CONSIDERING THE CONSTITUTIONALITY OFTHE COMMON LAW DEFENCE OF "REASONABLE AND MODERATE CHASTISEMENT"

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Chapter 1: Introduction.

> *"No violence against children is justifiable; all violence against children is preventable. Yet the in-depth study on violence against children confirms that such violence exists in every country of the world, cutting across culture, class, education, income and ethnic origin. In every region, in contradiction to human rights obligations and children's developmental needs, violence against children is socially approved, and is frequently legal and State-authorized."*[1]

Corporal punishment of children by parents is still a socially, culturally and legally accepted form of discipline of children in South Africa. This is also true of many other countries in the world, despite the growing movement against corporal punishment and the realization of the harm that it causes.

Corporal punishment in the home is legal in South Africa because a defence of reasonable and moderate chastisement exists in common-law as a ground of justification for parents when a criminal case or delictual claim based on assault is raised.[2]

A 2004 study[3] conducted with children on their experiences and views of corporal punishment in the home and in the school revealed that children living in households of all income levels,[4] living in both the rural and urban area of South Africa experienced corporal punishment in the home.[5] Objects used for administration of corporal punishment, as reported by children, included the use of hands, fists, belts, sticks and sjamboks, cables and shoes; and were most often administered to the legs, buttocks or face.[6] Clacherty and Donald also reported that there is no clear link between corporal punishment and types of misdemeanors by children. Children

[1] A/61/299 at page 5.
[2] Du Preez v Conradie and Another 1990 (4) SA 46 (B).
[3] Clacherty G, Clacherty A & Donald D (2005).
[4] Though less so in high income households.
[5] Clacherty G, Clacherty A & Donald D (2005) at page 21.
[6] As Above.

experience corporal punishment for both severe and minor misdemeanors, including for example, the unintentional breaking of an object in the home.[7]

The study also included quotes from children on their experiences of corporal punishment in order to substantiate the findings. These were some of their experiences relived by children interviewed:

> "Before all this I was hit by a belt, my mother saw that I am not crying, then she hit me with a wooden hanger. Still I did not cry then she took to hitting me with her bare hands. Then they gave me all these other punishments. (Boy, 13-18, rural, KZN)."[8]

> "My mother came and hit me with a fist hard and I didn't cry. Sometimes she cries because she thinks she will kill me. One day she hit me with ladies heel shoes on my hips. (Girl, 9-12, urban, Limpopo)."[9]

> "Sometimes my mommy or my daddy hit me. Sometimes with their hand or sometimes with a belt. They don't hit me with a stick and they don't hit me on the face, only my bum. Because my mommy says she doesn't want to touch my face or my head because just now they hit my head and my brain gets all mixed up. (Girl, 6-8, urban, W.C.)."[10]

On the second part of the last quotation above, the authors commented that the quotation "reflects a wider culture of more violent corporal punishment – one should ask, why did this child feel the need to say it?"[11]

A previous study[12] conducted with parents in 2005 also indicated that 57% of the parents interviewed used corporal punishment, of which 33% used severe[13] corporal punishment. The authors also noted that, "[s]tudies of sensitive subjects with parents

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[7] As Above.
[8] As above at page 11.
[9] As above at page 17.
[10] As above.
[11] As above.
[12] Dawes, Kafaar, de Sas Kropiwnicki, Pather & Richter (2005).
[13] The study distinguished between mild and severe corporal punishment. Administration of corporal punishment with the hand was taken as an indication of 'mild' corporal punishment, whereas the use of a belt, stick or similar object was an indication of 'severe' corporal punishment.

are likely to emerge with under-estimates in their claims as to the use of physical punishment",[14] and it could therefore be expected that the figures obtained is an underestimate of the phenomenon of parental corporal punishment in South Africa.

The study concluded by finding that corporal punishment is a discipline practice that is powerfully entrenched in South Africa's societal norms and practices. It poses a view that parenting attitudes in South Africa largely stem from an authoritarian point of view: discipline must come in the form of punishment, "because most members of the society are incapable of critical thinking and self-discipline, and thus need to be taught to fear disobedience."[15] This system was extensively used in colonial rule and later also entrenched itself in the Apartheid system, to which South Africa was historically subject. "[A]dults confirmed their power relationship with children, the young learn a range of scripts about their place in society, as well as notions of power, justice, and the use of violence to solve problems."[16]

Children's experiences as captured in the study and the figures obtained from adults' use of corporal punishment as highlighted above, show that corporal punishment is still a prevalent and an entrenched practice of discipline. Despite the fact that children have constitutional rights to human dignity,[17] freedom and security of person[18] and special rights to protection from maltreatment, abuse or degradation[19] as provided for in the Constitution, the law has not been adjusted to protect children's rights from being infringed by the reasonable and moderate chastisement defence.

1.1 Research question(s)

This dissertation will consider the constitutional validity of the defence of "reasonable and moderate chastisement" as allowed for in common law, taking into account applicable Constitutional provisions, relevant South African and foreign case law as well as international obligations.

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[14] Dawes, Kafaar, de Sas Kropiwnicki, Pather & Richter (2005) at page 21.
[15] As above at page 3.
[16] As above at page 6.
[17] Constitution of the Republic of South Africa Act 108 of 1996 at section 10. Hereinafter referred to as "the Constitution".
[18] As above at section 12.
[19] As above at section 28(1)(d).

The defence of moderate and reasonable chastisement was first analyzed in South Africa in the case of *Rex v Janke and Janke,*[20] where the court provided that:

> "The general rule adopted both by the Roman, the Roman-Dutch law and the English law is that a parent may inflict moderate and reasonable chastisement on a child for misconduct provided that this not be done in a manner offensive to good morals or for other objects than correction and admonition…The presumption is that such punishment has not been dictated by improper motives…A parent…may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment".[21]

The approach in *Rex v Janke and Janke*[22] continued to be followed in various judgments for the remainder of the century, including in *Rex v Schoombee*,[23] *Rex v Theron and Another,*[24] *Rex v Muller*,[25] *S v Lekgathe*[26]and more recently *Du Preez v Conradie and Another.*[27]

Since the inception of the South African Constitution in 1996 all legal provisions in South African law, including those which are provided for in common law, became subject to Constitutional scrutiny, and any provision inconsistent with the Constitution is invalid.[28] Section 8(3) of the Constitution more specifically provides that a court may develop the common law to give effect to a right or to limit a right when needed. The question that therefore needs to be asked and answered is whether the reasonable and moderate chastisement defence, as well as the reasoning in Janke and Janke[29] and subsequent cases, can withstand Constitutional scrutiny when taking into account the purpose of the defence and the rights of children that are being affected in allowing such a defence to exist.

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[20]1913 TPD 382.
[21]As above at pages 385 and 386.
[22] 1913 TPD 382.
[23] 1924 TPD 481.
[24] 1936 OD 166.
[25] 1984 (4) SA 848 (O).
[26] 1982 (3) SA 104 (B).
[27] 1990 (4) SA 46 (BG).
[28]Section 2 of the Constitution.
[29]1913 TPD 382.

The rights that come into play during such a test are respectively contained in sections 9 (equality), 10 (human dignity), 12 (freedom and security of person) and 28 (children) of the Constitution. In this respect, section 36 (the limitations clause) must also be taken into account in order to determine if the limitations are reasonable and justifiable.

The Constitution, in section 39, also makes a commitment to honour international treaties and conventions to which South Africa is a party by stating that "when interpreting the Bill of Rights, a court, tribunal or forum- (b) must consider international law".

In 1995 South Africa ratified the UN Convention on the Rights of the Child[30] and therefore has a legal and international obligation to implement the provisions of this Convention. General Comment no 8,[31] made by the UN Committee on the Rights of the Child in order to clarify article 19 of the UN CRC, provides that every state has an obligation to prohibit all forms of corporal punishment of children within its country:

> "The Convention on the Rights of the Child and other international human rights instruments recognize the right of the child to respect for the child's human dignity and physical integrity and equal protection under the law. The Committee is issuing this general comment to 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 States must take."[32]

Having ratified the UN CRC South Africa therefore has an international obligation to abolish the defence of reasonable and moderate chastisement available to parents and to prohibit by law all forms of corporal punishment of children.

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[30] Hereinafter referred to as the "UN CRC".
[31] UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia)*, 2 March 2007, CRC/C/GC/8.
[32] Ibid at page 3.

1.2 Significance of the study

The international movement against corporal punishment of children has gained significant momentum within the last two decades, with corporal punishment of children first being banned in Sweden in 1979 and subsequently in 29 more countries in the world.[33] Many international human rights instruments have also pronounced against corporal punishment, including the UN Convention on the Rights of the Child, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the European Social Charter.

Furthermore, the Committee on the Rights of the Child, in its Concluding Observations[34] in consideration of the report submitted by South Africa, stated that:

> "While the Committee is aware that corporal punishment is prohibited by law in schools, care institutions and the juvenile justice system, it remains concerned that corporal punishment is still permissible within families and that it is still regularly used in schools and care institutions as well as generally within society. The Committee … recommends that the State party 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 in conformity with the Convention. 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 experiences of other countries that have already enacted similar legislation."[35]

The study is significant in that it examines the international obligations imposed on South Africa by international human rights instruments to which South Africa is a

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[33] Global Initiative to End All Corporal Punishment of Children <http://www.endcorporalpunishment.org/pages/frame.html> (accessed 01 September 2011).

[34] CRC/15/Add.122. UN Committee on the Rights of the Child (CRC),Concluding Observations: South Africa, 23 February 2000.

[35] CRC/15/Add.122 at par 28.

party. It is also significant in that it examines the constitutionality of the common law defence taking into account the rights of children contained in the Bill of Rights as well as the purpose of the defence. This is an exercise that has not been undertaken by South African courts since inception of the Constitution.[36] The study will also examine relevant foreign case law and experiences for a comparative analysis in similar legal systems.

Finally, this dissertation will also include recommendations as to possible steps that could be taken by the legislature in order to avoid a constitutional challenge, such as a provision in legislation repealing the common law defence of "reasonable and moderate chastisement" and expressly prohibiting all forms of corporal punishment of children.

1.3 Proposed methodology

The study proposes to use an analytical and comparative approach. An analytical approach will be used to analyze the purpose of the reasonable and moderate chastisement defence, as well as the constitutional rights of children that are affected in allowing such a defence to be retained in South African law. Applicable international law and South Africa's duty to domesticate the provisions will also be analyzed. A comparative approach will be used when examining foreign case law.

1.4 Delineations of the study and limitations

This dissertation will examine the constitutionality of the common law defence of reasonable and moderate chastisement available to parents. During the study relevant foreign case law and international instruments will be considered and analyzed. The study will be limited to parental corporal punishment and will not examine corporal punishment of children in any other settings. It will also be confined to an examination of the constitutionality of the defence of reasonable and moderate chastisement in criminal law and will not consider other measures to prevent corporal punishment, such as educative approaches.

[36] The Constitutional Court has however considered the constitutionality of corporal punishment of children in the criminal justice system and in schools, and declared corporal punishment in both settings as unconstitutional. See paragraphs 2.1.1 and 2.1.2 below.

Chapter 2: South African legal position on corporal punishment

2.1 Overview of the legal status of corporal punishment of children in South Africa

Corporal punishment of children in South Africa is legislatively prohibited within all settings of children's lives, with the exception of the home where parental corporal punishment is still allowed. The different recognized settings identified includes the home,[37] school, alternative care and the justice system.[38] In South Africa, corporal punishment of children was first prohibited in the justice system, followed by prohibition in schools and lastly in alternative care settings. Legal prohibition of corporal punishment by parents in the home is still to be undertaken. What follows are brief discussions around the law relating to corporal punishment in the various settings mentioned.

2.1.1 Justice system

It is necessary to mention at this stage that the term corporal punishment in the 'justice system' is commonly used to collectively describe corporal punishment as a sentence handed down by a court of law for a crime committed, and as a form of discipline used within penal institutions.

2.1.1.1 As a sentence of court

Corporal punishment of children (juveniles) was prohibited in the justice system, specifically as a sentence for a crime, in 1995. This prohibition was brought into place through the judgment of *S v Williams and Others*,[39] where Langa, J held that "juvenile whipping is cruel, it is inhumane and it is degrading. It cannot, moreover, be justified in terms of section 33(1) of the [Interim] Constitution".[40] The court held

[37] Also sometimes referred to as the "family".
[38] As included in the UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*, 2 March 2007, CRC/C/GC/8 at Art 12. General Comment No 8 specifically deals with corporal punishment of children in all settings and requires that State parties explicitly prohibits it.
[39] 1995 (3) SA 632 (CC).
[40] As above at par 91. Section 33 of the 1993 Constitution provided for the requirements needed before a right contained within the Bill of Rights could be limited. This provision is similar to section 36 of the 1996 Constitution.

further that a "culture of authority which legitimates the use of violence is inconsistent with the values for which the Constitution stands".[41]

Following the *S v Williams*[42] ruling, the legislature proceeded to enact this prohibition in the Abolition of Corporal Punishment Act.[43] Section 1 of the Act provides that "[a]ny law which authorises corporal punishment by a court of law, including a court of traditional leaders, is hereby repealed to the extent that it authorises such punishment".

It is clear from the provision of section 1 of the Abolition of Corporal Punishment Act[44] that corporal punishment is not only prohibited as a sentence handed down by a court of law, but also prohibited as a sentence handed down by traditional courts. This provision is further substantiated in section 10(1)(d) of the Traditional Courts Bill[45] which also prohibits corporal punishment as a sentence in a criminal dispute before a Traditional Court.

2.1.1.2 As a disciplinary measure in penal institutions

There is no explicit prohibition on corporal punishment of children detained in prisons within the Correctional Services Act,[46] however, section 24 of the Act provides for the penalties that may be imposed on an inmate. Section 24 inter alia provides for a "reprimand", a "loss of gratuity for a period not exceeding one month",[47] "restriction of amenities for a period not exceeding seven days"[48] and in the case of serious or repeated infringements, "segregation in order to undergo specific programmes aimed at correcting his or her behaviour, with a loss of gratuity and restriction of amenities as contemplated in [the previous] paragraphs". It is clear from the specificity of the provisions in section 24 that corporal punishment is not a sanctioned measure to be undertaken as a penalty or as a form of discipline in prisons.

[41] As above at par 52.
[42] 1995 (3) SA 632 (CC).
[43] The Abolition of Corporal Punishment Act 33 of 1997.
[44] Act 33 of 1997.
[45] The Traditional Courts Bill 15 of 2008, as introduced in the National Assembly.
[46] The Correctional Services Act 111 of 1998.
[47] Two months in the case of a hearing taking place before a disciplinary official.
[48] 42 days in the case of a hearing taking place before a disciplinary official.

The Children's Act also makes provision for children to be detained in child and youth care centres as a pre-trial or pre-sentence measure or as a sentence handed down for a crime committed. With respect to the discipline of these children, the Children's Act Regulations[49] expressly prohibits physical punishment[50] and provide that "[e]very child who is cared for in a child and youth care centre has the right to positive discipline appropriate to his or her level of development".[51]

2.1.1.3 Conclusion:

When reading the Correctional Services Act,[52] the Abolition of Corporal Punishment Act,[53] the Traditional Courts Bill[54] and the Regulations of the Children's Act[55] together, it is clear that corporal punishment of children is prohibited as both a sanction for a crime (in both the formal and traditional courts) and as a form of discipline in a penal institution, thereby fulfilling international obligations and recognizing the "growing consensus in the international community that judicial whipping, involving as it does the deliberate infliction of physical pain on the person of the accused, offends society's notions of decency and is a direct invasion of the right which every person has to human dignity".[56]

2.1.2 Schools

Corporal punishment of learners in South African Schools was first prohibited in 1996 through the South African Schools Act.[57] Section 10 of the Act clearly prohibits and criminalizes the use of corporal punishment in schools by providing the following:

"Prohibition of corporal punishment

(1) No person may administer corporal punishment at a school to a learner.

[49] Consolidated Regulations pertaining to the Children's Act 38 of 2005.
[50] As above at regulation 76(2)(d).
[51] As above at regulation 73(j).
[52] Act 111 of 1998.
[53] Act 33 of 1997.
[54] 15 of 2008.
[55] Consolidated Regulations pertaining to the Children's Act 38 of 2005.
[56] S v Williams and Others at par 39.
[57] The South African Schools Act 84 of 1996.

(2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault."[58]

This prohibition was however unsuccessfully challenged in the case of *Christian Education South Africa v Minister of Education*,[59] where the Appellant, a voluntary umbrella body of 196 independent Christian schools, alleged that the blanket prohibition of the use of corporal punishment in its schools invaded their individual, parental and community rights to freely practice their religion.[60]

In its submissions made to the Constitutional Court, the Appellant inter alia contended that the blanket prohibition infringed section 14 (the right to privacy), section 15, (freedom of religion, belief and opinion), section 29, (the right to education, more specifically, the right to establish and maintain independent educational institutions), section 30 (the right to language and culture) and section 31 (cultural, religious and linguistic communities) of the Constitution.

The Minister of Education, Respondent in the case, contended to the contrary that allowing corporal punishment of children in the schools of the Applicants would infringe section 9 (right to equality), section 10 (human dignity), section 12 (freedom and security of the person) and section 28(1)(d) (a child's right to be protected from maltreatment, neglect, abuse or degradation) of the Constitution.[61] The Respondent furthermore stated that the international trend in democratic countries is to ban corporal punishment of children in schools.

The court found that "South Africa's international obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the United Nations Convention on the Rights of the Child, require the abolition of corporal punishment in schools, since it involves subjecting children to violence and degrading punishment."[62]

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[58] Section 10 of Act 84 of 1996.
[59] Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC).
[60] As above at par 2.
[61] Christian Education South Africa v Minister of Education at par 8.
[62] As above at par 13.

The Court held further that section 10 of the South African Schools Act[63] indeed limits the Applicant's religious rights both under section 15 and 31 of the Constitution, but that the limitation needs to be scrutinized in light of section 36 (limitation clause) of the Constitution in order to establish whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality.[64]

The Court stated that:

> "In [the Department of Education's] judgment, which was directly influenced by its constitutional obligations, general prohibition rather than supervised regulation of the practice was required. The ban was part of a comprehensive process of eliminating state-sanctioned use of physical force as a method of punishment. The outlawing of physical punishment in the school accordingly represented more than a pragmatic attempt to deal with disciplinary problems in a new way. It had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children."[65]

In its conclusion, the Court held that, in light of section 36, the Appellants are not required to make "an absolute and strenuous choice between obeying a law of the land or following their conscience. They can do both simultaneously".[66] The Court indicated that except for this one restriction, the Appellant's schools are not prevented from exercising their Christian beliefs.

Finally, the Court held that "[w]hen all these factors are weighed together, the scales come down firmly in favour of upholding the generality of the law in the face of the Appellant's claim for a constitutionally compelled exemption".[67]

The blanket prohibition on corporal punishment in South African public and private schools therefore withstood the scrutiny of a Constitutional challenge, and was held necessary to protect children's dignity, and physical and emotional integrity.

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[63] Act 84 of 1996.
[64] Christian Education South Africa v Minister of Education at par 27 and 28.
[65] As above at par 50.
[66] As above at par 51.
[67] As above at par 52.

2.1.3 Alternative Care

Corporal punishment in alternative care settings is expressly prohibited within the Regulations to the Children's Act.[68] Regulations 65, 69 and 76(2)(d) specifically prohibits corporal punishment in foster care settings, in cluster foster care schemes, in early childhood development programmes and in child and youth care centres. All of these regulations also makes particular provision for alternative positive forms of discipline and guidance of children.

In more detail, regulation 65, pertaining to foster care provides that:

> "65(1) A foster parent has the responsibility of providing for the day to day needs of a foster child … which includes the responsibility to-
>
> …
>
> (h) guide the behavior of the child in a humane manner and not impose any form of physical violence or punishment, or humiliating or degrading forms of discipline".

Regulation 69, pertaining to cluster foster care schemes, states that:

> "(1) A non-profit organization managing or operating a registered cluster foster care scheme must, in respect of schemes under its management or operation -
>
> (b) operate or be managed according to a written plan or agreement containing details
>
> (iv) on the management of the behavior of children in cluster foster care, and must include a prohibition of physical punishment, humiliating or degrading forms of discipline of such children".

Regulations 73(j) and 76(2)(d), containing regulations relating to child and youth care centres also "expressly prohibit[s] physical punishment" and provide every child with a "right to positive discipline appropriate to his or her level of development".

In addition, Annexure B (Part II) to the Regulations of the Children's Act which pertains to the National Norms and Standards for Early Childhood Development Programmes, identifies the importance of regulating the discipline of children by providing in regulation 3(b)(vi) that:

[68] Consolidated Regulations pertaining to the Children's Act 38 of 2005.

> "3(b)(vi) discipline must be effected in a humane way and promote integrity with due regard to the child's developmental stage and evolving capacities. Children may not be punished physically by hitting, smacking, slapping, kicking or pinching".

From the provisions above it is very clear that the legislature found it important to regulate discipline and prohibit corporal punishment of children in alternative care settings, recognizing that corporal punishment does not "promote [the] integrity" of children and is not a "humane way" in which to discipline children. [69]

2.1.4 Home

As mentioned in the introduction to this chapter, corporal punishment of children in the home is not prohibited in South Africa and is widely used in the discipline of children.[70]

Though practitioners in South Africa have identified the wide use of corporal punishment in the home[71] and analyzed the potential consequences and rights violations for children both under the South African Constitution and international law, the constitutionality of the reasonable and moderate chastisement defence has yet to be considered by the Constitutional Court.

In a recent unreported case,[72] a magistrate was tempted to venture into the issue of the constitutionality of the common law defence of reasonable and moderate chastisement of children. The court however higlighted that "no reported (and binding) decision by any High Court, the Supreme Court of Appeal and the Constitutional Court has altered the state of the common law on the lawful chastisement of children"[73] and that the magistrate's court was unfortunately prevented from doing so as "magistrates courts (as 'creatures of statute') do not

[69] Consolidated Regulations pertaining to the Children's Act 38 of 2005, Annexure B, Part II, Regulation 3(b)(vi).
[70] Clacherty G, Clacherty A & Donald D (2005). Also see S v Kunene and Another, Regional Division of Mpumalanga, Unreported Case No 131/10 at par 3.
[71] Bower (2008) 6.
[72] S v Kunene and Another, Regional Division of Mpumalanga, Unreported Case No 131/10.
[73] As above at par 9.

have the power to scrutinize rules of common law for their constitutionality and to develop them".[74]

Even though this is the case, the magistrate nevertheless emphasized that "the time might be 'ripe' for the courts in South Africa to consider and reconsider the constitutionality of reasonable and moderate chastisement of children by their parents as corrective measure",[75] and that

> "the answer to the question of the constitutionality of such chastisement would have had an effect (and a relevant one at that) on the issue of punishment in this matter. If all physical chastisement of children should be regarded as taboo, then obviously any assault of children should be regarded in a much more serious light than any assault of an adult person; and, I am not sure that the minimum sentencing legislation referred to above, alone, can have the requisite effect of stigmatizing the assault of children as such."[76]

There has also been previous attempts to legislatively challenge the position for children, but this has unfortunately failed.

In 2002 the South African Law Reform Commission (SALRC) released a draft Children's Bill.[77] The Children's Bill as first released contained a clause revoking the common law defence of reasonable and moderate chastisement, and recommended that "an educative and awareness-raising approach should be followed, in order to influence public opinion on the issue of corporal punishment".[78]

However, in 2003 the Children's Bill was split into two sections, namely the Children's Bill and the Children's Amendment Bill.[79] The issue of parental corporal punishment was left for consideration under the Children's Amendment Bill, which was to be considered after the Children's Bill was passed. The Children's Amendment Bill was accordingly later tabled in 2006. However, the version of the

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[74] As above.
[75] As above.
[76] As above.
[77] Children's Bill [B 19B-2006].
[78] As above at section 193.
[79] Those parts of the Bill which did not relate to national competencies within the South African government structure were left for the Amendment Bill which would be processed immediately after the piece dealing with national competencies was completed.

Children's Amendment Bill tabled did not include the original Children's Bill clause eliminating the reasonable and moderate chastisement defence. Instead, clause 139 of the tabled Bill only addressed corporal punishment in the public sphere.

Following consultations on clause 139 of the tabled Children's Amendment Bill, the clause was amended and resubmitted to the National Assembly. Subsection 2 of clause 139 contained an explicit prohibition of all corporal punishment of children, subsection 3 abolished the common law defence of reasonable and moderate chastisement, and subsection 5 provided for the availability of national education and awareness-raising programmes on the prohibition of corporal punishment and appropriate discipline. Subsections 6 and 7 furthermore provided for early intervention services to be made available to parents reported for subjecting a child to inappropriate forms of punishment, as well as prosecution of parents where the punishment constitutes abuse.[80]

Following the changes made to the Bill, further consultations were held and the Bill was again debated within the National Assembly in 2007. The National Assembly found itself divided on clause 139, leading to three different versions of the clause being drafted. The first version of the clause contained the original version tabled, prohibiting corporal punishment, the second version retained corporal punishment, and provided instructions according to which corporal punishment had to be administered, and lastly, the third clause retained corporal punishment without the conditions set out within the second version.[81]

Due to the apparent controversy amongst stakeholders around parental corporal punishment, clause 139 was deleted from the Bill in late 2007.[82] The explanations provided for its removal were, firstly, that the matter required further investigation and consultations and secondly, that this was a matter for national consideration and it should have been tabled during considerations around the Children's Bill.[83]

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[80] The Children's Amendment Bill [B 19B-2006].
[81] Bower (2008) at page 9.
[82] See Minutes of Social Development Portfolio Committee: Children's Amendment Bill, 23 October 2007.
[83] As Above.

The process around the inclusion (or exclusion) of a ban on parental corporal punishment of children in the Children's Bill and Children's Amendment Bill saw the involvement of a range stakeholders, including the non-profit sector and the faith based sector.[84] This debate marked the first and last time that parental corporal punishment and the reasonable and moderate chastisement defence was brought into the legislative arena. Other than this, it remains unchallenged since inception of the Constitution.

2.2 Conclusion

South Africa has prohibited corporal punishment in all settings in South Africa except for in the home, where the defence of reasonable and moderate chastisement is available to parents when a criminal or civil claim of assault is raised. When South Africa reported to the UN Committee on the Rights of the Child, the Committee acknowledged the progress made in South Africa to prohibit corporal punishment in some settings. However, the Committee unequivocally stated that South Africa must prohibit corporal punishment in the family setting, and advised that experiences from other countries that have undertaken similar law reform processes should be examined.[85]

In the following chapter an analysis of international human rights instruments relevant to the issue of corporal punishment in the home will be undertaken.

[84] The stakeholders that made submissions included: Childline South Africa, Centre for Child Law, Community law Centre, RAPCAN, the South African Human Rights Commission, the South African Council of Churches and Umtata Child Abuse Resource Centre.
[85] CRC/C/15/Add.122 at par 28.

Chapter 3: Applicable international human rights instruments

3.1 Analysis of South African case law on the application of international human rights instruments

The Bill of Rights is the cornerstone of democracy in South Africa and enshrines the rights of all people in South Africa. The State must respect, protect and promote the rights contained in the Bill of Rights, but the rights contained therein can be limited in terms of section 36.[86]

The underlying principles to be used when interpreting the Bill of Rights is contained in section 39 of the Constitution. Section 39(1) specifically provides that:

> "When interpreting the Bill of Rights, a court, tribunal or forum –
> a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> b) must consider international law; and
> c) may consider foreign law."

This section specifically emphasizes that courts, tribunals and forums *must* consider international law and *may* consider foreign law when interpreting the Bill of Rights.

Section 233 of the Constitution further provides that every court must "prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".

These sections makes it clear that international law is not only a tool that *must* be used for interpreting the rights contained in the Bill of Rights,[87] but *must* also be used in the interpretation of South African domestic legislation. "It is from this premise 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."[88]

[86] Section 7 of the Constitution.
[87] As contained in the Constitution.
[88] Ngidi in Killander (ed) (2010) at page 177.

The obligation imposed in section 39(1)(b) was analysed by the Constitutional Court in the case of *S v Makwanyane*[89] where the Court held that both binding and non-binding public international law may be used as tools of interpretation:[90]

> "International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments…may provide guidance as to the correct interpretation of particular provisions of Chapter Three".[91]

> "The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention".[92]

The court in *Government of the Republic of South Africa and Others v Grootboom and Others*[93] also emphasized the interpretive function of international law, but went on further to also emphasize that "where the relevant principles of international law binds South Africa, it may be directly applicable".[94]

Justice Ngcobo, in the case of *Kaunda and Others v President of the Republic of South Africa and Others*,[95] in considering the application of the African Charter and the International Convention on Civil and Political Rights, also noted that there is

> "an unequivocal commitment by the government to the promotion and protection of fundamental international human rights … Indeed ratification of international human rights instruments is a positive statement by the government to the world and to South African nationals that it will act in accordance with these instruments if any of the fundamental human rights enshrined in the international instruments it has ratified are violated …They

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[89] S v Makwanyane 1995 (3) SA 391 (CC).
[90] Currie & de Waal (2005) 159.
[91] S v Makwanyane at par 35.
[92] As above at par 34.
[93] Government of the Republic of South Africa & Others v Grootboom & Others 2001 1 SA 46 (CC).
[94] As above at par 26.
[95] Kaunda & Others v President of the Republic of South Africa & Others 2004 10 BCLR 1009 (CC).

> provide the government with a tool to protect the internationally recognized human rights of South African nationals. What is more, these instruments are binding under our Constitution."[96]

South African Courts have also specifically taken into account international law in cases pertaining to children. As highlighted by Ngidi:

> "international law that have been considered and applied in children's matters range from treaties, guidelines and general comments. The application of the provisions of international law has been used by child rights lawyers' to enhance arguments before the courts. This has produced profound judgments, some of which detail what role international law plays in South African child law and the development of children's rights."[97]

For example, in *De Gree and Another v Webb and Others*,[98] the Court had regard to both the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption as well as the UN CRC. Similarly, in the case of *Centre for Child Law and Another v Minister of Home Affairs and Others*[99] the court, having regard to the protection of children, stated that "South Africa is also a signatory to certain relevant conventions. These are the United Nations Convention on the Rights of the Child … [and] the African Charter on the Rights and Welfare of the Child …"[100]

From the above analysis it is evident that the Constitution places a duty on courts to take into account applicable international law and custom when interpreting the rights contained in the Bill of Rights and domestic legislation, including those pertaining to children. Therefore, when interpreting the rights of children affected by the reasonable and moderate chastisement defence, there is an obligation for our courts to consider applicable international law, especially taking into account the UN CRC.

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[96] As above at par 162.
[97] Ngidi in Killander (ed) 2010 at page 174.
[98] De Gree and Another v Webb and Others (Centre for Child Law, University of Pretoria, Amicus Curiae) 2007 5 SA 184 (SCA).
[99] Centre for Child Law and Another v Minister of Home Affairs and Others 2005 6 SA 50 (T).
[100] As above at par 24.

3.2 The United Nations Convention on the Rights of the Child

South Africa ratified the UN CRC in 1995 and enacted it within the Children's Act in 2005.[101] Under section 39 of the Constitution, any court, tribunal or forum must therefore give the UN CRC due consideration when interpreting the Bill of Rights.

Article 2 and article 4 of the UN CRC places an obligation on all State Parties to respect and ensure that the rights in the Convention are realized for each child within its jurisdiction without discrimination of any kind; and must also undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the UN CRC.[102]

The preamble to the UN CRC emphasizes in particular that children should be allowed to be brought up in a "spirit of peace, dignity, tolerance, freedom, equality and solidarity" and that the "child, by reason of his (sic) physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth".

Article 19 of the UN CRC provides for the protection rights of children and places an obligation on State Parties to ensure that measures are taken to prevent and respond to child protection violations. Article 19 reads as follows:

> "1. State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical … violence, injury or abuse … while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
>
> 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child … and, as appropriate, for judicial involvement."

[101] The Children's Act 37 of 2005.
[102] UN Convention on the Rights of the Child at Article 2(1) & Article 4.

Article 37 of the UN CRC also further emphasizes State Parties obligations to ensure a child's right to protection, by providing that "[n]o child shall be subjected to torture or other cruel, inhumane or degrading treatment or punishment".

3.2.1 General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment

In 2000 and 2001, the UN Committee on the Rights of the Child held general discussions on violence against children. Following the discussions, the Committee issued a General Comment on the "right of the child to protection from corporal punishment and other cruel or degrading forms of punishment"[103] in order to clarify articles 19, 28 (par 2) and 37 of the UN CRC, as highlighted above.

The Committee highlighted that the general comment focuses on corporal punishment and other cruel or degrading forms of punishment, which was viewed by the Committee as a "very widely accepted and practiced forms of violence against children".[104] The Committee accordingly issued the general comment in order to stress the obligation of all State Parties to move quickly to prohibit and eliminate all corporal punishment of children through the institution of legislative and other awareness-raising and educational measures.[105] The Committee also emphasizes the protection of the child's human dignity, physical integrity and equal protection under the law, which they state can only be ensured through the elimination of the reasonable and moderate chastisement defence and the legislative prohibition of all forms of corporal punishment of children.[106] It is interesting to note that these rights are also very important in the South African Constitution.

3.2.2 South Africa's state party report to the UN Committee on the Rights of the Child

In 1997 South Africa submitted a state party report under Article 44 of the UN CRC to the UN Committee on the Rights of the Child. In considering the report, the UN Committee specifically made reference to corporal punishment of South African children, and stated that whilst "corporal punishment it prohibited by law in schools,

[103] CRC/C/GC/8.
[104] As above at par 1.
[105] As above at par 2.
[106] As above at par 2, 26 and 31.

care institutions and the juvenile justice systems, it [the UN Committee] remains 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".[107] In this regard, the UN Committee made a specific recommendation that South Africa "take effective measures to prohibit by law the use of corporal punishment (and implicitly eliminate the reasonable chastisement defence) in the family and, in this context, examine the experience of other countries that have already enacted similar legislation".[108]

With this response to South Africa's state party report, the UN Committee clearly affirmed the international obligation placed on South Africa to prohibit and eliminate all forms of corporal punishment of children, especially corporal punishment in the home.

3.2.3 The United Nations Study on Violence Against Children[109]

"None of us can look children in the eye, if we continue to approve or condone any form of violence against them."[110]

The United Nations commissioned a study on violence against children in 2006, which was conducted by Paulo Sérgio Pinheiro, an independent expert appointed by the Secretary-General, in order to get a global picture of violence against children and to provide recommendations to prevent and respond to violence against children.[111] The study looked at violence in all spheres of children's lives, including in the home environment, and placed special emphasis on the prohibition and elimination of corporal punishment of children.

The study remarked that "[t]here can be no compromise in challenging violence against children. Children's uniqueness – their potential and vulnerability, their dependence on adults – makes it an imperative that they have more, not less, protection from violence." It stated unambiguously that there should be "an end to

[107] CRC/C/15/Add.122 at par 28.
[108] As Above.
[109] A/61/299.
[110] As above at page 24.
[111] As above at page 2.

adult justification of violence against children, whether accepted as a 'tradition' or disguised as 'discipline'".[112]

Societal acceptance of violence against children was raised as a particular concern by the independent expert. He raised concerns that discipline through physical and psychological violence are frequently perceived as normal, particularly when no visible or lasting physical injuries result. In exploring the range of violence against children, the study highlighted that reports suggest that up to 80 to 98 percent of children suffer physical punishment in their homes, with at least a third of these children experiencing severe corporal punishment resulting from the use of implements.[113]

The study recognized that

> "[e]liminating and responding to violence against children is perhaps most challenging in the context of family, considered by many as the most "private" of private spheres. However, children's rights to life, survival, development, dignity and physical integrity do not stop at the door of the family home, nor do States' obligations to ensure these rights for children".[114]

The recommendations of the study emphasized the prohibition of corporal punishment of children and drew special attention to General Comment No 8 of the Committee on the Rights of the Child on the rights of the child to protection from corporal punishment and other cruel or degrading forms of punishment.[115]

In conclusion it was held that:

> "The core message of the Study is that no violence against children is justifiable; all violence against children is preventable. There should be no more excuses. Member States must act now with urgency to fulfil their human rights obligations and other commitments to ensure protection from all forms of violence. While legal obligations lie with States, all sectors of society, all individuals, share the responsibility of condemning and preventing violence

[112] As above at page 5.
[113] As above at page 9.
[114] As above at page 12.
[115] As above at pages 25 and 26.

against children and responding to child victims. None of us can look children in the eye, if we continue to approve or condone any form of violence against them."[116]

3.3 The African Charter on the Rights and Welfare of the Child[117]

It is said that the African Charter is complimentary to the UN CRC, and was drafted in order to tailor to the specific needs of African children.[118] As stated by Mezmur, "there are very few areas where the [UN] CRC offers a better standard than the ACRWC [African Charter] … despite the way the two instruments complements each other, the ACRWC offers a greater number of progressive provisions tailored to address African realities".[119]

Within its preamble, the African Charter reaffirms adherence specifically to the UN CRC, which confirms the complimentary characteristic of the African Charter to the UN CRC.

The preamble to the African Charter notes with concern the unique situation of African children and recognizes that the child occupies a unique and privileged position in the African society and should "grow up in a family environment in an atmosphere of happiness, love and understanding". The preamble further recognize "that the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security".

Article 11(5) relates to discipline of children in a school and home environment, and provides that a child should be treated with humanity and respect for his/her inherent dignity and in conformity with the Charter. Article 16 of the African Charter compliments this section by providing for protection against child abuse and torture. Article 16(1) states that "State parties … shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture,

[116] As Above at page 24.
[117] Hereinafter referred to as the 'African Charter'.
[118] B Mezmur (2008) 23 *SA Public Law* 1.
[119] As above at page 28.

inhumane or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment … while in the care of the child".

The African Committee of Experts on the Rights and Welfare of the Child[120] has until recently not been vocal about the issue of corporal punishment of children. This has caused considerable uncertainty as to what was meant by the wording of the African Charter when it came to "inhumane or degrading treatment" of children.[121] However, in March 2011, the African Committee of Experts set out a statement on violence against children which provides as follows:

> "The notions deeply rooted in the social and cultural norms and traditions which accept, tolerate and indeed encourage violence, including sexist clichés, racial or ethnic discrimination, the acceptance of corporal punishment and other harmful traditional practices should be publicly condemned and eliminated. The harmful consequences that all forms of violence can have on children should be widely publicised."[122]

It is said that the African Charter is complimentary to the UN CRC, as it specifically reaffirms adherence within its preamble to the Convention. It can therefore further be deduced that in its spirit and purport it aims to also protect children from corporal punishment, as emphasized within the General Comment No 8 of the UN Committee.[123]

3.4 The International Covenant on Civil and Political Rights

The Human Rights Committee, responsible for monitoring the implementation of the International Covenant on Civil and Political Rights,[124] recognizes the inherent dignity and equality of all human beings within the Covenant's preamble.

Article 7 of the Covenant provides that "[n]o one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment". Article 26 also provides

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[120] Hereinafter referred to the 'African Committee of Experts'.
[121] Article 16(1) of the African Charter on the Rights and Welfare of the Child.
[122] African Committee of Experts on the Rights and Welfare of the Child: Statement on violence against children (2011).
[123] CRC/C/GC/8.
[124] Hereinafter referred to 'the Covenant'.

accordingly that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law".

Article 24(1) further provides, with reference to children, that:

> "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State".

In its 44th session in 1992, the Human Rights Committee set out General Comment No 20 on Article 7[125] of the Covenant. Within the General Comment, specific provision is made with respect to corporal punishment,[126] where the Human Rights Committee states that the prohibition in article 7 must extend to corporal punishment, for a crime or as an educative or disciplinary measure of children, and paragraph 11 places a duty on State Parties to provide detailed information on safeguards for the special protection of vulnerable persons, including children.

3.5 The Universal Declaration of Human Rights

As a member of the United Nations, South Africa accepts adherence to the Universal Declaration of Human Rights. Article 5 of the Universal Declaration specifically states that "[n]o one shall be subject to torture or cruel, inhumane or degrading treatment or punishment".

In 2002, the Special Rapporteur of the Commission on Human Rights submitted a report on torture and other cruel, inhuman or degrading treatment or punishment to the General Assembly,[127] where special mention was made of corporal punishment of children.[128]

The Special Rapporteur acknowledged that corporal punishment in the family home remains legally as well as culturally widely acceptable, and that in particular,

[125] CCPR/C/20.
[126] As above at par 5.
[127] A/57/173.
[128] As above at par 46 to 53.

reasonable and moderate chastisement or correction have been justified for educational purposes.[129]

The Special Rapporteur stated that he fully shares the views of his predecessors that corporal punishment of children is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment enshrined in the Universal Declaration of Human Rights.[130]

The Special Rapporteur also specifically made mention to the UN CRC, as well as Article 7 of the International Covenant on Civil and Political Rights and General Comment No 20 on article 7.[131]

3.6 The International Covenant on Economic, Social and Cultural Rights.

The International Covenant on Economic, Social and Cultural Rights was established to ensure that State Parties protect the equal right of all people to the enjoyment of all economic, social and cultural rights contained within the Covenant.[132]

The Committee on Economic, Social and Cultural Rights, tasked with overseeing the implementation of the Covenant, adopted General Comment No 13 on "The Right to Education"[133] in 1999. On the issue of discipline in schools, the Committee stated with no uncertainty that:

> "corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preamble to the Universal Declaration of Human Rights and both Covenants: the dignity of the individual … A State party is required to take measures to ensure that discipline which is inconsistent with the Covenant does not occur in any public or private educational institution within its jurisdiction. The Committee welcomes initiatives taken by some States parties which actively encourage schools to introduce "positive", non-violent approaches to school discipline."[134]

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[129] As above at par 46.
[130] As above at par 48.
[131] As above at par 48.
[132] Article 3 of the International Covenant on Economic, Social and Cultural Rights.
[133] E/C.12/1999/10.
[134] As above at par 41.

3.7 Universal Periodic Review

The Universal Periodic Review is a process undertaken by the UN Human Rights Council that involves the review of human rights records of all 192 UN Member States. The process of review is seen as State-driven process under the auspices of the UN Human Rights Council. The aim of the mechanism is "to improve the human rights situation in all countries and address human rights violations where they occur".[135]

To date 143 state reports have been reviewed, and the obligation to prohibit corporal punishment of children was raised in over 80 state reports.[136] South Africa was examined in the first session in 2008. The report was compiled by the South African Human Rights Commission, the University of Pretoria and 16 NGOs,[137] and amongst the specific concerns raised by the working group was the issue of corporal punishment of children.

Within the analysis of South Africa's human rights situation, Slovenia pressed South Africa to explain "why the prohibition of all forms of corporal punishment was omitted from recent children's legislation ... [g]iven that such punishment is still used at schools and in private homes, Slovenia urged South Africa to criminalise the practice".[138]

3.8 Conclusion

The above analysis clearly indicates that there is a duty on South African Courts to take into account international law when interpreting the Bill of Rights and any domestic legislation. This duty often translates into practice in South African courts when dealing with matters pertaining to children's rights As highlighted by Ngidi in "International law and domestic human rights litigation in Africa":[139]

> "[T]he Constitutional Court being the highest [court], take seriously the obligations placed on them by section[s] 39(1)(b) and 233 of the Constitution. It

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[135] A/RES/60/251.
[136] Global Initiative to End All Corporal Punishment of Children <http://www.endcorporalpunishment.org/pages/frame.html> (accessed 28 May 2011).
[137] Universal Periodic Review, 1st session, South Africa, 2008.
[138] As above at page 6.
[139] Ngidi in Killander (ed) (2010).

> is interesting to note that the international law that have been considered and applied in children's rights matters range from treaties, guidelines and general comments. The application of the provisions of international law has been used by child rights lawyers' to enhance arguments before courts. This has produced profound judgments, some of which detail what role international law plays in South African child law and the development of children's rights."[140]

The judgment in *S v M*[141] can be seen as one of the more "profound" judgments for children's rights. The Court specifically made mention of the UN CRC and the African Charter in the use of international law when interpreting the Bill of Rights. In his judgment, Sachs J went even further by providing that:

> "[S]ection 28 must be seen as responding in an expansive way to our international obligation as a state party to the United Nations Convention on the Rights of the Child (the CRC) … [r]egard accordingly has to be paid to the impact of the principles of the CRC as they inform the provisions of s 28 … The four great principles of the CRC which have become international currency, and as such guide all policy in South Africa in relation to children, are said to be survival, development, protection and participation. What unites these principles, and lies at the heart of s 28, I believe, is the right of a child to be a child and enjoy special care."[142]

There is wide consensus in international law that corporal punishment of children, and accordingly the reasonable and moderate chastisement defence, infringes children's rights to dignity and cruel, inhumane and degrading treatment and punishment. South Africa cannot take its duty in this regard lightly.

[140] As above at pages 173 to 174.
[141] S v M (Centre for Child Law as amicus curiae) 2008 3 SA 232 (CC).
[142] As above at par 16 and 17.

Chapter 4: Foreign law and foreign case law.

Section 39 of the Constitution, providing for the principles to be used during interpretation of the Bill of Rights, also makes provision for the application of foreign law in section 39(1)(c). This section provides that a court, tribunal or forum *may* consider foreign law when interpreting the Bill of Rights.

Since the first complete prohibition of corporal punishment of children in Sweden in 1979, 28 other states followed suit. This chapter will explore judgments from foreign common law countries on parental corporal punishment and the application of the reasonable and moderate chastisement defence. The discussion within this chapter will be limited to foreign case law as corporal punishment in the home has not been abolished legislatively, and will consequently most likely be considered through litigation. It is therefore instructive to see how similar challenges fared in other countries.

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

Parental corporal punishment of children in Canada is legally provided for in Section 43 of the Criminal Code,[143] also referred to as the "spanking" law,[144] which specifically provides that "[e]very schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward 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."

In 2003, the Canadian Foundation for Children, Youth and the Law challenged the constitutionality of this section in the supreme court case of *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*.[145]

Within this case, the Foundation for Children, Youth and the Law requested the Supreme Court of Canada to declare section 43 of the Criminal Code unlawful,

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[143] Criminal Code (R.S.C., 1985, c. C-46).
[144] Parliament of Canada, PRB 05-10E: The "Spanking" Law: Section 43 of the Criminal Code, Barnett L <http://www.parl.gc.ca/Content/LOP/researchpublications/prb0510-e.htm> (accessed 16 September 2011).
[145] Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General) 2004 SCC 4.

based on sections 7(right to life, liberty and freedom), 12(cruel and unusual treatment or punishment), or 15(1)(equality) of the Canadian Charter of Rights and Freedoms.[146]

The argument advanced by the Foundation was that section 43 of the Criminal Code violates section 7 of the Charter as it fails to give procedural safeguards to children, is not conducive to the best interests of the child and is too vague; section 12 of the Charter as it constitutes cruel and unusual treatment or punishment; and section (15)(1) as it denies children equal protection against assault as accorded to adults. The majority of the court found that the Criminal Code is not unconstitutional and does not offend sections 7, 12 or 15(1) of the Charter.

The Canadian Supreme court analyzed the applicability of the best interests of the child principle in Canada and recognized it as a "legal principle", but not an issue of "fundamental justice". The court indicated that "fundamental justice" implies three criteria: (1) that it must be a legal principle, (2) that there must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice", and (3) that the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results.[147]

In conclusion the court held, with regards to the second requirement for fundamental justice, that the best interests of the child is not seen as "vital or fundamental to our societal notion of justice"[148] but is an important legal principle, and a factor for consideration. It further held, regarding the third element, that the best interests of the child functions as a factor considered along with others, and that

> "[i]ts application is inevitably highly contextual and subject to dispute; reasonable people may well disagree about the results that its application will yield, particularly in areas of law where it is one consideration among many, such as the criminal justice system. It does not function as a principle of

[146] Hereinafter referred to as "the Charter". The sections in the Charter highlighted are similar to sections contained within the South African Constitution. The case of Law v Canada (Minister if Immigration) [1999] 1 SRC 497 is often referred to in South African case law pertaining to dignity. See for example National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (1) BCLR 39 at par 41.
[147] Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General) at page 24.
[148] As above at page 23.

> fundamental justice setting out our minimum requirements for the dispensation of justice. To conclude, "the best interests of the child" is a legal principle that carries great power in many contexts. However, it is not a principle of fundamental justice".[149]

At this point, the lack of recognition by the Canadian Charter of Rights and Freedoms and the analysis of the Supreme Court of Canada of the best interests of the child principle is highlighted by the writer for consideration, due to the high emphasis that the South African Constitution and South African courts place on the best interests of the child, compared to the Canadian legal system.

It is evident that the South African legal system sees the best interests of the child as a principle of fundamental justice, contrary to the Canadian legal system, in providing that "[a] child's best interests are of paramount importance in every matter concerning the child."[150]

It is contended that if the Canadian legal system accorded the same status to the best interests of the child principle within their Charter of Rights and Freedoms as the South African Constitution, and afforded it the same interpretation as South African courts, the focus would not have been on the rights of parents,[151] but would have centered on the interests of children affected by the "spanking law".[152]

As highlighted by UNICEF, "[i]n Canada it is often assumed that the Charter of Rights and Freedoms covers all human rights, but there is no reference to specific rights for children in the Charter".[153] The UN Committee on the Rights of the Child also made recommendations on the application of the best interests of the child principle in Canada, and raised a concern that the "best interests of the child is still

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[149] As above at page 24.
[150] Section 28(2) of the Constitution.
[151] Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General) at page 5.
[152] See for example the judgment of S v M (Centre for Child Law as amicus curiae) 2008 3 SA 232 (CC) where Sachs J posed the following question within the introduction to his judgment: "…did the courts below pay sufficient attention to the constitutional provision that in all matters concerning children, the children's interests shall be paramount?".
[153] Best interests of the Child: Meaning and Application in Canada: Discussion Paper for Conference Participants, UNICEF <http://www.unicef.ca/portal/Secure/Community/502/WCM/HELP/take_action/Advocacy/Best%20Interests%20of%20the%20Child%20Discussion%20Paper.pdf> (accessed 04 June 2011).

not adequately defined and reflected in some legislation, court decisions and policies affecting certain children".[154] The committee in this regard recommended that:

> "the principle of "best interests of the child" contained in article 3 be appropriately analysed and objectively implemented with regard to individual and groups of children in various situations … and integrated in all reviews of legislation concerning children, legal procedures in courts, as well as in judicial and administrative decisions and in projects, programmes and services that have an impact on children."[155]

With regards to its international obligations under the UN CRC, the Canadian Supreme Court, in the writer's opinion, incorrectly contended that "the Convention on the Rights of the Child…[does not] explicitly require state parties to ban all corporal punishment of children".[156]

The Canadian Supreme court had no regard to the UN Committee on the Rights of the Child's response to their state party report issued in October 2003, which specifically indicated with regards to section 43 of the Criminal Code that "the Committee is deeply concerned that the State party has not enacted legislation explicitly prohibiting all forms of corporal punishment and has taken no action to remove section 43 of the Criminal Code, which allows corporal punishment".[157] The Committee recommended "that the State party adopt legislation to remove the existing authorization of the use of "reasonable force" in disciplining children and explicitly prohibit all forms of violence against children, however light, within the family, in schools and in other institutions where children may be placed".[158]

In conclusion, it is contended that if, in light of section 28(2) of the South African Constitution and South Africa's adherence to international law, the case of *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* was heard by the Constitutional Court of South Africa, instead of the Canadian Supreme Court, there may have been a different outcome to the case for children, in that section 43

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[154] CRC/C/15/Add.215 at par 24.
[155] As above at par 25.
[156] Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General) at par 33.
[157] CRC/C/15/Add.215 at par 32.
[158] As above at par 33.

of the Criminal Code would have most likely have been repealed and declared unconstitutional.

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

In January 2000, the Israeli Supreme Court handed down a landmark decision prohibiting all forms of corporal punishment of children and eliminating the defence of "reasonable force", which entered the Israeli legal system through English common law.[159]

The facts of the case indicated that the appellant, a mother, was convicted of abuse of a minor and assault on a minor by a lower court, based on evidence that she struck, slapped and punched her children on various occasions over the course of a number of years.[160]

The Supreme Court indicated that there were two central questions in the case- that required decision:

> "1. Did the crime of abuse take place … ;
> 2. Does the defence of use of reasonable force by a parent in order to punish his/her child exist?"[161]

With regards to the first question, the court answered the question in affirmative and in addition indicated that "the definition of 'abuse' includes, by nature, a moral failing, there are no circumstances in which a defence of justification will apply to this type of act … the claim of legal justification for reasonable corporal punishment that is made by the appellant cannot apply to acts of abuse, and is relevant only to the crime of assault of which the appellant was convicted".[162]

On the second question, as to whether the defence of reasonable corporal punishment/reasonable force exist in Israeli law, the court went into a lengthy analysis and made a number of noteworthy remarks.

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[159] Plonit v Attorney General 54 (1) PD 145 (Criminal Appeal 4596/98) (Unofficial translation).
[160] As above at page 1.
[161] As above.
[162] As above at page 2.

The court acknowledged that the question of legitimacy of corporal punishment and the defence available to parents is not unique to Israel – many other countries are faced with this question, and approach it in a variety of ways, ranging from "moral, social, educational and ethical outlooks".[163]

In its analysis of the different approaches used, the court highlighted the inheritance in Israel of the English common law defence of reasonable corporal punishment, which entails the use of force as a disciplinary/educational measure available to parents and that "[t]his approach emphasizes the right of the parents and their authority".[164] The court, followed a similar approach to the South African courts, in that it also investigated the first entry of this defence into common law in *R v Hopley*[165] in 1860 and the development of the understanding of what is meant by "reasonableness".[166] However, in this regard the court indicated reasonableness, as interpreted, opened a door of uncertainty, and potentially risking the wellbeing of children.

Further to the court's analysis of an educational approach to the issue of corporal punishment, the court highlighted that the professional-educational approach was rejected, outlawed or strictly limited in a number of countries, including Sweden, Finland, Denmark, Norway and Austria. It highlighted that these countries and other research stressed that "corporal punishment as an educational method not only fails to achieve its goals, it also causes physical and emotional damage to the child which may leave their mark on him or her even in adulthood".[167]

Interestingly, the Israeli Supreme Court also referred to section 43 of the Canadian Criminal Code, and Canadian judgments prior to the case of *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*.[168] The court pointed out, unlike the Canadian Supreme Court, that section 43 "has earned wide criticism in the various Canadian Courts".[169] The court highlighted that the criticism of the

[163] As above at page 3.
[164] As above at page 3.
[165] *R v Hopley* (1860) 2 F&F 202.
[166] As above at page 3 and 6.
[167] As above at page 6.
[168] 2004 SCC 4.
[169] Plonit v Attorney General at page 5.

section mainly stemmed around the definition of "reasonable" force, and accordingly, Canadian parents who used very little force have been tried and found guilty, though other parents who used excessive force have been found not guilty. It noted that because of this, parents lack clear guidance of the extent of force permitted or not.[170] Furthermore, the Israeli Supreme Court also made specific reference to the case of *R. v. James*[171] where the Canadian Court pointed out that Canada is a signatory of the Convention on the Rights of the Child and highlighted (contrary to the case of *Canadian Foundation for Children, Youth and the Law*) [172] that:

> "section 43 defies interpretation using the *Convention*, because the *Convention* stands in direct conflict with the state of the law. One wonders how section 43 can remain in the *Criminal Code* in the face of Canada's international commitment. To this extent the paradox might inform any discussions of the constitutionality of the defence…[t]he only personal view I will express is that I think this is an area that begs for legislative reform."[173]

It is also interesting to note that ironically, the Israeli Supreme Court made extensive mention Canadian case law that criticized section 43 of the Canadian Criminal Code, whilst the Canadian Supreme Court in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*[174] made no mention of these judgments.

Returning to the case under discussion, the Supreme Court of Israel also investigated Israel's international obligations and highlighted the Convention UNCRC, which was ratified by Israel in August 1991, and enacted into force on November 1999. Contrary to the approach of the Canadian Supreme Court, the Israeli Court highlighted that Article 19(1) the Convention clearly "recognizes the child's right to protect his or her physical and mental integrity … [and] expressly forbids the use of physical or mental violence against children, and obligates the

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[170] As above at page 5.
[171] R v James 1998 Carswell Ont 1396, [1998] O.J. No. 1438.
[172] Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General) 2004 SCC 4.
[173] R v James at pars 10 and 18. The Israel Supreme Court also made mention of the judgment of R. v. J.O.W [1996] O.J. 4061, where it was noted that "if Parliament determines that corporal punishment is no longer tolerable in our society; to then repeal Section 43 of the Code. The current state of uncertainty is inadequate to protect children…".
[174] Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General) 2004 SCC 4.

state to take measures to prevent violence against children".[175] It thus concluded that Israel has an international obligation to prohibit corporal punishment.

With regard to the effects of corporal punishment on children, the court indicated that "light" punishment has the potential to devolve over time into more serious violence and systematic abuse, which may endanger the welfare of the child with little or no educational value:

> "A 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. A court cannot and is not permitted to close its eyes to social developments and the lessons that have been learned from educational and psychological studies, which have completely changed the attitude towards education by means of corporal punishment. Beyond the fact that painful or humiliating punishment fails as an educational system and causes the child physical and emotional damage, such punishment violates the basic rights … of children in our society to dignity, and to integrity of mind and body."

In conclusion, the court held that criminal law possesses enough "filters", for example the discretion of the prosecutor to prosecute and the de minimis rule, which may be imposed to prevent parents from being prosecuted for mild force. Similarly, the court distinguished corporal punishment from force used to protect the body of a child from harm, where the latter will not be met with criminal sanction.

In finality it was held that:

> "The child depends upon the parents, is entitled to parental love, protection and the parents' gentle touch. 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

[175] Plonit v Attorney General at pages 10 and 11.

> body, feelings, dignity and proper development. Such punishment distances us from our goal of a society free of violence. Accordingly, let it be known that in our society, parents are now forbidden to make use of corporal punishments or methods that demean and humiliate the child as an educational system."[176]
>
> "We cannot endanger the bodily and mental integrity of the minor with any type of corporal punishment; the type of permissible measures must be clear and unequivocal, the message being that corporal punishment is not permitted".[177]

The Israeli Supreme Court went to extensive lengths to highlight that the defence of reasonable and moderate chastisement unnecessarily opens a door for uncertainty, lesser protection and infringes children's right to dignity and adequate protection.

4.3 Conclusion

Foreign law, also referred to by the courts as comparative research, has often been considered of value by the South African Courts. The court in *Sanderson*[178] indicated that comparative human rights jurisprudence will be of great importance while an indigenous Constitutional jurisprudence is being developed, but cautioned that foreign case law is not necessary a safe guide to the interpretation of the Bill of Rights, hence the word 'may' is used within section 39(1)(c). In this regard, the court indicated that "[c]omparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence but well developed in mature constitutional democracies … Nevertheless the use of foreign precedent requires circumspection and acknowledgement that transplants require careful management."[179]

Therefore, when having regards to judgments such as *Canadian Foundation for Children, Youth and the Law* it is important to take into account both similarities and differences between the Canadian Charter and the South African Constitution. Specifically in this regard, it is important to note that the best interests of the child is only seen as a legal principle and not a constitutional right in and of itself in

[176] As above at page 11.
[177] As above at page 12.
[178] Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC).
[179] As above at par 26.

Canadian law, which differs from the status accorded to best interests under the South African Constitution. This is the basis of the previously mentioned contention, that if the best interests of the child was afforded the same legal importance in Canadian law, as it is in South African law, the court would have come to a different conclusion.

The South African Constitutional Court also places particular value on international law when interpreting the Bill of Rights. The Canadian Court in the case discussed above did not take substantial notice of international law within its judgment, which might also have resulted in a different outcome had the comments from the UN Committee on the Rights of the Child regarding Canada's State party report been taken into account.

Contrary to the Canadian case, the Israeli Supreme Court took ample notice of Israel's international obligations by recognizing that the UN CRC expressly forbids the use of physical violence against children and holding that this requires the State to take all necessary measures to prohibit corporal punishment of children within its jurisdiction.[180]

The Israeli Court also examined entry of the common law defence of reasonable and moderate chastisement into Israel's law. In this regard the court made reference to cases such as *R v Hopley*,[181] which was also previously referred to in South African cases prior to the South African Constitution coming into force.

Lastly, the Israeli Supreme Court also made reference to the rights of children, especially to dignity and protection, that are infringed by the reasonable and moderate chastisement defence, and in this regard highlighted that:

> "Human dignity and liberty, which raises the status of human dignity to a super-legal constitutional rank, also serves as an important legal source in our case. The law gives obligatory force to the dignity and protection that society is

[180] Polit v Attorney General at pages 10 and 11.
[181] (1860) 2 F&F 202.

obliged to supply to the weak and helpless amongst us, among them minors who fall victim to violence from their parents."[182]

There is much to learn from the judgments above, keeping the mind the caution that must be applied in foreign comparative law assessments. It is clear that the best interests of the child are valued at a higher level within the South African Constitution and Israeli law than in the Canadian Charter, and this has resulted in different outcomes in each of the cases considered. It is contended that the South African Courts are likely to come to a similar conclusion as the Israeli Supreme Court, regarding corporal punishment of children, during consideration of the best interests of the child principle.

It is also further contended that in taking into account international law, the South African Constitutional Court will come to a similar conclusion as the Israeli Supreme Court. The Canadian court failed to take notice of the response provided by the UN Committee to Canada's state party report whereas the South African courts must have regard to its international obligations, and thus the response of the UN Committee to South Africa's state party report.

Therefore, having regard to the analysis of the judgments above, it is contended that the South African Constitutional Court would follow a similar approach to that taken in *Polit v Attorney General* and accordingly come to a similar conclusion, namely that "[w]e cannot endanger the bodily and mental integrity of the minor with any type of corporal punishment; the type of permissible measures must be clear and unequivocal, the message being that corporal punishment is not permitted".[183]

[182] Polit v Attorney General at page 10.
[183] As above at page 12.

Chapter 5: Challenging the constitutionality of the "reasonable and moderate chastisement defence"

The legal question that this dissertation attempts to answer pivots around the Constitutional rights of South African children affected by the common law defence of reasonable and moderate chastisement. What follows is an analysis of the reasonable and moderate chastisement defence, identification and interpretation of the possible rights infringed by the defence, and a subsequent analysis of these rights in light of the limitation clause contained within section 36 of the Bill of Rights.

5.1 Analysis of the common law defence of reasonable and moderate chastisement

As mentioned previously in this writing, South African common law makes provision for a defence of reasonable and moderate chastisement, as a ground of justification for parents when a criminal case or delictual claim based on assault is raised.

Assault is defined in our law, described by Snyman, as the unlawful and intentional application of force (or inspiring a belief that force is to be applied) directly or indirectly to the person of another.[184] As seen from the definition, both adults and children can be subject to assault, which assault must be unlawful. Unlawfulness denotes that there must be no justification in law allowing for the person's use of force. Grounds of justification for assault in South African law include private defence, necessity, official capacity, consent and a parent's "right of chastisement".[185]

The defence of reasonable and moderate chastisement stems from common law and was analyzed in the case of *Rex v Janke and Janke*[186] in 1931 as follows:

> "The general rule adopted both by the Roman, the Roman-Dutch law and the English law is that a parent may inflict moderate and reasonable chastisement on a child for misconduct provided that this not be done in a manner offensive to good morals or for other objects than correction and admonition … The presumption is that such punishment has not been dictated by improper

[184] Snyman (2002) 430.
[185] As above at page 433.
[186] Rex v Janke and Janke 1913 TPD 382.

motives … A parent … may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment".[187]

The 1990 case of *Du Preez v Conradie and Another*[188] also confirmed this defence in law by providing 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. In order to achieve this object parents have the right to chastise their children. The chastisement must be moderate and reasonable, even when it takes the form of corporal punishment, which in turn must be restrained and tenable."[189]

The components of the defence includes the requirements of moderation and reasonableness. What is "moderate" would depend on the circumstances of the case, at which point regard must be had to, inter alia, the "age, bodily and mental conditions of the child, the amount of punishment inflicted, and the nature of the instrument used".[190] The degree of chastisement must furthermore be reasonable in that:

"[t]he child must have acted wrongfully, or threatened to act wrongfully. The child must have deserved the chastisement. 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. The parent must chastise the child in order to educate the child or to censure or correct the child for an actual misdeed. If she punishes the child merely to give vent to rage or out of sadism, her conduct is not justified."[191]

The Court in *Conradie v Du Preez and Another*[192] confirmed that in order to be justifiable, the punishment must be "equitable and fair" and in determining the reasonableness of the punishment the following considerations must be taken into account:

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[187] 1913 TPD 382 at page 385 and 386.
[188] 1990 (4) SA 46 (B).
[189] Du Preez v Conradie and Another at page 51.
[190] S v Lekgathe 1982 (3) SA 104 (B) at page 109.
[191] Snyman (2002) 136.
[192] 1990 (4) SA 46 (BG).

"(i) the nature of the offence;
(ii) the condition of the child, physically and mentally;
(iii) the motive of the person administering the punishment;
(iv) the severity of the punishment, ie the degree of force applied;
(v) the object used to administer punishment;
(vi) the age and sex of the child;
(vii) the build of the child."[193]

It is furthermore lawful for parents to delegate the authority to chastise a child to another person, subject to the conditions that are stipulated above. It should however be noted, that parents are no longer allowed to delegate this authority to educators and other stakeholders in the education setting.[194]

The reasonable and moderate chastisement defence has also received attention in international law, particularly by the UN Committee on the Rights of the Child. The UN Committee acknowledged that the defence of "lawful", "reasonable" or "moderate" chastisement has formed part of the English common law for centuries, and that many States have at one time allowed this defence to be raised as a justification for chastisement of wives by their husbands, as well as for slaves, servants and apprentices by their masters. The Committee emphasized that States party to the convention should promptly abolish this defence in law, as no amount of violence against children is justifiable. Allowing this defence is not in the best interest of the child.[195]

5.2 Identification and interpretation of the rights contained in the Bill of Rights that are affected by the common law defence.

The rights of children affected by the common law defence of reasonable and moderate chastisement are contained in sections 9(equality), 10(human dignity), 12(freedom and security of the person) and 28(specific rights of children) of the

[193] Du Preez v Conradie and Another at pages 52 and 53.
[194] Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC) at par 51.
[195] CRC/C/GC/8 at pars 26 and 31.

South African Constitution. The identification of the rights affected is substantiated by the UN Committee on the Rights of the Child in General Comment No 8:[196]

> "The Convention on the Rights of the Child and other international human rights instruments recognize the right of the child to respect for the child's human *dignity* and *physical integrity* and *equal protection under the law*.[197] When the Committee on the Rights of the Child has raised eliminating corporal punishment with certain States … governmental representatives have sometimes suggested that some level of "reasonable" or "moderate" corporal punishment can be justified as in the best interests of the child. The Committee has rejected this explanation, emphasising the "*best interests" of the child* … interpretation of a child's best interests must be consistent with the whole Convention, including the obligation to protect children from all forms of violence … it cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child's *human dignity* and right to *physical integrity*."[198]

What follows is a brief analysis of each of the Constitutional rights of children affected by the common law defence of reasonable and moderate chastisement.

5.2.1 Section 9: Equality

Section 9 of the Bill of Rights pertaining to equality reads as follows:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> …
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including … age.
>
> (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.

[196] CRC/C/GC/8.
[197] As above at par 2 (own emphasis).
[198] CRC/C/GC/8 at par 26 (own emphasis).

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

It was previously submitted by the writer that the reasonable and moderate chastisement defence affords children less protection from assault under the law than it affords adults. It immunizes parents from what would otherwise be considered assault, if the 'assault' is against a child and is reasonable, moderate and aimed at correction.

It is however trite law that differentiation in itself does not always constitute unfair discrimination. The inquiry as to whether the differentiation amounts to unfair discrimination was summarized by the court in *Harksen v Lane NO*,[199] where a two stage analysis was highlighted. Firstly, an enquiry as to whether the differentiation amounts to "discrimination" needs to be undertaken, and secondly, if discrimination is established, the question as to whether the discrimination is of such nature that it amounts to "unfair discrimination" needs to be answered.[200]

Albertyn and Goldblatt analysed the test in *Harksen v Lane NO,*[201] to consist of a three pronged inquiry:

1. Does the differentiation amount to discrimination?
2. If so, is the discrimination unfair?
3. If the discrimination is unfair, can it be justified in terms of the limitation clause contained in section 36 of the Constitution?[202]

The first leg of the enquiry requires a court to establish whether the differentiation amounts to discrimination. The Constitution in section 9(3) specifically makes provision for listed grounds where differentiation will automatically amount to "discrimination".[203] Therefore, if the differentiation is established on a ground listed, such as age, then the differentiation amounts to discrimination.

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[199] Harksen v Lane NO 1998 (1) SA 300 (CC).
[200] As above at par 45.
[201] 1998 (1) SA 300 (CC).
[202] Woolman S, Roux, T & Bishop, M (eds) (2002) at page 35-43.
[203] As above at page 35-44.

Regarding the second leg of the enquiry, whether the discrimination is unfair, "[t]here is no suggestion in *Harksen* that the differentiation [on listed grounds in subsection 3] would need to entail some prejudice to the person complaining of the discrimination".[204] Thus, if the discrimination falls within the listed grounds in section 3, access is provided to the presumption of unfairness contained in subsection 5.[205] The onus is therefore placed on the person alleging that the differentiation does not amount to unfair discrimination to prove fairness.

The third leg of the enquiry requires an analysis in terms of section 36 of the Constitution, referred to as the "limitation clause". 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".[206] In this regard, Albertyn and Goldblatt state that it is "unlikely, though not logically impossible, for a violation of FC [Final Constitution] s 9(3) or 9(4) to be justified under FC 36".[207] This statement is amplified by the provision of a presumption of unfairness provided for in subsection 5.

In interpreting the right to equality for children, it is clear that the differentiation between adults and children imposed by the reasonable and moderate chastisement defence provides children with less protection and benefit of the law in terms of subsection 1, and discriminates against children based on the listed grounds of "age" in terms of subsection 3. There is also a presumption that the discrimination amounts to unfair discrimination if based on the grounds listed in subsection 3, as highlighted above. Therefore, it is held that the first and second questions in the test are answered in the affirmative, resulting in the conclusion that the defence of reasonable and moderate chastisement unfairly discriminates against children. Lastly, the third leg of the test, whether the unfair discrimination against children established can be justified, must also to be embarked on. This enquiry will be dealt

[204] As above.
[205] As above at page 35-45. Subsection 5 provides that "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."
[206] Section 36 of the Constitution.
[207] As above at page 35-16.

with below during the analysis of the section 36 limitation clause.[208] What is apparent from this section though, is that unfair discrimination against children has been established, and will be difficult to justify in the ambit of section 36 of the Constitution.

5.2.2 Section 10: Human Dignity

Section 10 of the Constitution provides that:

> "Everyone has inherent dignity and the right to have their dignity respected and protected."

According to section 1 of the Constitution, South Africa is founded on the fundamental values of 'human dignity', 'equality' and the advancement of human rights. Dignity is seen as closely related to the concept of equality.[209] In *President of the RSA v Hugo*[210] the court identified dignity to be a core value of equality, and in this respect provided that:

> "At the heart of the prohibition of unfair discrimination lies a 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 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."[211]

The value of dignity within equality entails the notion of equal moral worth and respect.[212] "Respect for the intrinsic worth of every person should mean that individuals are not to be perceived or treated merely as instruments or objects of the will of others."[213]

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[208] See par 5.3 below.
[209] Woolman S, Roux, T & Bishop, M (eds) (2002) at pages 35-8 and 35-9.
[210] President of the RSA v Hugo 1997 (4) SA 1 (CC).
[211] As above at par 41 (own emphasis).
[212] Woolman S, Roux, T & Bishop, M (eds) (2002) at page 35-12.
[213] O Schacher (1983) 77 *American Journal of International Law* at page 2.

The South African courts often refer to the Canadian case of *Law v Canada (Minister if Immigration)*[214] which provides as follows:

> "Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits … Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law."[215]

The Court in *S v Williams*[216] did specifically took into account the right to human dignity within its judgment on the constitutionality of juvenile whipping as a sentence. The court highlighted that:

> "[w]hether one speaks of 'cruel and unusual punishment' ... or 'cruel, inhuman or degrading punishment' ... the common thread running through the assessment of each phrase is the identification and acknowledgement of society's concept of decency and human dignity[217]... There is unmistakably a growing consensus in the international community that judicial whipping, involving as it does the deliberate infliction of physical pain on the person … offends society's notions of decency and is a direct invasion of the right which every person has to human dignity[218]... An enlightened society will punish offenders, but will do so without sacrificing decency and human dignity[219]... The severity of the pain inflicted is arbitrary, depending as it does almost entirely on the person administering the whipping. Although the juvenile is not trussed, he is as helpless. He has to submit to the beating, his terror and sensitivity to pain

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[214] Law v Canada (Minister if Immigration) [1999] 1 SRC 497. For use in South African case law, see for example National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (1) BCLR 39 at par 41.
[215] As above at par 144.
[216] 1995 (3) SA 632 (CC).
[217] S v Williams at par 28.
[218] As above at par 39.
[219] As above at par 68.

> notwithstanding … The whipping … in itself, a severe affront to their dignity as human beings[220] … The Constitution clearly places a very high premium on human dignity and the protection against punishments that are cruel, inhuman or degrading; very stringent requirements would have to be met by the State before these rights can be limited."[221]

As emphasized within the judgment above, there is a growing movement internationally against corporal punishment which specifically emphasizes the infringement of human dignity.[222]

General Comment No 8 of the UN Committee on the Rights of the Child specifically highlights that the UN CRC builds on the foundation of "'everyone's right to respect for his/her human dignity"[223] as enshrined within the International Bill of Human Rights, the Universal Declaration and the two International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. "The dignity of each and every individual is the fundamental guiding principle of international human rights law."[224]

The UN Committee noted that within the drafting process of the UN CRC, corporal punishment of children did not explicitly feature within its considerations. However, the UN Committee emphasized that the UN CRC, like all human rights instruments, is a living document, whose interpretation develops over time. As the practice of corporal punishment became more and more visible to the Committee since enactment of the UN CRC, the Committee clearly took a stance against corporal punishment of children. Once visible, the Committee stressed that "it is clear that the practice directly conflicts with the equal and inalienable rights of children to respect for their *human dignity and physical integrity*".[225]

In conclusion, as highlighted, the South African Constitution regards dignity as a founding value of the new South African democracy, and together with the right to

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[220] As above at par 45.
[221] As above at par 76.
[222] As above at par 28. Also see General Comment no 8 of the UN Committee on the Rights of the Child.
[223] CRC/C/GC/8 at par 16.
[224] As above at par 16.
[225] As above at par 21 (own emphasis).

equality is valued above all other rights,[226] and used to inform interpretation of all other rights in the Bill of Rights.[227] Dignity emphasizes that people, including children, should not be treated as mere objects of the will of others, including parents. The rights not to be subjected to cruel, inhumane or degrading punishment, including corporal punishment of children (as highlighted within General Comment no 8 of the UN CRC), inherently includes a right to respect for a person's dignity.

Since the Constitution requires international law to be taken into account when interpreting the rights contained within the Bill of Rights,[228] and since international law deems corporal punishment as a violation of children's inalienable right to human dignity, the reasonable and moderate chastisement defence, allowing corporal punishment of children, must be construed as infringing children's inherent right to human dignity.

5.2.3 Section 12: Freedom and security of the person

Section 12 of the Bill of Rights pertains to freedom and security of the person and reads as follows:

> "(1) Everyone has the right to freedom and security of person, which includes the rights-
>
> …
>
> (c) to be free from all forms of violence from either public or private sources; [and]
>
> …
>
> (e) not to be treated or punished in a cruel, inhumane or degrading way."

The rights contained within this section are of considerable importance as "[g]enerally [these rights are] guaranteed in absolute, non-derogable and unqualified terms; justification in those instances is not possible".[229]

Section 12 "combine a right to freedom and security of the person with a right to bodily and psychological integrity".[230] The provision provides protection to individuals

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[226] S v Makwanyane 1995 (3) SA 391 (CC) at par 144.
[227] CRC/C/GC/8 at pars 21 and 26.
[228] See section 39 of the Constitution.
[229] S v Williams at par 21.
[230] Currie & De Waal (2005) at page 292.

through placing both a positive and negative duty on the State. Section 12 firstly requires the state to refrain from meting out violence or punishment that is cruel, inhumane or degrading; and secondly, places a positive duty on the state to restrain or discourage private individuals form such invasions.[231] The rights pertain to both the public and private spheres and "[t]he specific inclusion of private sources emphasizes 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".[232]

The right not to be treated or punished in a cruel, inhumane or degrading way denotes three disjunctive concepts. It therefore holds that if a "punishment has any one of these three characteristics"[233] the punishment meted out would violate section 12 of the Constitution.

In *Tyrer v United Kingdom*,[234] the European court held that corporal punishment constitutes degrading treatment, however it did not constitute inhumane treatment as it did not attain the required level of severity. Similarly, in the case of *Ireland v the United Kingdom*[235] the court ventured into establishing what is meant by "degrading", and held accordingly that treatment can be regarded as degrading when it "may arouse in the victim feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance".[236]

Some courts within the Southern Africa region also considered the degree of infringement irrelevant as "once one has arrived at the conclusion that corporal punishment per se is impairing the dignity of the recipient or subjects him to degrading treatment or even to cruel or inhumane treatment or punishment … the fact remains that any type of corporal punishment results in some impairment of dignity and [therefore constitutes] degrading treatment".[237]

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[231] As above at page 304.
[232] S v Baloyi (Minister of Justice & Another Intervening) 2002 (2) SA 425 (CC) at par 11 (own emphasis).
[233] S v Dodo 2001 (3) SA 382 (CC) at par 35.
[234] *Tyrer v. the United Kingdom (application No. 5856/72).*
[235] Ireland v the United Kingdom (1978) 2 EHRR 25.
[236] As above at par 176.
[237] Ex parte Attorney-General, Namibia: In re Corporal punishment by Organs of State 1991 (3) SA 76 (NmS) at 97C-E.

The court in *Christian Education South Africa v Minister of Education*[238] also specifically highlighted section 12 within its judgment on corporal punishment in schools, by stressing that "[u]nder section 7(2) the state is obliged to 'respect, protect, promote and fulfil' these rights. It must accordingly take appropriate steps to reduce violence in public and private life. Coupled with its special duty towards children, this obligation represents a powerful requirement on the state to act."[239]

The Court also contended that the rights contained within section 12 is closely linked to the right to dignity enshrined within section 10, in that it stated that "the impairment of human dignity, in some form and to some degree, must be involved in all three".[240]

The court decided not to venture into the question as to the constitutionality of corporal punishment meted out by parents, as this was not under question before the court. However, the court did choose to emphasize that the issue of parental corporal punishment should be analyzed within the concept of violence from a "private source", at which point a determination should be made as to whether or not the common law should be developed so as to further regulate or even prohibit corporal punishment in the home.[241]

5.2.4 Section 28: Children's specific rights

"(1) Every child has the right –

…

(d) to be protected from maltreatment, neglect, abuse or degradation;

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

Section 28 sets out a range of rights for children that is additional to the protection that they receive from the remainder of the Bill of Rights.[242] The purpose of section 28 is to protect children from situations where they are particularly vulnerable, and in this respect, the rights contained within section 28 enhances the protection

[238] 2000 (4) SA 757 (CC).
[239] Christian Education South Africa v Minister of Education at par 47.
[240] As above. See also S v Williams at par 35.
[241] As above at par 48.
[242] Currie & De Waal (eds) (2005) at page 600.

contained within the rest of the Bill of Rights.[243] Accordingly the specific Constitutional rights provided to children also means that children cannot be seen as mere extension of their parents.[244]

Section 28(1)(d) specifically provides children with the right not to be subject to neglect, abuse or degradation. This right is additional to the rights contained within section 12(1)(c) of the Constitution. It is therefore contended that section 28(1)(d) acts as an amplifier to the rights contained in section 12(1)(c) and (e) of the Constitution and places an increased duty of protection on the State when it comes to children.

According to Sloth-Nielsen the question that needs to be asked is to what extent the rights provided for in section 28(1)(d) allow and impose a duty on the state to intervene in private or parental relationships to prevent abuse or neglect of children.[245] She found the answer in the *Grootboom*[246] case where the court stated that "[t]he State appears to be directly responsible for ensuring fulfillment of [the child's right to protection from maltreatment, abuse and degradation, whether children are in parental, familial, or alternative care".[247]

Section 28(1)(d) is seen as a recognition of South Africa's duty to protect children in terms of article 19(1) of the Convention on the Rights of the Child. "The protection of the child's right not to be subjected to neglect, abuse or degradation is a municipal reinforcement of art 19(1) of the Convention on the Rights of the Child".[248] It must therefore be contended that General Comment No 8 of the Committee on the Rights of the Child on corporal punishment must be taken into consideration when interpreting section 28(1)(d) of the Constitution.

Accordingly, if General Comment No 8 is taken into consideration, then it is clear that the right of children to be protected from neglect, abuse and degradation would

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[243] As above at page 603.
[244] As above at page 602.
[245] Cheadle and Davis (eds) (200) at page 23-13.
[246] Government of the Republic of South Africa & Others v Grootboom & Others 2001 (1) SA 46 (CC).
[247] Sloth-Nielsen in Cheadle & Davis (eds) (2005) at pages 23-13.
[248] As above at page 614.

include the right to be protected from parental corporal punishment. As stressed by the UN Committee on the Rights of the Child:

> "There is no ambiguity: 'all forms of physical or mental violence' does not leave room for any level of legalized 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."[249]

The UN CRC also includes a provision on the best interests of the child by providing that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[250]

The South African Constitution, containing a similar provision to the UN CRC, however places a higher emphasis on the best interests of the child by providing that the best interests of the child is of "*paramount* importance in every matter concerning the child".[251]

Skelton, in her analysis of the stature of the right, emphasized that:

> "It is clear that section 28(2), following the lead of the international instruments, intends to expand the meaning and application of the best interests to all aspects of the law that affects children. Section 28(2) has indeed become a key provision in Bill of Rights jurisprudence. It has helped to develop the meaning of some of the other rights in the Bill of Rights. It has also been used to determine the ambit, and to limit, other competing rights. Section 28(2) should not be regarded merely as a principle that helps interpretation of other rights. It is a right in itself." [252]

The UN Committee on the Rights of the Child specifically took into consideration the best interests of the child in General Comment No 8 by highlighting that some state parties suggested that the best interests of the child justifies the use of corporal

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[249] CRC/C/GC/8 at par 18.
[250] Article 3 of the UN Convention on the Rights of the Child.
[251] Section 28(2) of the Constitution (own emphasis).
[252] Skelton in Boezaart (ed) at page 280.

punishment and the allowance of a reasonable and moderate chastisement defence in law. The UN Committee stressed however that the best interests of the child does not allow for the existence of this defence or the allowance of corporal punishment in law. On the contrary, the UN Committee stressed that the UN CRC requires that the best interests of the child is of primary consideration in all actions concerning children, and that the best interests of the child pertains to all articles within the Convention, including article 19, which prohibits the use of corporal punishment.[253]

Therefore, as the South African Constitution places a higher emphasis on the best interests of the child principle than the UN CRC, the principle of the best interests of the child within the South African Constitution must be interpreted so as to not justify the use of corporal punishment, "which conflicts with the child's human dignity and right to physical integrity".[254]

From the above analysis, it is clear that neither section 28(1)(d) nor section 28(2) can be interpreted to make allowance for parental corporal punishment of children in South Africa and a positive duty is placed on the State to intervene in the private family sphere to protect children.[255]

5.3 Analysis of the rights affected by the reasonable and moderate chastisement defence in light of the limitation clause contained in section 36 of the Bill of Rights.

Section 36 of the Constitution provides for specific guidelines on limitation of the Rights contained in the Bill of Rights. Section 36 states that:

> "36(1) The rights in the Bill of Rights may be limited only in terms of the 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 relationship between the limitation and its purpose; and

[253] CRC/C/GC/8 at par 26.
[254] As above.
[255] Government of the Republic of South Africa & Others v Grootboom & Others at par 78.

(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."

The task of determining whether a right can be limited within the ambit of section 36 is not an easy one, as it requires a range of factors to be taken into account, and requires both factual as well as objective inquiries at different stages. In a nutshell, section 36 firstly requires an inquiry as to whether the rights affected are limited by a law of general application. Secondly, it requires an analysis of the limitation in light of a democracy that values human dignity, equality and freedom, taking into account subsections 36(1)(a) to (e) of the Constitution.

5.3.1 Law of general application

The first factor that needs to be established is whether the rights of children limited is done so by a law of general application. In the case of *President of the RSA v Hugo,*[256] the Constitutional Court had to determine whether a Presidential Act fell within the scope of law of general application. The Court referred to the case of *Du Plessis and Others v De Klerk and Another*[257] where the Court held that:

"The term 'reg' is used in other parts of chapter 3 [of the Interim Constitution] as the equivalent of 'law', for example in s 8 ('equality before the law') and s 33(1) ('law of general application'). Express references to the common law in such sections as s 33(2) and s 35(3) reinforce the conclusion that the law referred to in s 7(2) includes the common law and that chapter 3 accordingly affects or may affect the common law … [S] 33(1) … draws no distinction between different categories of law of general application … [I]t is irrelevant whether such rule is statutory, regulatory, horizontal or vertical, and it matters not whether it is founded on the XII Tables of Roman law, a Placaet of Holland or a tribal custom."[258]

[256] 1997 (4) SA 1 (CC).
[257] Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (CC).
[258] As above at pars 44 and 72.

The Court in *President of the RSA v Hugo,*[259] in keeping with their earlier decision of *Du Plessis and Others v De Klerk and Another*,[260] found that the term 'law of general application' encapsulates both common law as well as statutory law.[261] Thus, as the defence of reasonable and moderate chastisement falls within common law, it is deemed to be a law of general application, and will allow the rights of children to be limited if it passes the remainder of the requirements within section 36.

5.3.2 Section36(1)(a): Nature of the rights infringed

Section 36(1)(a), requires an examination into the nature of the rights of children infringed by the common law defence of reasonable and moderate chastisement. These rights were analyzed in detail in paragraph 5.2 above. The right to human dignity is included in the Constitution as one of the founding principles of the South African democracy.[262] The rights to be free from all forms of violence from either public or private sources and not to be treated or punished in a cruel, inhumane or degrading way, as contained within section 12 of the Bill of Rights, necessarily involves a component of human dignity.[263] The duty on the State to protect people from all forms of violence is amplified by the duty on the State to provide extra protection to children under section 28 of the Constitution.[264]

Furthermore, differentiation between adults and children, in allowance of the reasonable and moderate chastisement defence, provides children with "less protection and benefit of the law" in terms of subsection 9(1) of the Constitution, and discriminates against children based on age in terms of subsection 9(3). There is furthermore a presumption of unfairness in subsection 9(5), which highlights that discrimination based on subsection 9(3) is presumed to be unfair unless it is established that the discrimination is fair. The onus of proving fairness is closely linked to the requirements imposed by the section 36 limitation clause, and is therefore undertaken under this section+.

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[259] 1997 (4) SA 1 (CC).
[260] 1996 (3) SA 850 (CC).
[261] As above at par 96.
[262] S v Makwanyane at par 144.
[263] Christian Education v Minister of Education at par 47. See also S v Williams at par 35.
[264] Christian Education v Minister of Education at par 47.

It is evident from the analysis above that the rights identified are of considerable importance in a democratic South Africa, given its history of inequality, violence and degrading treatment. What follows is an analysis of the importance, purpose, nature and extent of the limitation, the relationship between the limitation and its purpose and a less restrictive means to achieve the purpose as required in sections 36(1)(b) to (e).

5.3.3 Section36(1)(b): The importance of the purpose of the limitation

In order for the limitations imposed by the reasonable and moderate chastisement defence to be justifiable it must serve a purpose that is reasonable in an open and democratic society.

The indicative purpose of the defence of reasonable and moderate chastisement is to enable parents to provide discipline and correction to their children. This purpose was highlighted in a number court judgments throughout the last century, starting in 1913 in *Rex v Janke and Janke*[265] who referred to a case from 1860, *Regina v Hopley,*[266] in stating that "a parent … may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment".[267]

Subsequent to this judgment, numerous other courts followed in highlighting the purpose of allowing the reasonable and moderate chastisement of children. For example, *S v Lekgathe*[268] 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",[269] *Du Preez v Conradie and Another*[270] also indicated that:

> "parents have the right and power to administer punishment to their minor children for the purpose of correction and education. In order to achieve this object parents have the right to chastise their children. The chastisement must

[265] 1913 TPD 382.
[266] (1860) 2 F&F 202
[267] Rex v Janke and Janke at page 385.
[268] 1982 (3) SA 104 (B).
[269] S v Lekgathe at page 109.
[270] 1990 (4) SA 46 (B).

> be moderate and reasonable, even when it takes the form of corporal punishment…".[271]

From the above it is evident that the courts have highlighted the purpose of the reasonable and moderate chastisement defence to be important for the correction, education and discipline of children.

5.3.4 Section 36(1)(c): The nature and extent of the limitation

The nature of the reasonable and moderate chastisement defence is such that it provides parents with a grounds of justification in law when a criminal case or delictual claim of assault is raised. If this defence in law did not exist, parents would be liable for assault when they physically punish their children.

Allowance the defence of reasonable and moderate chastisement results in children, despite being seen as vulnerable and deserving of more protection,[272] being afforded less protection against assault than any other category of persons in South Africa. This is especially so, as what is reasonable and moderate would solely depend on the parent's judgment at the time of administering corporal punishment.

As highlighted by Douglas and Straus:

> "In practice, the difference between corporal punishment and physical abuse hinges on whether the child is injured seriously enough for the case to be classified as 'abuse' by child protective services, regardless of the intent of the parent. This is shown by research showing that about two-thirds of cases of physical abuse begin as corporal punishment, but due to circumstances such as a defiant child or the child hitting the parent, escalate out of control and the child is injured."[273]

Therefore, the nature of the limitation is such that it provides children with less protection from the law when it comes to charges of assault, than any other category of persons in South Africa, despite their inherent vulnerability. It also increases children's protection risks as the reasonableness and moderation of the

[271] Du Preez v Conradie and Another at page 51.
[272] As is evident from the special category of rights provided for children in section 28 of the Constitution.
[273] Douglas and Straus in Felthous & Sass (eds) 2008 at page 305.

chastisement is subjectively evaluated and depends solely on the discretion of the parent at time of administration.

The extent of its use is also widespread, as research has show that corporal punishment of children in South Africa is frequently used and deeply entrenched as a culture of discipline.[274]

5.3.5 Section 36(1)(d): The relationship between the limitation and its purpose

It is contended that the relationship between the limitation imposed by the reasonable and moderate chastisement defence, and the purpose that it seeks to achieve is tenuous.

Extensive amounts of research exists on the effects of corporal punishment on children's discipline for both the short term and long term. Psychological and educational findings 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 behaviors on others, and may teach children the desirability of not getting caught."[275]

> "[A]lthough immediate compliance is often a valid short term goal for parents, their long-term goals are that children continue to comply in the future and in their absence. Immediate compliance can be imperative when children are in danger, yet successful socialization requires that children internalize moral norms and social rules; in and of itself, immediate compliance does not imply internalization."[276]

These effects on children are contradictory to and seems to frustrate the indicative purpose for disciplining children, which is to promote "the development of children's internal controls … [for] long-term socialization [rather] than immediate compliance".[277]

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[274] See Clacherty G, Clacherty A & Donald D (2005) and Dawes, Kafaar, de Sas Kropiwnicki, Pather & Richter (2005).
[275] Gershoff (2002) 539 *Psychological Bulletin* at page 541.
[276] As above at page 550.
[277] As above at page 541.

Furthermore, numerous studies have shown that corporal punishment of children "is associated with harmful side effects such as aggression and delinquency in childhood, crime and antisocial behavior as an adult, low empathy or conscience, poor parent-child relations, and mental health problems such as depression".[278]

The assertion of aggression was confirmed by children themselves in a study conducted with children in South Africa on their experiences of corporal punishment:[279]

> "When we arrived at home she carry on shouting at me telling me that I will fall pregnant and she hit me with a shoe again and I hit her back with a shoe and told her to understand I am a teenager now and I was very angry and I left the house and I went to take a walk with my boyfriend. (Girl, 13-18, rural, Limpopo)."[280]
>
> "I thought it was unfair because it was an accident. I felt a little bit angry, but just forgot about it because it will go past faster if you forget about it. (Boy, 9-12, urban, Limpopo)."[281]
>
> "He started getting really angry and then he tried to throttle me and if I remember correctly he tapped me in the face and I got really, really angry (Boy, 9-12, urban, Gauteng)."[282]
>
> "The punishment was not balancing to me, it was too much. I just felt angry and I went to my bed. (Girl, 13-18, urban, W.C.)."[283]

Moreover, it has been shown in the studies highlighted above, that corporal punishment not only increases children's aggression in childhood, but also later in adulthood, and thereby perpetuating a cycle of violence. "A tendency toward intergenerational transmission of aggression in close relationships is evident in a strong tendency for parents who were corporally punished to continue the practice

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[278] Straus in Loseke DR, Gelles RJ, Cavanaugh MM (eds) 2005 at page 140.
[279] Clacherty G, Clacherty A & Donald D (2005).
[280] As above at page 11.
[281] As above at page 60.
[282] As above.
[283] As above at page 51.

with their own children."[284] Corporal punishment in itself models aggression and violent behavior, and is rewarded by children's own compliance with it, as such children learn that aggression is an effective way to achieve compliance from others.[285]

It has also been concluded, as indicated above, that corporal punishment erodes the parent-child relationship in that "[t]he painful nature of corporal punishment can evoke feelings of fear, anxiety, and anger in children; [and] if these emotions are generalized to the parent, they can interfere with a positive parent–child relationship by inciting children to be fearful of and to avoid the parent".[286] This in turn results in a decrease in the child's "motivation to internalize parents' values and those of the society, which in turn results in low self-control"[287] and possibly criminal and antisocial behaviour in childhood and adulthood.[288]

A further important point to note is the effect of parental emotion on the use of corporal punishment. Strong emotions in parents, such as anger, frustration or stress, influence how they react to a child's misbehaviours, and often results in a parent being less able to regulate their own behaviour. "Indeed, corporal punishment is used most often when parents are angry or when parents report experiencing one or more episodes of frustration or aggravation with their children on a typical day."[289] As such "child abuse researchers tend to see corporal punishment and physical abuse on a continuum, such that if corporal punishment is administered too severely or too frequently, the outcome can be physical abuse."[290]

The main conclusion to be drawn from the analysis above, is that the relationship between the limitation imposed by the reasonable and moderate chastisement defence and the purpose that it seeks, which is to allow corporal punishment in order

[284] Gershoff (2002) *Psychological Bulletin* 539 at page 542.
[285] As above at page 541
[286] As above at page 542.
[287] As above at pages 541 and 542.
[288] As above at page 542.
[289] As above at page 557.
[290] As above at page 540.

to ensure that children become responsible citizens conducive to our society, is tenuous: "corporal punishment is ineffective at best and harmful at worst".[291]

5.3.6 Section 36(1)(e): Less restrictive means to achieve the purpose

Considering whether a less restrictive means to achieve the purpose exists plays an important role within the inquiry. A less restrictive means of achieving the purpose would speak to the rationality and reasonableness of the limitation. If a less restrictive and equally effective means to achieve the purpose exists, it would evidently mean that the more restrictive means would not be reasonable or justifiable.[292]

Again, extensive research indicate that there is a wide range of alternative positive child disciplining methods that exists as alternatives to corporal punishment, which achieves the same purpose and are far less restrictive and more conducive to children's rights than corporal punishment.[293]

5.4 Conclusion

The defence of reasonable and moderate chastisement is allowed as a ground of justification in law for parents when a criminal case or a delictual claim based on assault is raised. This defence has been analysed through numerous court cases in the last century, and its constitutionality remains unchallenged by the Constitutional Court despite the rights of children that it affects.

As this dissertation seeks to challenge the constitutionality of this defence, the writer was required to scrutinize the reasonableness and justifiability of the limitation imposed by the defence on children's rights, in light of the requirements contained in the section 36 limitations clause.

Section 36 of the Constitution firstly requires an inquiry as to whether the rights of children affected are limited by a law of general application, secondly it requires a look into the nature of the rights infringed; the importance and purpose of the

[291] As above at page 539.
[292] Currie & De Waal (eds) (2005) at page 184.
[293] See http://www.endcorporalpunishment.org/pages/frame.html for a wide range of alternative positive forms of discipline resources.

limitation; the nature and extent of the limitation; the relationship between the limitation and its purpose; and a less restrictive means to achieve the purpose.

The analysis undertaken within this chapter concluded that the common law defence of reasonable and moderate chastisement is a law of general application, in terms of which children's rights can be limited, if it passes the scrutiny of the remainder of the requirements in section 36 of the Constitution.

The rights of children affected by the defence include the right to dignity, equality, freedom and security of the person and children's specific rights as contained within section 28 of the Constitution. These rights have been identified as fundamental rights in the South African Constitution, and in an open and democratic society free from violence, and therefore very stringent requirements would have to be met before these rights can be limited.

The importance and purpose of the limitation was highlighted in numerous court judgments and was analysed to be for the correction, education and discipline of children, in order to ensure that they become responsible adults conducive to a society based on human rights and freedom.

The nature and extent of the defence is such that it provides parents with a grounds of justification in law when a criminal case or delictual claim for assault is raised. If the defence did not exist in law, parents would be liable for assault, as with any other category of persons, when physically punishing children. The allowance of the defence therefore results in children, despite being seen as more vulnerable and deserving of more protection, being afforded less protection than any other category of persons.

With respect to the relationship between the defence and its purpose, it was highlighted through numerous studies that corporal punishment does not achieve the purpose that it seeks to achieve, which is to ensure that children become responsible citizens conducive to a society that our Constitution seek to achieve. On the contrary, it does not necessarily result in moral internalization, which is necessary for successful socialization, and it is "associated with harmful side effects such as aggression and delinquency in childhood, crime and antisocial behaviour in adulthood, low empathy or conscience, poor parent-child relations, and mental

health problems such as depression".[294] Therefore the relationship between the defence and the purpose that it seeks to achieve is deemed weak, as "corporal punishment is ineffective at best and harmful at worst".[295]

Lastly, it was shown that there are more effective alternative methods of discipline, that will not require physical punishments of children, available to parents. Therefore, corporal punishment cannot be deemed to be reasonable and justifiable within an open and democratic society bases on human dignity, equality and freedom, as a less restrictive means to achieve the purpose would necessarily speak to the rationality and reasonableness of the limitation.

In conclusion, it is submitted that the defence of reasonable and moderate chastisement does not meet the standards of reasonableness and justifiability as required by section 36 of the Constitution. The nature, extent and purpose of the limitation in relation to the rights in question, coupled with less restrictive methods of discipline, fails the limitation test. It is therefore submitted that if an attack on the constitutionality of the common law defence of reasonable and moderate chastisement is made, the Constitutional Court will, in light of the fundamental nature of the constitutional rights of children affected and also obligayions in international law, have no option but to declare the reasonable and moderate chastisement defence unconstitutional and invalid.

[294] Straus in Loseke DR, Gelles RJ, Cavanaugh MM (eds) 2005 at page 140.
[295] Gershoff (2002) 539 *Psychological Bulletin* at page 539.

Chapter 6: Conclusion: The potential success of a Constitutional Court challenge

Corporal punishment of children in South Africa has been a long standing entrenched practice of discipline in all settings. The reasonable and moderate chastisement defence has withstood the scrutiny of various court decisions prior to the enactment of the Constitution. However, since enactment of the Interim Constitution in 1993 two cases[296] on corporal punishment of children have been brought before the Constitutional Court, and in both cases, corporal punishment failed to withstand Constitutional scrutiny. The reasons provided for outlawing corporal punishment in each of the cases respectively revolved around the rights of children that were infringed and the international duty placed on South Africa to ban corporal punishment of children.

The issue that was highlighted but not addressed by either of the courts was corporal punishment in the private sphere of the family and the allowance of the common law defence of reasonable and moderate chastisement to exist in law.

Therefore, the question that this dissertation attempts to answer is precisely that which the courts decided to evade: will corporal punishment in the private family home, including the reasonable and moderate chastisement defence, withstand similar Constitutional scrutiny when challenged?

The writer is of the opinion that this dissertation has proven beyond any doubt that the reasonable and moderate chastisement defence will not withstand Constitutional scrutiny. Taking into account the nature of the rights that are infringed[297] (similar to those highlighted in the cases mentioned above) together with increasing international condemnation of corporal punishment and the reasonable and moderate chastisement defence,[298] the Constitutional Court will "have no option but

[296] S v Williams and Others 1995 (3) SA 632 (CC) and Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC).
[297] Human dignity (section 10), equality (section 9), freedom and security of the person (section 12), Children's right to protection from maltreatment, neglect, abuse or degradation (s28(1)(d)) and the Child's best interests (s28(2)).
[298] CRC/C/GC/8.

to declare such punishment to be contrary to the Constitution and therefore invalid".[299]

It is therefore recommended that the legislature take all necessary steps to outlaw the common law defence of reasonable and moderate chastisement, and that the legislature provide guidance to parents through educational interventions on alternative positive, non-violent forms of discipline. Should the legislature fail to take these steps, it is envisaged that a Constitutional Court challenge will be an unavoidable and costly consequence.

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[299] Bekink B (2006) 19 *South African Journal of Criminal Justice* 173 at page 190.

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