add.122.

United Nations Convention on the Rights of the Child, Concluding Observations on the Second Periodic Report of South Africa,(2016) CRC/C/ZAF/CO/2

INTERNET

Bower C Prohibition of Corporal and Humiliating Punishment in the Home. The PAN: children 1. <http://children.pan.org.za/> accessed on 12 July 2020

Global Initiative to End All Corporal Punishment of Children
<http://www.endcorporalpunishment.org/pages/frame.html>> (accessed 11 March 2020)

<https://www.apa.org>.accessed (11 June 2020)

www.capetalk.co.za.accessed (10 March 2020).

<https://healthunits.com>.accessed(20 March 2020)



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

UNICEF Report hidden in plain sight: a Statistical Analysis of Violence against children (2014), available at www.unicef.org/publications/index-74864.html accessed (11 July 2020)

<https://healthunits.com> accessed (22 June 2020).

Others

Dawes et al “Corporal Punishment of Children: A South African National Survey ‘Human Science Research Council Child Youth and Family Development Report’ 2005.

Scottish law reform 1992

Criminal Code (R.S.C 1985. C.C-46).