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# The Unreasonableness of 'Reasonable Chastisement'

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Annexure G

## University of Pretoria

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# Chapter 1: Introduction

## 1.1 Topic

“It is time for our country to march in step with its international obligations under the Convention of the Rights of the Child by recognising that the reasonable chastisement defence is no longer legally acceptable under our constitutional dispensation”.<sup>1</sup>

In this mini-dissertation an in-depth analysis will be conducted to examine the reasonableness of ‘reasonable chastisement’. This stems from the High Court decision of *YG v S* as well as international obligations placed on South Africa through the ratification of certain international documents.<sup>2</sup> The High Court’s decision was that the common law defence of ‘reasonable chastisement’ no longer finds place in South African law and is therefore unconstitutional. The matter in *YG v S* was escalated to the Constitutional Court. The High Court’s decision has since been confirmed by the Constitutional Court.<sup>3</sup>

## 1.2 Background and relevance of study

In the past corporal punishment was seen as an essential part of the South African educational system.<sup>4</sup> In the case of *Christian Education South Africa v Minister of Education*,<sup>5</sup> the Constitutional Court ruled that corporal punishment was unconstitutional in the South African educational system. The court went further to say that by striking down corporal punishment, it placed emphasis on how the state is breaking away from the past and welcoming the present constitutional dispensation.

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<sup>1</sup> *YG v S* 2018 (1) SACR 64 (GJ) par 85.

<sup>2</sup> *Ibid*; United Nations Conventions on the Right of the Child 1989 (ratified by South Africa on 16 June 1995); African Charter on the Rights and Welfare of the Child 1990 (ratified by South Africa on 7 January 2000).

<sup>3</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* 2019 ZACC 33 par 73.

<sup>4</sup> Morrell R ‘Corporal punishment in South African schools: A neglected explanation for its persistence’ (2001) 21 *South African Journal of Education* 292 293.

<sup>5</sup> *Christian Education South Africa v Minister of Education* 1999 (4) SA 1092 (SE); *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

In another Constitutional Court decision, on whipping in the child justice system,<sup>6</sup> Chief Justice Pius Langa emphasised that it is inconsistent with the Constitution to maintain authority by using violence.<sup>7</sup> Breaking away from South Africa's authoritarian past was one of the factors that gave rise to the implementation of the South African Schools Act and in terms of section 10 of that Act the use of corporal punishment in schools is banned.<sup>8</sup> Contravening section 10 of the South African Schools Act constitutes a criminal offence and on conviction the perpetrator could be liable to a sentence which could be imposed for assault.<sup>9</sup>

Corporal punishment in South African schools has been abolished for over two decades. There is still a challenge with regards to corporal punishment that needs to be addressed, namely, the use of corporal punishment in the home. It needs to be mentioned that in terms of international human rights bodies there is still plenty of room for improvement on the South African side. For example, the United Nations (UN) General Assembly (of which South Africa is a founding member) has sent South Africa recommendations to prohibit corporal punishment in all settings, including the home.<sup>10</sup> These recommendations have occurred on three separate occasions and will be discussed in chapter four of this mini-dissertation.

South Africa has not been completely silent on the matter. In fact in 2006 there was an attempt in the Children's Bill to abolish corporal punishment in the home.<sup>11</sup> It can be deduced from the topic of this dissertation that the clause to abolish corporal punishment in the home was left out of the promulgated Act.<sup>12</sup> There is some indication that this happened again.<sup>13</sup>

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<sup>6</sup> *S v Williams* 1995 (3) SA 632 (CC) par 50.

<sup>7</sup> Par 52.

<sup>8</sup> South African Schools Act 84 of 1996.

<sup>9</sup> Section 10(2) of the South African Schools Act; Van Heerden B, Cockrell A & Keightley R 'Personal and proprietary aspects of the parental power' in Van Heerden B, Cockrell A & Keightley R (eds) *Boberg's Law of Persons and The Family* (1999) 657 673.

<sup>10</sup> Mezmur B 'Don't try this at home!: Reasonable or moderate chastisement, and the rights of the child in South Africa with YG v S in perspective' (2019) 32 *Speculum Juris* 75 80.

<sup>11</sup> Clause 139 of the Children's Bill [B 19 of 2006].

<sup>12</sup> Boezaart T 'Legislating for the realisation of children's rights - the Schools Act and beyond' in De Waal E (ed) *Pathways to successful schooling: South African Schools Act 84 of 1996 - 20 years on* (2018) 35 43.

<sup>13</sup> See discussion in chapter 4 par 4.4.

The relevance of this mini-dissertation is to show that South Africa's legislation on corporal punishment is not up to standard with regards to international conventions as well as the law in many other countries. In order to prevent recurrence of the facts in *YG v S*, South Africa will need to develop its legislation.

### **1.3 Research question**

The main research question is: 'does corporal punishment in the home infringe on the boundaries of the rights of the child and as a result go against the constitutional dispensation?' In order to provide an answer on the above, the following pertinent questions will be addressed:

1. What does the common law defence of 'reasonable chastisement' entail?
2. What is South Africa's position in terms of legislation?
3. What is the international benchmark regarding corporal chastisement?
4. What is the significance of the *YG v S* case in the corporal chastisement debate?
5. Do we need to amend the Children's Act?<sup>14</sup>

### **1.4 Methodology**

The methodology is largely based on a thorough desktop study of relevant legislation, case law, journal articles, books and reports. This study is approached from an analytical and comparative perspective. An analytical approach is followed to critically analyse the legislative framework and the international standards regarding corporal chastisement. A comparative study is used to examine the position of corporal punishment in other countries. The two countries that are investigated and compared to South Africa on this topic are Sweden and Ireland. The reason behind this selection is that Sweden was the first country to ban corporal punishment in all settings over 40 years ago. Ireland on the other hand made use of the common law defence of reasonable chastisement and finally abolished the common law defence in 2015. These countries will be fully discussed in chapter 7.

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<sup>14</sup> Children's Act 38 of 2005.

## 1.5 Limitations

The importance of this topic for the rights of children justifies extensive comparative research but due to the word limitation the study is limited to two other countries. Another limitation will be the fact that due to the word limitation an in-depth analysis on how banning corporal punishment would affect the 'defence' of religious belief will not be possible.<sup>15</sup> This mini-dissertation will also be limited in that there will be no examination as to how or why low socio-economic statuses contribute to corporal punishment in the homes. Nor will it include the suggested link of male dominated households and the extensive use of corporal punishment. There will furthermore be no in-depth discussion on the history of corporal punishment in South Africa due to the limited scope of a mini-dissertation and the importance of recent developments. The most recent development, being the unanimous judgment of the Constitutional Court in *YG v S* matter,<sup>16</sup> will be briefly alluded to and accommodated in the text of this mini-dissertation as far as time constraints allow. This had been included after finalising the body of the research due to the importance thereof and it validated all the related findings as at that stage. However, even after that judgment, the topic remains pivotal as inter alia parental guidance, public awareness and legislative changes will have to be conducted.

## 1.6 Structure of the thesis

The introductory chapter includes the background and relevance of the study, as well as the main research question. This chapter also contains subsidiary questions and the methodology being followed to unpack this multifaceted topic. The second chapter discusses the common law defence of 'reasonable chastisement', which the High Court in *YG v S* has found to be unconstitutional. The defence has recently been declared unconstitutional by the Constitutional Court as well. The common law defence is a defence which the parent can raise to state that the degree of punishment was reasonable.<sup>17</sup> Where the parent exceeded the boundaries of this defence they

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<sup>15</sup> This was one of the defences raised in *YG v S* 2018 (1) SACR 64 (GJ) par 17.

<sup>16</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* 2019 ZACC 33.

<sup>17</sup> Van Heerden B, Cockrell A & Keightley R (1999) 669.



found themselves in trouble with the law. This chapter goes on to examine how these boundaries are established, what the defence of 'reasonable chastisement' entails as well as the effect thereof on children's rights.

The third chapter deals with the position that international conventions take on the topic of corporal punishment. This chapter includes recommendations made by oversight bodies constituted in terms of these conventions and how South Africa has dealt with such recommendations. In the fourth chapter there is a discussion on the current legislative framework in South Africa. This includes the draft Bills which had addressed in certain sections the abolishment of corporal punishment but which never ended up forming part of legislation.

The monumental case of *YG v S* is discussed in-depth in the fifth chapter. As stated before,<sup>18</sup> the High Court found in this case that the defence of 'reasonable chastisement' is unconstitutional. A brief discussion on the findings by the Constitutional Court declaring the defence unconstitutional is also contained in the fifth chapter. The sixth chapter deals with some of the adverse side effects corporal punishment could possibly have on a child, including short term as well as long term effects.<sup>19</sup> The chapter places emphasis and encouragement on a positive based approach to discipline, while acknowledging the rights of children.

A comparative study regarding corporal punishment in the home of two other countries is discussed in chapter seven. Sweden is the first country that is used to compare to South Africa. The reason for choosing Sweden is that Sweden had paved the way for many countries to ban corporal punishment in all settings, including the home. Ireland is the second country to be compared. The motive behind using Ireland in this comparative study is that Ireland relied on the common law defence of 'reasonable chastisement' for many years. Ireland has recently abolished the defence and it is now unlawful to chastise a child in all settings, including the home. It thus seemed to guide South Africa in some way.

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<sup>18</sup> See discussion in chapter 1 par 1.1.

<sup>19</sup> Gershoff E 'Spanking and child development: we know enough now to stop hitting our children' (2013) *Child Development Perspect* 1.

In chapter eight, the conclusion considers whether South Africa is upholding the rights of children and furthermore, whether the use of corporal punishment in the home is inconsistent with the South African Constitution.<sup>20</sup> This chapter also includes recommendations where the common law defence of 'reasonable chastisement' is found to be inconsistent with the Constitution. These recommendations include that there is the need for the implementation of legislation banning corporal punishment in the home and guidance for parents to implement a more positive approach in disciplining their children.

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<sup>20</sup> Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution).

## Chapter 2: The common law defence of ‘reasonable chastisement’ and South African law

### 2.1 Terminology

It is important to understand some concepts before the common law defence of ‘reasonable chastisement’ is examined. Corporal punishment can be defined as ‘any punishment in which physical force is used and intended to cause some pain or discomfort’.<sup>1</sup> It can be inflicted in many ways, for instance hitting, slapping, kicking, throwing a child and pulling a child’s hair to name a few.<sup>2</sup> It is also important to understand the difference between punishment and discipline. Punishment originates from the Latin term *punier*.<sup>3</sup> This essentially means to improve behaviour by inflicting pain for some offence.<sup>4</sup> Whereas discipline originates from the Latin term *disciplina*,<sup>5</sup> meaning an instruction given to teach.<sup>6</sup>

In a *Save the Children Sweden* publication Soneson finds that there are two forms of punishment which overlap significantly, namely corporal punishment as well as humiliating and degrading punishment.<sup>7</sup> Corporal punishment was defined as above but with regards to humiliating and degrading punishment the author stated that it consisted of ‘psychological punishment, verbal abuse, isolation or ignoring the child’.<sup>8</sup> It seems that the line between corporal punishment and humiliating and degrading

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<sup>1</sup> United Nations Committee on the Rights of the Child, General Comment No 8: The rights of the child to protection from corporal punishment and other cruel or degrading forms of punishment (2006) par 11. It should be mentioned that there are forms of non-corporal punishment, for instance, subjecting a child to heavy physical labour which are regarded as corporal punishment as well as humiliating and degrading.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Cassell’s New Latin Dictionary: Latin English-English Latin* (1960).

<sup>4</sup> Bower C ‘Prohibition of Corporal and Humiliating Punishment in the Home’ (2012) <https://children.pan.org.zae.pdf> (accessed on 12 March 2019) Pan: Children 1 1.

<sup>5</sup> *Cassell’s New Latin Dictionary: Latin English-English Latin* (1960).

<sup>6</sup> Bower (2012) Pan: Children 3.

<sup>7</sup> Soneson U ‘Ending Corporal Punishment of Children in South Africa. I want her to talk with me when I make a mistake’ (2005) *Save the Children Sweden* 1 6.

<sup>8</sup> *Ibid.*

punishment is blurred as children generally consider corporal punishment as being humiliating and degrading.<sup>9</sup>

## **2.2 The origin of the common law defence of ‘reasonable chastisement’**

The common law defence of ‘reasonable chastisement’ has been adopted from Roman-Dutch law but this defence finds place in Roman and English law as well. The origin of the common law defence was an attribute of the common law rights and duties of parents.<sup>10</sup> What this means is that on one side of the coin parents have the right to expect that their child is obedient to their orders but on the reverse side of the coin a parent has the duty to discipline his or her child in order to correct the child’s behaviour.<sup>11</sup> Boberg continues to explain that to curb ‘the irresponsible and sometimes potentially injurious impulses of the young is both the right and the duty of their parent’.<sup>12</sup> Burchell and Hunt describe the origins as ‘the law has traditionally conceded to parents a uniquely independent authority in rearing children’.<sup>13</sup> Burchell and Hunt continue to say that this explains why the State did not want to encroach on the responsibilities, rights and duties given to parents in raising their children.<sup>14</sup>

## **2.3 The content and boundaries of the common law defence**

Assault constitutes an offence under South African law. Snyman defines assault as ‘conduct which results in another person’s bodily integrity being impaired or the belief of such impairment’.<sup>15</sup> In terms of the word ‘person’ in the above definition, Snyman does not draw a distinction between adults and children.<sup>16</sup> Therefore, it is accepted that assault can be committed against any person.<sup>17</sup> According to common law where a parent was charged with assault of a child, they could raise the special defence known as ‘reasonable chastisement’. Thus, the punishment is only lawful where it was

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<sup>9</sup> *Ibid.*

<sup>10</sup> *YG v S* 2018 (1) SACR 64 (GJ) par 32.

<sup>11</sup> *Ibid.*

<sup>12</sup> Boberg PQR *The Law of Delict* (1984) 843.

<sup>13</sup> Burchell JM & Hunt PM *South African Criminal Law and Procedure* (1996) 117.

<sup>14</sup> *Ibid.*

<sup>15</sup> Snyman CR *Criminal Law* (2008) 443 445.

<sup>16</sup> Snyman (2008) 31.

<sup>17</sup> *Ibid.*

'reasonable'. As this is an issue of wrongfulness the criterion is an objective one.<sup>18</sup> It should be acknowledged that the parents' motives are taken into account. Therefore the motives must have been to correct the child and not for any other reason like gratification for the parents' sadistic impulses.<sup>19</sup> It should also be noted that ulterior motives include where out of anger a parent inflicts punishment on his or her child. The perception taken when dealing with reasonableness is that it allows the courts to apply the universal morals of consensus with regards to the punishing of children.<sup>20</sup> It should be mentioned that the common law defence places an independent authority on parents with regards to how they raise their children. Therefore, this means that the courts are generally reluctant to interfere with this authority.<sup>21</sup> Once the parent has raised the defence of 'reasonable chastisement' it is up to the prosecution to prove beyond a reasonable doubt that the chastisement exceeded the boundaries of reasonableness and constitutes unlawful punishment.<sup>22</sup> In civil cases,<sup>23</sup> there must be proof that the punishment was excessive/unreasonable based on a balance of probability and this onus is on the claimant.<sup>24</sup>

*Rev v Janke and Janke* is regarded as the *locus classicus* with regards to chastisement of children.<sup>25</sup> In the aforementioned case the court established the factors which provide the guidelines in determining whether the punishment inflicted was reasonable.<sup>26</sup> The court held that the factors that will be considered are the 'child's age, health and sex, the gravity of the offence, nature of the instrument used to inflict the punishment as well as the quality and quantity of the force used'.<sup>27</sup> There are other factors which a court can take into account to determine the parents' state of mind and

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<sup>18</sup> Boberg (1984) 843.

<sup>19</sup> *Ibid.*

<sup>20</sup> Parsons S 'Comment, Human Rights and the Defence of Chastisement' (2007) 71 *The Journal of Criminal Law* 308 310.

<sup>21</sup> Bekink B 'When do parents go too far? Are South African parents still allowed to chastise their children through corporal punishment in their private homes?' (2006) 257 *South African Journal of Criminal Justice* 173 178.

<sup>22</sup> *Ibid.*

<sup>23</sup> When dealing with the *YG v S* case the Constitutional Court rightly found that where a parent committed assault, they could possibly find themselves criminally liable, but the Constitutional Court failed to mention that a parent could also find themselves civilly liable.

<sup>24</sup> *Hiltonian Society v Crofton* 1952 (3) SA 130 (A).

<sup>25</sup> 1919 TPD 382.

<sup>26</sup> Par 387.

<sup>27</sup> *Ibid.*

the reasonableness of the chastisement.<sup>28</sup> These factors are the relationship between the parent and the child, frequency of punishment as well as the reason behind inflicting the said punishment.<sup>29</sup> The reason for the broad approach was to ensure that only *bona fide* punishment, 'tailored to both the offender and the offence, will escape the law's reproof'.<sup>30</sup> In the *Janke* case the court held that corporal punishment must not be inflicted in a manner which is offensive to good morals or for any other motive but for correction and admonition.<sup>31</sup> In the case of *Rex v Theron*, the court held that the discretion afforded to a parent is not to be exercised in 'arbitrary and capricious manner'.<sup>32</sup>

In *YG v S* the court stated that the physical force implemented must have been for the *bona fide* purpose of discipline but how it is implemented and what degree of force is used falls to the discretion of the parent, on condition that it is not excessive.<sup>33</sup> The court continued to state that they will not just interfere with the parental discretion as the presumption is that the 'reasonable chastisement' was not *mala fide*.<sup>34</sup>

If it is found that the parent exceeded these boundaries they could find themselves open to civil and criminal liability.<sup>35</sup> This liability exists even where the punishment would have been considered as moderate and justifiable but the parent inflicted punishment in an arbitrary manner or failed to consider the nature of the offence.<sup>36</sup> If the said parent convinced the court that it was only reasonable punishment they were acquitted, but failure to convince the court lead to the parent facing a charge of assault.<sup>37</sup>

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<sup>28</sup> Bekink (2006) *South African Journal of Criminal Justice* 176.

<sup>29</sup> *Ibid.*

<sup>30</sup> Boberg (1984) 843.

<sup>31</sup> *R v Janke and Janke* 1919 TPD (382) par 382.

<sup>32</sup> 1936 OPD 166.

<sup>33</sup> 2018 (1) SACR 64 (GJ) par 33.

<sup>34</sup> *Ibid.*

<sup>35</sup> Van Heerden B, Cockrell A, & Keightley R (1999) 669. Also see footnote 23 above.

<sup>36</sup> *S v Lekgathe* 1982 (3) SA 104 (B) par 109D.

<sup>37</sup> *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) par 2.

## 2.4 The eradication of corporal punishment in some settings

The Constitutional Court has been an advocate for the abolishment of corporal punishment.<sup>38</sup> In *S v Williams*,<sup>39</sup> the court held that whipping of a child offender in the criminal justice system was unconstitutional. Chief Justice Pius Langa emphasised the point that corporal punishment is an infringement on a child's dignity.<sup>40</sup> The case went further to state that corporal punishment could have the implications of affecting children's 'regard for a culture of decency and respect for the rights of others'.<sup>41</sup> Stemming from this case there was the implementation of the Abolishment of Corporal Punishment Act. Section 1 of this Act not only abolishes corporal punishment as a sentence given by courts but it also includes the abolishment of corporal punishment as a sentence handed down by Traditional Courts. Skelton predicted that the outcome in *S v Williams* could well come up again in future challenges with regards to the defence of 'reasonable chastisement'.<sup>42</sup>

Before there was any legislation prohibiting corporal punishment in schools, it was seen as an essential part of the South African educational system.<sup>43</sup> Corporal punishment in schools would be routinely reported in newspapers where injuries caused by teachers resulted in children ending up in hospital.<sup>44</sup> For some or other reason teachers were protected as there was reluctance to prosecute them.<sup>45</sup> The *Christian Education* case,<sup>46</sup> presented the Constitutional Court with the perfect opportunity to abolish corporal punishment and be in line with the new constitutional dispensation. The court found that the state needs to take steps to reduce violence in both the public and private environment.<sup>47</sup> Justice Sachs went on to further state that there is a special duty on the state to protect children.<sup>48</sup> He further stated that the

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<sup>38</sup> Boezaart (2018) 46.

<sup>39</sup> *S v Williams* 1995 (3) SA 632 (CC) par 50.

<sup>40</sup> It must be noted that this case was decided during the Interim Constitution (Constitution of the Republic of South Africa, Act 200 of 1993).

<sup>41</sup> *S v Williams* 1995 (3) SA 632 (CC) par 40.

<sup>42</sup> Skelton A 'S v Williams: A springboard for further debate about corporal punishment' (2015) *Acta Juridica* 336 359.

<sup>43</sup> Morrell (2001) 21(4) *South African Journal of Education* 293.

<sup>44</sup> Morrell (2001) 21(4) *South African Journal of Education* 292.

<sup>45</sup> *Ibid.*

<sup>46</sup> 2000 (4) SA 757 (CC).

<sup>47</sup> Par 47. See section 12(1)(c) of the Constitution.

<sup>48</sup> Par 47. See section 18(2) of the Constitution.

international documents which had been ratified by South Africa required appropriate measures to be put in place.<sup>49</sup> The *Christian Education* case paved the way for the South African Schools Act which abolished corporal punishment in schools.<sup>50</sup> Boezaart describes the Act from a child-right perspective as a ‘trail-blazer in the abolishment of corporal punishment’.<sup>51</sup>

Corporal punishment has also been abolished in some other sectors concerning children. Under the Children’s Act, specifically regulation 65, 69 and 76(2), the use of corporal punishment in early childhood development programmes, child and youth care centres and foster care is prohibited.<sup>52</sup> Included in the regulations mentioned above are alternative positive forms of discipline, for example in regulation 76(2)(d). This regulation states that ‘every child has the right to positive discipline appropriate to the level of development of such a child’. From these regulations it is clear that there was some understanding that no form of corporal punishment is lawful and that corporal punishment fails to uphold the integrity of a child as well. It also implies that it is not a humane way to discipline a child.<sup>53</sup>

## 2.5 Conclusion

The ‘transgenerational’ essence of corporal punishment, which is historically ingrained in family values, contributes largely to the unwillingness to change.<sup>54</sup> This has started to change and the enduring power of corporal punishment has been eradicated from prisons, schools and alternative care setting as discussed in the above chapter.<sup>55</sup> It seems the progression in eradicating corporal punishment has been successful in every setting, except one, the home. When questioning why it has been abolished in all other settings, except the home, there does not seem to be a straight-forward answer. It has been suggested that fear of backlash from religious and political backgrounds may play a role.<sup>56</sup>

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<sup>49</sup> *Ibid.*

<sup>50</sup> South African Schools Act 84 of 1996.

<sup>51</sup> Boezaart (2018) 38.

<sup>52</sup> Consolidated Regulations pertaining to the Children’s Act 38 of 2005 (27<sup>th</sup> June 2008).

<sup>53</sup> Regulation 65(1)(h).

<sup>54</sup> Pollard D ‘Banning child corporal punishment’ (2003) 77 *Tulane Law Review* 576 583.

<sup>55</sup> Mezmur (2019) *Speculum Juris* 25.

<sup>56</sup> Skelton (2015) *Acta Juridica* 355.



## Chapter 3: International conventions and their take on corporal punishment

### 3.1 Introduction

Section 39 of the South African Constitution states that international law must be considered when a court, tribunal or other forum interprets the Bill of Rights. This clause binds South Africa to abide by any international treaties or conventions of which it is a party. Section 39(1) and section 233 go hand in hand. The latter section states that when interpreting legislation a court should elect to follow a reasonable interpretation of legislation in order to be in line with international law.<sup>1</sup> These sections provide that courts will be advised by international laws.<sup>2</sup> The accepted view based on case law,<sup>3</sup> and supported by authors,<sup>4</sup> is that the function of international human rights law with regards to interpretation is not just limited to the specific conventions South Africa has ratified.<sup>5</sup> This being said, it needs to be noted that where an international human rights law has been ratified, it will hold a more persuasive force.<sup>6</sup>

### 3.2 Conventions which have been ratified by South Africa

South Africa follows a dualistic approach with regards to international law. This essentially means that international law must be domesticated to have the force of law. Boezaart expresses the view that 'the Constitution and legislation dealing with children's rights have to a large extent' executed the dualistic approach.<sup>7</sup>

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<sup>1</sup> The Constitution.

<sup>2</sup> Dugard J 'Human Rights' in Dugard D, du Plessis M, Maluwa T & Tladi D (eds) *Dugard's International Law A South African Perspective* (2018) 454 497.

<sup>3</sup> *Azanian People's Organization v President of the Republic of South Africa* 1996 (4) SA 671 (CC) par 26.

<sup>4</sup> Dugard J 'The role of international law in interpreting the Bill of Rights' (1994) *South African Journal of Human Rights law* 208 208.

<sup>5</sup> Mezmur (2019) *Speculum Juris* 79.

<sup>6</sup> *Ibid.*

<sup>7</sup> Boezaart T 'From reasonable to unreasonable - what is right for children regarding corporal punishment in the home?' Unpublished paper at Children's Rights Colloquium on *Children's Rights: Families, Guidance and Evolving Capacity* 17-18 July 2019, Cambridge 8.

The United Nations Convention on the Rights of the Child (hereafter referred to as the UN CRC), is an international convention which encompasses a range of specific rights of children under the age of 18 years.<sup>8</sup> Article 19 of the UN CRC safeguards all children from any and all forms of corporal punishment. It states that parties need to ensure that legislation is in place to carry out this obligation set by the UN CRC. A further article, namely article 37(a), states that no child shall be subjected to any torture or any degrading punishment.<sup>9</sup> The intention of article 37(a) is to protect both the dignity and the physical and mental integrity of a child.<sup>10</sup> There is no doubt as expressed in article 6 that children have the right to life, survival and development. Perhaps less recognised is article 2(2) which states that children need to be protected from all forms of discrimination or punishment based off of their parents' opinions or beliefs. Interestingly the reason behind the corporal punishment in *YG v S* was the father's own religious beliefs.<sup>11</sup>

Under General Comment No 8, the Committee on the Rights of the Child highlighted that there is an obligation on all parties to the convention to act hastily in abolishing all forms of corporal punishment as well as 'all other cruel or degrading forms of punishment of children'.<sup>12</sup> It specifically addressed that all parties to the convention need to create legislation which is in line with the UN CRC policy on corporal punishment.<sup>13</sup> The members of the Committee on the Rights of the Child are of the opinion that it is not sufficient for a member country to have laws in place which limit rather than abolish the use of corporal punishment. The members of the Committee further expressed that having the 'reasonable chastisement' defence in place goes against the provisions of the UN CRC.<sup>14</sup> Where corporal punishment is still prevalent it is a complete violation of the Convention.

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<sup>8</sup> Article 1 of the United Nations Convention on the Rights of the Child.

<sup>9</sup> United Nations Committee on the Rights of the Child, General Comment No 8 (2006) par 37.

<sup>10</sup> Freeman MDA 'Upholding the dignity and best interest of children: International law and the corporal punishment of children' (2010) *Law and the Contemporary Problems* 211 215.

<sup>11</sup> *YG v S* 2018 (1) SACR 64 (GJ) par 6.

<sup>12</sup> Committee on the Rights of the Child, General Comment No 8 (2006) par 2.

<sup>13</sup> *Ibid.*

<sup>14</sup> Committee on the Rights of the Child, General Comment No 8 (2006) par 3.

The UN CRC is not the only convention on this matter which has been ratified by South Africa. The African Charter on the Rights and Welfare of the Child (hereafter referred to as ACRWC) is the first regional charter specifically for Africa. It focuses on aspects affecting African children which had been left out of the UN CRC.<sup>15</sup> It can be deduced that the motive behind the adoption of the ACRWC is based on political reasons.<sup>16</sup> During the drafting of the UN CRC, Africa only had a limited say. This is evident from the fact that in the five out of nine years it took to draft the UN CRC, there had only been participation from three African countries.<sup>17</sup> Mezmur describes the ACRWC perfectly by stating that ‘the charter reflects an African normative consensus on children’s rights and thereby complementing the UN CRC...’.<sup>18</sup> As mentioned above the ACRWC was designed to make the UN CRC more relatable in terms of an African context.<sup>19</sup>

The framework within the ACRWC could on the one hand find it acceptable for the implementation of corporal punishment, as it is seen as part of African culture.<sup>20</sup> The importance of African culture can be deduced from paragraph 6 in the Preamble which briefly states that cultural heritage, historical background and the values of African civilization should be taken into account when applying the ACRWC. Article 11(5) further supports corporal punishment which states that where a child is subjected to discipline either by a parent or at school, such discipline should respect the dignity of the child. In addition, article 20(1)(c) provides that parents or other persons responsible for a child shall ‘ensure that domestic discipline is administered with humanity’. What can be taken from this article is that a parent may impose corporal punishment provided it is reasonable, taking us back to the concept of ‘reasonable chastisement’.<sup>21</sup>

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<sup>15</sup> Mezmur B ‘The African Charter on the Rights of the Child and corporal punishment: Spare the rod, spare the child’ (2006) *Article* 19 8.

<sup>16</sup> Sloth-Nielsen J ‘The African Charter on the Rights and Welfare of the Child’ in Boezaart T (ed) *Child Law in South Africa* (2017) 426 426.

<sup>17</sup> *Ibid.*

<sup>18</sup> Mezmur (2006) *Article* 19 8.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> Mezmur B (2006) *Article* 19 9.

On the other hand the ACRWC places emphasis on the best interest of the child principle. In terms of article 4(1) the best interests of a child are the primary considerations in all actions concerning the child undertaken by any person with authority. Therefore, when taking the best interest of the child into perspective it seems that having an argument in favour of corporal punishment will not be able to withstand any scrutiny and would topple under its own might.<sup>22</sup> If this is the case then it begs the question how can article 11(5) be in line with the best interest of the child? Is there the possibility that under the ACRWC and taking cognisance of a child's right to dignity, corporal punishment can still be administered?<sup>23</sup> Mezmur answers this question with a stone cold 'No, it is not possible!'. He further explains that dignity and corporal punishment are mutually exclusive.<sup>24</sup> Corporal punishment cannot be considered as tradition because in terms of article 21(1) the effect of corporal punishment can be detrimental to a child's health and life. In article 16 the ACRWC prohibits all forms of corporal and humiliating punishment. The reasons for an argument against corporal punishment outweighs any argument in favour of corporal punishment when reading the ACRWC as article 21(1) expressly states that member parties are under an obligation to abolish any harmful social and cultural practices and this in turn would include the abolishment of corporal punishment in all settings.

Both the UN CRC and the ACRWC may therefore be interpreted to abolish corporal punishment in all settings, including the home. Over a decade ago the Committee on the Rights of the Child addressed the matter of corporal punishment during a review of the Initial Report of South Africa. In this review they noted that corporal punishment was still accepted amongst families.<sup>25</sup> The Committee had already then recommended that South Africa take adequate measures to abolish corporal punishment in the home and use other countries who have already enacted similar legislation as a guideline.<sup>26</sup>

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<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> UN CRC Committee: Concluding Observations, South Africa Initial Report, February 2000 par 38.

<sup>26</sup> *Ibid.*

### 3.3 The human rights obligation placed on South Africa

The Human Rights Commission, a subsidiary body of the United Nations General Assembly of which South Africa is a founding member, reviewed South Africa three times in the Universal Periodic Review process.<sup>27</sup> This review is conducted by way of a state driven process under the auspices of the Human Rights Council. This means that each member state is afforded the opportunity to showcase the steps they have taken to better the human rights situations.<sup>28</sup> In all three occasions, 2008, 2012 and 2017, the general recommendation to South Africa has been that South Africa needs to abolish the use of corporal punishment in all settings, including the home.

In 2008 the recommendation came from Slovenia, who stated that South Africa should not only abolish the common law defence of reasonable chastisement, but they should implement legislation criminalising corporal punishment.<sup>29</sup> South Africa remained mute on this recommendation by not accepting or rejecting it but stated that legislation in South Africa on domestic violence encapsulates corporal punishment in the home.<sup>30</sup> However, this was not an accurate reflection of the position in South Africa at that stage.<sup>31</sup> Again in 2012 Mexico recommended that South Africa should abolish and implement sanctions with regards to corporal punishment both in the home, as well as in public institutions such as schools and prisons.<sup>32</sup> South Africa accepted the recommendation but stated that corporal punishment has been criminalised in South Africa and any perpetrators who commit such an inhumane form of punishment are punished for their actions.<sup>33</sup> This was not a true reflection of the position at that time due to the fact that corporal punishment in the home was still being administered and no legislation had been created to abolish it.

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<sup>27</sup> The Universal Periodic Review Process, is a review of the human rights records of all member states.

<sup>28</sup> Mezmur (2019) *Speculum Juris* 79.

<sup>29</sup> Report of the working group on the Universal Periodic Review: South Africa 23 May 2008 par 67.

<sup>30</sup> *Ibid.*

<sup>31</sup> Mezmur (2019) *Speculum Juris* 80.

<sup>32</sup> Report of the working group on the Universal Periodic Review: South Africa 9 July 2012 par 124.

<sup>33</sup> Report of the working group on the Universal Periodic Review: South Africa 18 September 2012 Addendum Annex par 7.

In 2017 more than one state made a recommendation to South Africa, namely Israel and Liechtenstein. The fact that the recommendations increased by other states can only be attributed to the fact that the previous two recommendations had not been complied with by South Africa.<sup>34</sup> Israel recommended that South Africa implement legislation to criminalise the use of corporal punishment in the private sphere.<sup>35</sup> Liechtenstein suggested that South Africa accelerate the implementation of legislation that prohibits all forms of corporal punishment in the home. Liechtenstein further recommended that South Africa abolish the common law defence of 'reasonable chastisement' and ensure that any perpetrators in terms of corporal punishment be punished for their actions.<sup>36</sup> South Africa's response to this was that they are aware of the recommendations but did not accept them. South Africa stated that they could not commit as the recommendations made were issues on which South Africa is still in the process of deliberation.<sup>37</sup> As stated above, South Africa is a member of the Human Rights Commission and thus under an obligation to abolish corporal punishment. Ignoring such recommendations would constitute a contravention of the policies set out by the conventions.<sup>38</sup>

In 2016 the Human Rights Committee continued to recommend that South Africa abolish corporal punishment. The Committee recommended that the government should take steps to enact legislation to abolish corporal punishment in all settings as corporal punishment is still widely practiced and accepted.<sup>39</sup> The Committee Against Torture stepped in as well and stated that there is an obligation placed on South Africa that legislation abolishing the use of corporal punishment be implemented.<sup>40</sup> Emphasis needs to be placed on 'strict implementation' of legislation banning corporal punishment in all settings. This is important to mention as, even with the existence of

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<sup>34</sup> Mezmur (2019) *Speculum Juris* 79.

<sup>35</sup> Report of the working group on the Universal Periodic Review: South Africa 18 September 2017 par 233.

<sup>36</sup> Report of the working group on the Universal Periodic Review: South Africa 18 September 2017 par 234.

<sup>37</sup> Report of the working group on the Universal Periodic Review: South Africa 19 September 2017 Addendum par 4.

<sup>38</sup> Article 12 of the Universal Declaration of Human Rights.

<sup>39</sup> Human Rights Committee: Concluding Observations, South Africa Initial Report, April 2016 par 25.

<sup>40</sup> Committee Against Torture: Concluding Observations, South Africa Initial Report, December 2006 par 25.

legislation banning corporal punishment, failure to implement the ban 'contributes to the lack of accountability'.<sup>41</sup>

### **3.4 Conclusion**

The guidance and recommendations of international conventions certainly seem compelling. It is also apparent that South Africa is under an obligation to abolish corporal punishment in the home by enacting legislation. This is evident from the repetition regarding the recommendations made by various human rights bodies going back over a decade but still without much success. Taking into account the international bodies discussed, there seems to only be one right direction. Great emphasis must be placed on prevention and educating parents in order to achieve what these international bodies have set out to do.<sup>42</sup>

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<sup>41</sup> Mezmur (2019) *Speculum Juris* 81.

<sup>42</sup> Freeman (2010) *Law and the Contemporary Problems* 215.

## Chapter 4: Legislative framework

### 4.1 Introduction

Patterns of power stem from the use of corporal punishment which has been entrenched historically in South African society.<sup>1</sup> During colonial rule which affected most of South Africa, an authoritarian system was in place,<sup>2</sup> the ideology of which, established the principle that discipline must be implemented in the form of punishment. The reason for this is seemingly that many members of society are unable to think critically and lack self-discipline, and as a result punishment is the only way to correct this and have them fear disobedience.<sup>3</sup> South Africa is seen as a patriarchal society defined by strongly held traditions and conservative views with regards to the right place for women and children.<sup>4</sup> The consequence of this, is that it leads to high levels of violence.<sup>5</sup>

### 4.2 South African legislation

The South African Constitution is the highest law in the land and any law or conduct which is inconsistent with the Constitution is invalid.<sup>6</sup> The Constitution in itself is enriched with a Bill of Rights in Chapter 2. The Bill of Rights provides protection for all South Africans, including children and affirms the democratic values of equality (section 9), human dignity (section 10), and the right not to be subjected to any cruel, degrading or inhumane treatment (section 12). The government is under an obligation to respect, promote and fulfil the rights set out in the Bill of Rights.<sup>7</sup>

The equality clause in terms of section 9 starts with the words '[e]veryone is equal before the law'. It also states in the first subsection that everyone has the right to equal

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<sup>1</sup> Pete S, 'A practice that smacks of abuse' *Children First* (1999) 3 6.

<sup>2</sup> Dawes A, Kropiwnicki Z, Kafaar Z & Richter L 'Corporal Punishment of Children: A South African National Survey' (2005) *Save the Children Sweden* 2 3.

<sup>3</sup> *Ibid.*

<sup>4</sup> Dawes, Kropiwnicki , Kafaar & Richter (2005) *Save the Children Sweden* 4.

<sup>5</sup> *Ibid.*

<sup>6</sup> Section 2.

<sup>7</sup> Section 7(1) and 7(2) of the Constitution.



protection and benefit of the law. This means that no one is excluded from such protection, including children.<sup>8</sup> Furthermore, section 9(3) obliges the state not to unfairly discriminate directly or indirectly against anyone, thus including children, based on inter alia age. Therefore, adults are protected under the law with regards to assault and in turn children need to be provided with the same protection, in order to be in line with section 9 of the Constitution. Section 9 and section 10 are closely related in that a person has the right to be treated with equal concern and respect.<sup>9</sup>

Section 10 states that everyone has the right to have their dignity respected and protected. Again the word 'everyone' has to be interpreted to include children.<sup>10</sup> It can be said that inflicting corporal punishment no matter the degree on a child creates a sense of shame, perhaps that something has been taken away and instils a feeling of being less dignified than before.<sup>11</sup> Human dignity is not only a right that must be protected, but it also finds application in all other fundamental rights.<sup>12</sup> Just as section 9 and 10 intertwine so does section 10 and 12 of the Constitution.

In terms of section 12(1)(e) no one may be subjected to any cruel, inhuman or degrading treatment. If a child is subjected to any of these it emphasises a denial of the child's dignity.<sup>13</sup> Section 12(1)(c) provides everyone with the right to be free from all forms of violence both in the public and private sphere. Corporal punishment has been eradicated from all public sources yet corporal punishment is still being implemented in the private sphere, namely the home.<sup>14</sup> Therefore it is fair to say that corporal punishment contravenes section 12(1)(c). Less obvious but noteworthy is that section 12(2) of the Constitution could also be invoked against the use of corporal punishment.<sup>15</sup>

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<sup>8</sup> YG v S 2018 (1) SACR 64 (GJ) par 72.

<sup>9</sup> Albertyn C & Goldblatt B 'Equality' in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* (2014) 35-1 35-9.

<sup>10</sup> Freeman M & Saunders B, 'Can we Conquer Child Abuse if we don't Outlaw Physical Chastisement of Children' (2014) *International Journal of Children's Rights* 681 701.

<sup>11</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* par 47.

<sup>12</sup> Currie I & De Waal J *The Bill of Rights Handbook* (2013) 250 253.

<sup>13</sup> Bishop M & Woolman S 'Freedom and Security of the Person' in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* (2014) 40-1 40-67.

<sup>14</sup> See discussion in chapter 2 par 2.4.

<sup>15</sup> This section provides the right to psychological integrity. See discussion in chapter 6 par 6.2.

Encapsulated in section 28(1) is inter alia that children have the right not to be neglected, abused or degraded.<sup>16</sup> Section 28(2) provides additional protection to children where the best interests of the child are of paramount importance. Freeman's viewpoint is accepted that violence against a child is not in a child's best interest.<sup>17</sup> It needs to be argued that by not abolishing corporal punishment in the home it is in contravention of all the above sections.

The Children's Act provides a legislative framework for early intervention and protection of children from all forms of violence.<sup>18</sup> This is evident from section 144(1)(b) which emphasises the need for positive, non-violent forms of discipline. It must be noted that the use of corporal punishment is not expressly addressed in the Children's Act even though it has been deliberated on. The Children's Act does however define 'abuse' in terms of section 1 as any form of harm which has been deliberately inflicted on a child. The Children's Act then continues in section 9 to state that the 'best interest of a child are of paramount importance' and it has been argued above that corporal punishment cannot be in a child's best interest. With regards to what happens where a child's rights have been infringed, it is expressly stated that a person who has infringed on the rights of a child by abusing them may be liable to a fine or imprisonment for a period not exceeding ten years.<sup>19</sup> Over a decade and a half ago the South African Law Reform Commission (SALRC) suggested that the common law defence of reasonable chastisement should be deemed unlawful. However, it was never implemented into the Children's Act.<sup>20</sup>

### **4.3 The Bill that never was**

In 2006 the Children's Amendment Bill gave some hope that the Act would soon deal with the contentious matter of corporal punishment on children in clause 139.<sup>21</sup> The

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<sup>16</sup> Section 28(1) of the Constitution.

<sup>17</sup> Freeman MDA (2010) 73 *Law and the Contemporary Problems* 216.

<sup>18</sup> Bower (2012) Pan: Children 1 2.

<sup>19</sup> Section 305(3) of the Children's Act 38 of 2005.

<sup>20</sup> South African Law Reform Commission *Report on the Review of the Child Care Act* Report Project 110 (2002) 121 [http://www.justice.gov.za/salrc/reports/r\\_pr110\\_01\\_2002dec.pdf](http://www.justice.gov.za/salrc/reports/r_pr110_01_2002dec.pdf) (accessed on 14 March 2019).

<sup>21</sup> Children's Amendment Bill B19 of 2006.

purpose of clause 139 was to protect children's physical and psychological well-being. The South African Human Rights Committee applauded the National Council of Provinces for recognising children's rights and for adopting modern human rights standards in line with international laws.<sup>22</sup> The South African Human Rights Commission expressed that children are protected like all citizens but it needs to be kept in mind that they occupy a special place due to their vulnerability.<sup>23</sup>

Clause 139(2) made provision for the complete abolishment of any form of corporal, inhumane or degrading punishment implemented by parents against children. Clause 139(3) further expressly abolished the common law defence of 'reasonable chastisement'.<sup>24</sup> In addition the clause made provision that where a parent had subjected a child to inappropriate forms of punishment, they be referred to an early intervention service and only in serious circumstances where the punishment constituted abuse would the parent be prosecuted.<sup>25</sup> The Commission intended that the prosecutorial discretion would make way for differentiation between less and more serious cases.<sup>26</sup> At the time there seemed to be backlash from various child rights organisations expressing the view that clause 139(7) signified the use of corporal punishment as being acceptable as long as it does not exceed the boundaries and constitute abuse.<sup>27</sup>

The Children's Amendment Bill was then sent to the National Portfolio Committee on Social Development for debate.<sup>28</sup> The debate expanded over four provinces, where various submissions were made, both for and against the use of corporal punishment.<sup>29</sup> In addition to the debates, the Committee held public hearings at parliament during August 2007.<sup>30</sup> The Committee received criticism from all ends. On

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<sup>22</sup> Submissions on the Children's Act Amendment Bill [B19B-2006] <https://www.sahrc.org.za.pdf> (accessed on 22 July 2019).

<sup>23</sup> *Ibid.*

<sup>24</sup> Skelton (2015) *Acta Juridica* 346.

<sup>25</sup> Children's Amendment Bill section 139(6).

<sup>26</sup> South African Law Commission, *Review of the Child Care Act (2002)* par 9.7.

<sup>27</sup> Waterhouse S, 'Status of corporal punishment in the South African Children's Amendment Bill law reform process' (2007) *Save the Children Sweden* 1 2.

<sup>28</sup> Waterhouse (2007) *Save the Children Sweden* 1.

<sup>29</sup> Waterhouse (2007) *Save the Children Sweden* 3.

<sup>30</sup> *Ibid.*

the one hand they were criticised for not having the courage to just outright ban the use of corporal punishment and provide criminal sanctions for offenders as proposed by the Commission.<sup>31</sup> On the other hand people were of the opinion that the recommendation would limit their religious beliefs as well as the constitutional rights of parents to raise their children.<sup>32</sup> What this emphasises is the difficulty law-makers face when they attempt to regulate issues in the private sphere.<sup>33</sup> The discussion on corporal punishment in parliament had been heated and the Committee was divided on the issue of whether to go ahead and include clause 139 in the Bill.<sup>34</sup> During this intense time, three different clauses were drafted to reflect the opinions of the Committee members in which a vote would be cast to elect the most suitable one.<sup>35</sup> These clauses will be discussed briefly below.

The first option was for the abolishment of corporal punishment.<sup>36</sup> It provided an alternative to prosecution of parents: rather it suggested diversion to early intervention programmes.<sup>37</sup> It furthermore provided that where a parent had participated in diversion programmes the National Prosecuting Authority should withdraw charges or decline to prosecute.<sup>38</sup> The second option retained corporal punishment but contained the clause that corporal punishment may not exceed the boundaries of being ‘cruel, inhumane or degrading’.<sup>39</sup> Thirdly the punishment must be applied in a moderate and reasonable manner. Lastly the punishment may only be administered with an open hand or a flat object which must not cause any harm.<sup>40</sup> The last option again retained the use of corporal punishment and provided parents with the right to ‘subject a child to discipline that is not excessive, deliberate, abuse or involves a degrading use of force’.<sup>41</sup>

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<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> South African Law Commission: *Review of the Child Care Act* (2002) 116.

<sup>37</sup> *Ibid.*

<sup>38</sup> Draft Children’s Amendment Bill dated 18 October 2007.

<sup>39</sup> Waterhouse (2007) *Save the Children* Sweden 3.

<sup>40</sup> Draft Children’s Amendment Bill dated 18 October 2007.

<sup>41</sup> *Ibid.*

When the Children's Amendment Bill was finally passed in 2007 it came as a shock to many child rights activists that the clause addressing corporal punishment of children by parents had been left out completely.<sup>42</sup> The Committee explained that the motive behind excluding the clause abolishing corporal punishment was that the clause required additional investigation.<sup>43</sup> The Children's Amendment Bill only contained the following clauses, firstly that a child has the right to physical integrity. Secondly a child has the right to be free from all forms of violence from public or private sources. Lastly it requoted section 28 of the Constitution. The clause expressly invalidated any legislation including common and customary law which allowed for corporal punishment of a child by a court, including a court of traditional leaders.<sup>44</sup> The clause furthermore contained the provision that no person was allowed to administer corporal punishment to a child at any child and youth care centre.<sup>45</sup>

#### **4.4 Further hope for the abolishment**

Then in 2014 there seemed to be hope again for the abolishment of corporal punishment.<sup>46</sup> Amendments to the Children's Act had been proposed, this time there were two suggested clauses with regards to corporal punishment in the home.<sup>47</sup> The first clause explicitly abolished the use of any and all forms of corporal punishment and the second clause called for the repeal of the common law defence of 'reasonable chastisement'.<sup>48</sup> But a year later in May 2015 the Minister of Social Development tabled the Children's Amendment Bill and the Children's Second Amendment Bill in Parliament. There was no mention of the abolishment of corporal punishment in the home nor the repeal of the 'reasonable chastisement' defence.<sup>49</sup> When questioned on the matter the South African Human Rights Commission responded by stating that the

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<sup>42</sup> *Ibid.*

<sup>43</sup> National Department of Social Development, Media Statement 18 October 2007.

<sup>44</sup> Section 110 Children's Amendment Bill B197 of 2006.

<sup>45</sup> *Ibid.*

<sup>46</sup> 'Corporal punishment of children in South Africa' December 2018 Global Initiative to end all corporal punishment of children available at [www.endcorporalpunishment.org](http://www.endcorporalpunishment.org) (accessed on 21 April 2019).

<sup>47</sup> Sonke Gender Justice 'Policy brief: prohibition of corporal punishment in the home in South Africa' [www.genderjustice.org.za](http://www.genderjustice.org.za) (accessed on 21 February 2019).

<sup>48</sup> 'Corporal punishment of children in South Africa' December 2018 Global Initiative to end all corporal punishment of children available at [www.endcorporalpunishment.org](http://www.endcorporalpunishment.org) (accessed on the 21 April 2019).

<sup>49</sup> *Ibid.*

aim of the Bills was to primarily align the Children's Act with Constitutional Court judgments,<sup>50</sup> and that the use of corporal punishment in the home will be addressed in the Children's Third Amendment Bill.<sup>51</sup> This proposed clause which had been anticipated to be tabled in 2016 stated that 'no child may be subjected to corporal punishment or be punished in a cruel, inhumane or degrading way' and 'the common law defence of reasonable chastisement is hereby abolished'.<sup>52</sup>

In 2018 the Department of Social Development published the Children's Third Draft Amendment Bill for consultation. The intended purpose was to abolish the use of corporal punishment in the home and to remove the common law defence of 'reasonable chastisement'.<sup>53</sup> The proposed clause 12A stated the following with regards to discipline of children. In clause 12A(1) 'any person caring for a child, including a person with parental responsibilities and rights in respect of a child may not treat or punish the child in a cruel, inhumane or degrading way'. Furthermore in clause 12A(2) 'any punishment within the home or other environment, in which physical force or action is used and intended to cause some degree of pain or harm to the child is unlawful'. Towards the end of 2018 the clause to abolish the use of corporal punishment yet again disappeared from the Children's Third Draft Amendment Bill.

#### 4.5 Conclusion

This chapter signifies how backwards South Africa's legislation is with regards to the use of corporal punishment in the home. It has been nearly two and a half decades since the Constitutional Court made a finding that the use of judicial corporal punishment was unconstitutional,<sup>54</sup> and then five years later, the Constitutional Court found that it was again unconstitutional to use corporal punishment in schools.<sup>55</sup> There is thus still room for the viewpoint of Bekink that current legislation does not sufficiently

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<sup>50</sup> *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); *S v Williams* 1995 (3) SA 632 (CC).

<sup>51</sup> South African Human Rights Commission, Communication with the Global Initiative, October 2015.

<sup>52</sup> Information provided to the Global Initiative, November 2015.

<sup>53</sup> Children's Third Amendment Draft Bill <https://pmg.org.za/call-for-comment/704/> (accessed on 2 July 2019).

<sup>54</sup> *S v Williams* 1995 (3) SA 632 (CC) par 92.

<sup>55</sup> *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) par 52.

protect our children and are in contravention of the Constitution as well as legislative framework.<sup>56</sup>

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<sup>56</sup> Bekink (2006) *South African Journal of Criminal Justice* 173 189.

## Chapter 5: YG v S, the case that changed it all

### 5.1 Introduction

On the 19<sup>th</sup> of October 2017 the case of YG v S was heard,<sup>1</sup> wherein which the High Court declared the common law defence of 'reasonable chastisement',<sup>2</sup> unconstitutional.<sup>3</sup> At that time and as a result of this declaration South Africa joined fifty-four other states that have also prohibited the use of corporal punishment on children administered by parents.<sup>4</sup> On the 18<sup>th</sup> of September 2019 the Constitutional Court made a monumental decision by affirming the High Court's decision,<sup>5</sup> and on the 21 October 2019 there were fifty-eight states that prohibited the use of corporal punishment in the home.

### 5.2 Facts

This case was on appeal from the Regional Court, wherein which the appellant (the father) in the matter had been found guilty of two charges of assault with the intention to do grievous bodily harm.<sup>6</sup> The first is against his 13 year old son (M) and the other against his wife (YG). The assault inflicted on M by the appellant stemmed from the appellant's belief that his son was watching pornography and lied about it.<sup>7</sup> The manner and level of violence used against M was in dispute. The son's version is gravely different from the appellant's. M testified that the appellant punched him with fists on his thighs, punched him in the chest and, as a result of this altercation, M fell off the bed. While on the floor the appellant kicked him three or four times with his bare

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<sup>1</sup> YG v S 2018 (1) SACR 64 (GJ).

<sup>2</sup> See discussion in chapter 2 par 2.2.

<sup>3</sup> Lenta P 'The "Reasonable Corporal Punishment" Defence struck down: YG v S' (2018) *The South African Law Journal* 205 205.

<sup>4</sup> Global Initiative to End All Corporal punishment of Children Global Report 2018: Progress towards ending corporal punishment of children <http://www.endcorporalpunishment.org> (accessed on 19 July 2019).

<sup>5</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* (2019) ZACC 34 par 73.

<sup>6</sup> YG v S 2018 (1) SACR 64 (GJ) par 1.

<sup>7</sup> Par 3.



foot.<sup>8</sup> M also mentioned that during this altercation the appellant was ‘very angry’.<sup>9</sup> The appellant argued that he only slapped M with an open hand on his buttocks. He continued to state that the reason for this was that he was disappointed in M for watching pornography (which is forbidden in their religion) and for lying to the appellant about it.<sup>10</sup> The appellant stated that there was no intention to assault M but rather to discipline him to distinguish between right and wrong.<sup>11</sup> A medical doctor, who examined M four days after the incident, testified that the bruising in question was inflicted by a fist and not an open palm as indicated by the appellant.<sup>12</sup>

The trial court found that probabilities favoured the appellant’s version that the son was watching pornography. The court however emphasised that M’s untruthfulness on this aspect should not contaminate the remainder of M’s evidence. The trial court accepted M’s version of the assault.<sup>13</sup> The appellant then proceeded to invoke his defence of ‘reasonable chastisement’. This led to the pivotal question whether such a defence could withstand scrutiny under the constitutional dispensation when assessed with regards to the rights of the child.

### **5.3 The *amici curiae***

The case had four *amici curiae*, whom each made both written and oral submissions. The first three *amici curiae* were represented by the Centre for Child Law at the University of Pretoria namely, the Children’s Institute, the Quaker Peace Centre and lastly Sonke Gender Justice.<sup>14</sup> The main objective which the Children’s Institute focused on with regards to children in South Africa, is the high rate of violence and incidence of abused children.<sup>15</sup> The Quaker Peace Centre focuses on providing information and skills for the implementation of positive and non-violent discipline of children.<sup>16</sup> Lastly Sonke Gender Justice is working towards the end of violence against

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<sup>8</sup> Par 5.

<sup>9</sup> *Ibid.*

<sup>10</sup> Par 6.

<sup>11</sup> *Ibid.*

<sup>12</sup> Par 7.

<sup>13</sup> Par 10.

<sup>14</sup> Par 12.

<sup>15</sup> Par 13.

<sup>16</sup> Par 14.

children.<sup>17</sup> The above mentioned *amici* expressed their view that the common law defence of 'reasonable chastisement' is not in line with the values set out in the Constitution. They further stated that the common law defence should be developed by the court in declaring that it no longer finds application in South African law.<sup>18</sup> The *amici* filed an expert opinion in the form of an affidavit addressing the relationship between corporal punishment and violence against children.<sup>19</sup> It should be noted that the Minister of Social Development supported the view of the above three *amici*.

On the other hand, Freedom of Religion South Africa (hereafter referred to as FORSA) joined as *amicus* in support of the appellant's argument that the common law defence of 'reasonable chastisement' is valid and is not in violation of the rights of the child.<sup>20</sup> FORSA is a non-profit company with the aim of engaging in advancing freedom of religion in South Africa. They claim to represent six million people spanning various denominations.<sup>21</sup>

#### **5.4 The High Court and the constitutionality issue**

It was common cause amongst the parties that the Constitutional Court is of the opinion that a court may, of its own accord, raise and decide a constitutional issue where it is necessary for purposes of disposing of the matter before it or where it is in the interest of justice.<sup>22</sup> The three *amici* that argued for the removal of the common law defence were of the opinion that this was a constitutional issue that the High Court should decide on. Furthermore, they stipulated that even in the event that the court would find the common law defence unconstitutional it should not affect the appellant's rights.<sup>23</sup> On the other hand, FORSA was of the opinion that unless on this appeal the court finds that the appellant acted within the boundaries of the common law defence,

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<sup>17</sup> Par 15.

<sup>18</sup> *Ibid.*

<sup>19</sup> Par 16.

<sup>20</sup> Par 17.

<sup>21</sup> *Ibid.*

<sup>22</sup> *DPP Transvaal v Minister of Justice* 2009 (2) SA 222 (CC) par 40.

<sup>23</sup> Par 21.

the constitutional issue had become moot and for this reason should not be investigated any further.<sup>24</sup>

The High Court however found that it is in the interest of justice to determine whether the common law defence is in fact in line with the Constitution.<sup>25</sup> The court reasoned that it will be of utmost importance for parents who have been charged with assault of their child to know whether the common law defence is still at their disposal.<sup>26</sup> The High Court noted that it is under an obligation in terms of section 39(2) of the Constitution to develop the common law where it falls short of the spirit, purport or objects of the Bill of Rights. The matter at hand concerns itself with the rights of children who are afforded special protection under the Bill of Rights.<sup>27</sup> The High Court stated that where there is an order declaring the common law defence unconstitutional that it will only have prospective and not retrospective effect.<sup>28</sup>

## **5.5 The common law defence of ‘reasonable chastisement’ and the Constitution**

The court started off by answering the question whether the defence can withstand the Constitution by stating that the ‘Constitution imagines children as their own constitutional beings’ and that they have separate and distinct rights from their parents.<sup>29</sup> The court acknowledged the fact that there is a surplus of case law and an excess of authorities, the combination of which makes reference to parental rights to use reasonable and moderate chastisement.<sup>30</sup> These rights seem to be different from the child-focused rights set out in the Constitution.<sup>31</sup>

FORSA argued that it is parents’ duty to discipline their children to ensure that their children are brought up with manners and to restrict such power would not be in the

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<sup>24</sup> Par 23.

<sup>25</sup> Par 26.

<sup>26</sup> *Ibid.*

<sup>27</sup> Par 28.

<sup>28</sup> *Ibid.* What this means is that the only if/where a Bill or a court decision comes into force will it have effect on a person, it will not look back in time to previous matters.

<sup>29</sup> Par 61, referring to *S v M* (Centre for Child law as *Amicus Curie*) 2008 (3) SA 232 (CC).

<sup>30</sup> Par 63.

<sup>31</sup> Par 64.

best interest of the child/children.<sup>32</sup> FORSA further stated that it needs to be noted that the defence does not allow for extreme levels of physical punishment rather only reasonable or moderate levels of discipline and therefore cannot constitute abuse.<sup>33</sup> They concluded that the common law defence cannot be seen in the light of breaching a child's right's.<sup>34</sup>

The High Court on the other hand held a very different view.<sup>35</sup> It based its judgment on four pivotal arguments. Firstly, it acknowledged that case law does provide various factors which are taken into account when determining whether chastisement was in fact reasonable. The High Court noted that the common law defence falls short of providing strict guidelines as to what constitutes 'reasonable chastisement'.<sup>36</sup> Secondly, the High Court argued that the constitutional protection from all forms of violence and the right to bodily and psychological integrity would not be mutually exclusive with the defence.<sup>37</sup> Thirdly, that the right to human dignity in terms of section 10 of the Constitution and lastly, section 9 on equal protection of the law, places great doubt as to whether the common law defence could withstand the Constitution.<sup>38</sup> The High Court therefore agreed with the first three *amici* for the abolishment of the defence because it breaches many rights of children.<sup>39</sup>

The High Court in terms of the limitation clause, section 36 of the Constitution, had to determine whether the infringements of children's rights can be justifiable.<sup>40</sup> As was held in the *Williams* case,<sup>41</sup> the limitation can only be justified where the court has determined that the nature and importance of the right and the extent to which the right is limited, is justified in relation to the purpose, importance and effect of the provisions which results in its limitation, taking into account the possibility of less restrictive

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<sup>32</sup> *Ibid.*

<sup>33</sup> Par 66.

<sup>34</sup> *Ibid.*

<sup>35</sup> Par 67.

<sup>36</sup> Par 68.

<sup>37</sup> Par 69; Mezmur (2019) *Speculum Juris* 78.

<sup>37</sup> *YG v S* par 69.

<sup>38</sup> Par 75.

<sup>39</sup> Par 76. Some of the rights which are breached are bodily integrity, the best interests of a child, right to dignity as well as the right to equality to name but a few.

<sup>40</sup> Par 77.

<sup>41</sup> 1995 (3) SA 632 (CC) par 54.

means to achieve this purpose.<sup>42</sup> The High Court determined that the rights are of importance as it involves the rights of children to be placed on the same footing as adults with regards to protection from assault which infringes on their dignity and bodily integrity.<sup>43</sup> This is of importance due to the high levels of child abuse and violence against children in South Africa. The court continued by stating that the defence creates the impression of 'off-limits' for any state involvement. This goes against the state's intention to have a child-focused justice and protection system for children.<sup>44</sup> Lastly, the court expressed the concern that by allowing the common law defence to continue, would be in full contradiction of the best interests of the child.<sup>45</sup> With regards to the limitation, it seems to have originated in pre-constitutional time, when children were not regarded as individuals with their own set of rights.<sup>46</sup> The court emphasised that the aim is not to create the impression that parents cannot discipline their children but that even 'reasonable chastisement' may be considered as abuse.<sup>47</sup> The court then stated that the question at hand is whether the limitation created by the defence with regards to the rights of children can be justified by the desire to continue to permit parents to discipline their children through abuse.<sup>48</sup> Keightley J found no reason that would justify such a limitation under section 36.<sup>49</sup> She concluded by stating that the common law defence of 'reasonable chastisement' finds no place in South African law.<sup>50</sup> This judgment was however taken on appeal by one of the *amici*.

## 5.6 Leave to appeal

In an unexpected move, FORSA applied to the Constitutional Court for both standing and leave to appeal this case. FORSA relied on provisions in terms of section 38(c), (d) and (e) of the Constitution, which provides for the enforcement of rights where a person alleges that a right in terms of the Bill of Rights has been infringed or

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<sup>42</sup> *YG v S* par 78.

<sup>43</sup> Par 79.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> Par 80.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> Par 85.

<sup>50</sup> *Ibid.*

threatened.<sup>51</sup> It was held in the *University of Witwatersrand Law Clinic v Minister of Home Affairs and Another* where the University of Witwatersrand was the applicant, that it will only be permissible for an *amicus curiae* to appeal against an order where there is a clear public interest and that the parties to the litigation did not intend to pursue an appeal.<sup>52</sup> FORSA noted in their founding affidavit that there was no intention from the State nor the appellant to lodge an appeal.<sup>53</sup> They further expressed the view that the case had created substantial public interest as the case directly affects parents and children in South Africa.<sup>54</sup> FORSA then cited numerous factors dealt with in the *Campus Law Clinic* case indicating when proceedings are brought in the public interest.<sup>55</sup>

The factors consist of the following: if there was any other manner to bring the appeal; the nature of relief sought and the extent of its application; the range of persons/groups who may be affected either directly or indirectly by an order made by the Court; the degree of vulnerability of the people affected; the nature of the right said to be infringed upon and lastly, the consequences of such an infringement.<sup>56</sup> On the first factor FORSA was of the opinion that 'to the extent that this court directs the Supreme Court of Appeal to hear the application' there is no other way.<sup>57</sup> The relief sought by FORSA was to reconsider the High Court's decision on the common law defence and the outcome of a prospective application. FORSA expressed their concern that this matter affects all parents and children. FORSA further submitted that the High Court judgment raises important constitutional issues, particular parental rights as well as the constitutional right in terms of section 15 which provides for the right to freedom of religion, belief and opinion.<sup>58</sup> They also noted that a constitutional invalidly order made by any court, will have no force unless the Constitutional Court confirms it and that this

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<sup>51</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* par 14.

<sup>52</sup> *University of Witwatersrand Law Clinic v Minister of Home Affairs and Another* 2008 (1) SA 447 (CC) par 6.

<sup>53</sup> *Freedom of Religion South Africa: Founding Affidavit* (CC) in the case of YG v S par 24.

<sup>54</sup> *Ibid.*

<sup>55</sup> *The Campus Law Clinic (University of Kwa-Zulu Natal Durban) v Standard Bank of South Africa Ltd and Another* 2006 (6) SA 103 (CC) par 21. Section 38(d) of the Constitution.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Freedom of Religion South Africa: Founding Affidavit* (CC) in the case of YG v S par 25.

<sup>58</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* par 34.

principles applies to common law equally.<sup>59</sup> In conclusion of FORSA's founding affidavit they asked the Constitutional Court to set aside the decision of the High Court, where the court found the common law defence to be unconstitutional. They further suggested that the common law needs to be developed and include definitions to clearly identify what 'reasonable' and 'moderate' chastisement entails.<sup>60</sup>

The other three *amici*, represented by the Centre for Child Law, stated in their affidavit that they oppose FORSA's application for leave to appeal. They also asked that if FORSA's standing was recognised, that they too be.<sup>61</sup> With regards to the factors which FORSA listed the other *amici* are firstly of the opinion that stating that either the Constitutional Court or the Supreme Court of Appeal is the only 'reasonable and effective manner' seems more of a challenge than an appeal. Furthermore, they stated that FORSA should keep in mind that this does not open new opportunities for the case to be reheard on different evidence.<sup>62</sup> They also placed into dispute the constitutional issues FORSA is of the opinion that the judgment raised. The applicant emphasised on the fact that the case 'centrally raises the rights of children, as rights bearers' and not parental rights.<sup>63</sup> In their conclusion they stated that FORSA had made an insufficient case and that the appeal should be dismissed.

## 5.7 The Constitutional Court decision

The question in front of the Constitutional Court was whether the common law defence of 'reasonable chastisement' was constitutionally sound. The court in answering this question first placed its attention on section 12(1)(c) of the Constitution.<sup>64</sup> This section states that everyone has the right to be free from any form of violence in both the

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<sup>59</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* par 18.

<sup>60</sup> *Freedom of Religion South Africa: Founding Affidavit (CC) in the case of YG v S* par 42.

<sup>61</sup> The Children's Institute, The Quaker Peace Centre and Sonke Gender Justice: founding affidavit in the Constitutional Court par 20.

<sup>62</sup> The Children's Institute, The Quaker Peace Centre and Sonke Gender Justice: founding affidavit in the Constitutional Court par 46.

<sup>63</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* Par 24.

<sup>64</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* par 36. See discussion in chapter 4 par 4.2.

public and private sphere. The court questioned whether the term 'violence' should be considered in its ordinary grammatical meaning or in a highly technical meaning.<sup>65</sup> When taking into consideration the ordinary meaning, it includes the administering of force, however minimal.<sup>66</sup> The court found that in terms of the definition of chastisement it does entail a measure of violence.<sup>67</sup> On this topic the court concluded that the reference to the term 'violence' encapsulates all forms of chastisement, whether it is moderate or extreme.<sup>68</sup> It found that chastisement does limit a child's rights in terms of section 12(1)(c).<sup>69</sup> The court then moved on to consider the constitutional right to human dignity (section 10). Children are regarded as independent and autonomous right holders and therefore the use of corporal punishment does limit a child's right to human dignity.<sup>70</sup>

As determined above, section 12(1)(c) and section 10 are limited by the use of corporal punishment but can these limitations be justified in terms of section 36 of the Constitution? The court noted that the common law defence of 'reasonable chastisement' is a law of general application and may by virtue of this potentially limit the rights in the Bill of Rights.<sup>71</sup> In considering whether these limitations are justified the Constitutional Court distinguished between parental chastisement and institutionalised punishment.<sup>72</sup> It found that the former was one which was administered by a loving parent.<sup>73</sup> Parents have an obligation to raise their children to become responsible members of society.<sup>74</sup> Whereas institutionalised punishment was

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<sup>65</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* par 39.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* par 40.

<sup>69</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* par 44.

<sup>70</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* par 46. See discussion in chapter 4 par 4.2.

<sup>71</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* par 50.

<sup>72</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* par 51.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*



seen as detached and administered by a stranger.<sup>75</sup> The court continued to mention that strangers implemented punishment in a less caring manner.<sup>76</sup> By invalidating the defence parents who discipline their children in terms of their faith or culture could expose themselves to criminal prosecution, possible conviction and possible imprisonment.<sup>77</sup> The only safety net available to them would be the *de minimis non curat lex* principle. The court rightly noted that this safety net would only be effective where the punishment was trivial and would not prevent a conviction of assault.<sup>78</sup>

The court then turned to examine the best interest of the child principle in terms of section 28(2) of the Constitution. There is an obligation placed on the State in terms of section 28 and the judiciary is bound by the provisions set out in section 28.<sup>79</sup> This means that while the court decides whether a parent is entitled to chastise their child, the best interest of the child should be the main focus. The court pointed out that the right to freedom of religion (section 15) in the Constitution is not wide enough to include 'reasonable chastisement'.<sup>80</sup> In order for 'reasonable chastisement' to withstand the pressure placed on it by section 28(2), it would have to prove that the effects are for the good of the child and not assault.<sup>81</sup> The court found that there had not been substantial evidence placed in front of it to justify the limitations.

In its concluding remarks the Constitutional Court stated that the rights in terms of section 12 and 10 of the Constitution, united with the fact that less harmful means are available, only points in one direction, that there is no justification for the common law defence to continue to exist. It found that 'reasonable chastisement' does constitute assault.<sup>82</sup> Finally, it confirmed the High Court's decision and in a monumental

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<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* par 52.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* par 56.

<sup>80</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* par 63.

<sup>81</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* par 65.

<sup>82</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* par 72.

judgment found the common law defence of 'reasonable chastisement' to be unconstitutional.<sup>83</sup>

## 5.8 Conclusion

YG v S is still the case that changed it all. There is a lot of admiration for the High Court decision and the confirmation by the Constitutional Court. The High Court and the Constitutional Court criminalised a 'practice viewed by the majority of South Africans, albeit mistakenly, as morally permissible and by some as morally obligatory',<sup>84</sup> something the legislature has not been able to accomplish. The judgment marks a moment in South Africa but this is not the end. In order to truly protect the most vulnerable group, legislation needs to be implemented. However, the Constitutional Court decision definitely pointed all efforts in the right direction. Still more has to be done to guide and regulate parental behaviour and the effects that corporal punishment has on children as a matter of urgency.

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<sup>83</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* par 73.

<sup>84</sup> Lenta (2018) *The South African Law Journal* 219.

## Chapter 6: The long-term psychological effects

### 6.1 Introduction

It seems appropriate to start this chapter off by stating some statistics. Unfortunately there is no recent data on corporal punishment in the home in South Africa. However, the statistics that are available indicate high levels of corporal punishment.<sup>1</sup> A national survey conducted by the Human Sciences Research Council stated that at the age of three years old the most common form of punishment was being smacked.<sup>2</sup> The survey went on to state that the age of four years old was the most common age where a child was beaten with some or other object.<sup>3</sup> The data collected indicated that at least 57% of parents used corporal punishment, for example smacking, and 33% used harsher forms of corporal punishment, for example beating and kicking.<sup>4</sup> In this study the authors pointed out that where studies are conducted with regards to sensitive subject matter, parents are more likely to under-estimate their claims as to the use of corporal punishment.<sup>5</sup> Thus, what can be taken from this is that the figures obtained are an underestimate of how many children experience corporal punishment in South Africa in the home. It also needs to be mentioned that most corporal punishment is inflicted behind closed doors thereby affecting the exact estimates.<sup>6</sup>

In an international survey it was found that out of 1.7 billion children who have experienced some or other form of violence, 80% of them have been affected by corporal punishment.<sup>7</sup> There are several harmful consequences when corporal

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<sup>1</sup> Bower C 'Prohibition of Corporal and Humiliating Punishment in the Home' (2012) <https://children.pan.org.zae.pdf> (accessed on 12 March 2019) Pan: Children 1 1.

<sup>2</sup> Dawes A, Kropiwnicki Z, Kafaar Z & Richter L 'Corporal Punishment of Children: A South African National Survey' (2005) Save the Children Sweden 2 3.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> Dodd C *Ending corporal punishment of children: A handbook for working with and within religious communities* (2011) Save the Children Sweden 25.

<sup>7</sup> Know Violence in Childhood 'Ending Violence in Childhood: a Global Report' (2017) available at [www.globalreport.knowviolenceinchildhood.org](http://www.globalreport.knowviolenceinchildhood.org) (accessed on 3 March 2019).

punishment is enforced. The only 'positive' outcome is temporary compliance. However the behaviour of children being punished in this way gets worse over time.<sup>8</sup>

## 6.2 Physical and psychological effects

Research conducted by Gershoff indicates that the implementation of corporal punishment has many negative neurological, physical, behavioural, cognitive, emotional and social developmental effects.<sup>9</sup> It has also been said that there is no rational link between the corporal punishment inflicted and the type of misbehaviour.<sup>10</sup>

The adverse physical outcomes when corporal punishment is inflicted could include broken bones, cuts, bruises and in the worst case could lead to death.<sup>11</sup> A study conducted by the Medical Research Council in South Africa stated that at least 45% of child homicide was related to child abuse.<sup>12</sup>

The study by Gershoff also found that spanking resulted in an increase in child aggression, delinquency and antisocial behaviour which then negatively impacted them later on in adulthood.<sup>13</sup> Another revelation that the study indicated was that children who had been spanked during their childhood were more likely to abuse their own children.<sup>14</sup> Studies also suggest that there are many psychological implications, for example, mood disorder, anxiety disorder and substance abuse which have all been linked to children who faced corporal punishment in their homes.<sup>15</sup> Stress caused by pain or fear of corporal punishment can consequently effect the development and functions of a child's brain.<sup>16</sup> The adverse neurological effects can

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<sup>8</sup> Bower (2012) Pan: Children 6.

<sup>9</sup> Gershoff (2013) *Child Dev Perspect* 4.

<sup>10</sup> Clacherty A, Clacherty G & Donald D 'South African Children's Experiences of Corporal Punishment, Pretoria' (2005) *Save the Children Sweden* 1 21.

<sup>11</sup> Bower (2012) Pan: Children 6.

<sup>12</sup> Mathews S, Abrahams N, Jewkes R & Martin L 'Underreported child abuse deaths: Experiences from a National Study on Child Homicide' (2013) *South African Medical Journal* 103 133.

<sup>13</sup> Bower (2012) Pan: Children 6.

<sup>14</sup> Gershoff (2013) *Child Dev Perspect* 4.

<sup>15</sup> Afifi T, Mota N, Dasiewicz P, MacMillan H & Sareen J 'Physical Punishment and Mental Disorders: Results from a National Representative US Sample' (2012) *Pediatrics* 1 9.

<sup>16</sup> Bower (2012) Pan: Children 7.

be 'derailing of a natural healthy brain growth, resulting in life-long and irreversible abnormalities'.<sup>17</sup>

Mathews is of the opinion that there is a link between corporal punishment and other forms of violence. She stated in an expert affidavit that corporal punishment creates a barrier for a child to trust their parents and can create aggression and a lack of empathy in a child.<sup>18</sup> When corporal punishment is inflicted on a child it teaches them the wrong lesson, creating the impression that it is acceptable to assert your will on someone else if you are stronger than they are, for example.<sup>19</sup>

Freeman and Saunders ask a thought-provoking question.<sup>20</sup> The question is what comes first, 'do children behave badly because they are hit, or is it badly behaved children who get hit?'<sup>21</sup> A study was conducted to answer this question and it found that children that experienced little to no physical punishment had no increase or drop in their anti-social behaviour index, but the trend indicated that physical punishment made things worse with the increase of a child's anti-social behaviour index.<sup>22</sup> This study could be linked to Gershoff's study, which found that corporal punishment actually resulted in an increase in child aggression.

### 6.3 Conclusion

The negative physical and psychological effects of corporal punishment are well documented. A home is supposed to be regarded as a safe place for children. But the fact of the matter is, it is not a place of safety in some instances. Rather the severe adverse impacts of corporal punishment is not something children just grow out of, as it can be seen in the studies referred to above. It usually follows them to their adulthood.

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<sup>17</sup> Riak J 'Plain talk about spanking, alamo parents and teachers against violence in education (PTAVE)' 2011 [www.nospank.net/pt2011pa.pdf](http://www.nospank.net/pt2011pa.pdf) (accessed on 12 April 2019).

<sup>18</sup> Sonke Gender Justice [www.genderjustice.org.za](http://www.genderjustice.org.za) (accessed on 27 February 2019).

<sup>19</sup> Sonke Gender Justice 'Policy brief: prohibition of corporal punishment in the home in South Africa' [www.genderjustice.org.za](http://www.genderjustice.org.za) (accessed on 21 February 2019).

<sup>20</sup> Freeman M & Saunders B (2014) *International Journal of Children's Rights* 688.

<sup>21</sup> *Ibid.*

<sup>22</sup> Straus M *Beating the Devil Out of Them: Corporal Punishment in American Families* (1994) 197-197.

The suggestion when trying to combat corporal punishment is to rather make use of positive discipline techniques as they are less damaging and more effective in the long run. Positive discipline does not mean a lack of discipline. It acknowledges the bad behaviour and addresses it in a manner that instils positive behaviour. Examples of positive techniques are, building a mutual respectful relationship with children, seeking long term solutions that develop a child's own self-discipline as well as to have clear lines of communications with regards to expectations, rules and certain limitations.<sup>23</sup>

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<sup>23</sup> Bower (2012) Pan: Children 1.

## Chapter 7: Comparative study

### 7.1 Introduction

In terms of section 39(1)(c) of the Constitution, South Africa 'may' use foreign law when interpreting rights in the Bill of Rights. The 'may' is permissive.<sup>1</sup> Due to the limitations inherent in this research,<sup>2</sup> only two countries will be examined but they could shed some light on viable approaches South Africa could possibly adopt. The two countries to be discussed are Sweden and Ireland. Both countries have abolished corporal punishment in every setting, including the home. Sweden was the first country in the world to abolish corporal punishment in the home over forty years ago and Ireland grappled over the idea to abolish corporal punishment in a similar fashion to South Africa. The purpose behind this comparative study is to highlight possible solutions available to South Africa in order to achieve the goal of a corporal punishment free country.

### 7.2 Sweden

The process of abolishing corporal punishment truly started in 1975, when a three year old girl was so severely beaten by her father, she had to be taken to hospital.<sup>3</sup> Despite the severity of the girls injuries the court acquitted her father, declaring that he had not exceeded his right to chastise his daughter.<sup>4</sup> This matter sparked outrage and many petitioned asking for more stringent laws on the use of physical force on children.<sup>5</sup> The Minister appointed a Commission on Children's Rights to review legislation. This Commission was of the opinion that the abolishment of corporal punishment needed to be implemented as they found a strong connection between negative psychological and sociological effects and the implementation of corporal punishment.<sup>6</sup> Many

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<sup>1</sup> This section is similar to section 35(1) of the 1993 Interim Constitution.

<sup>2</sup> See discussion in chapter 1 par 5.1.

<sup>3</sup> Joan E 'The Swedish Ban on Corporal Punishment: the history and effects' (1996) *Family Violence Against Children: A Challenge for Society* 19 19.

<sup>4</sup> *Ibid.*

<sup>5</sup> Joan (1996) *Family Violence Against Children: A Challenge for Society* 21.

<sup>6</sup> Ziegret K 'The Swedish Prohibition of Corporal Punishment: A Preliminary Report' (1983) *Journal of Marriage and the Family* 917 917.

opinions were heard during the hearings and there was a substantially large number of people supporting the ban of corporal punishment.<sup>7</sup> It was the unanimous opinion of the Commission that the time was ripe to protect children and illustrate that a child is an individual who regardless of their dependency, is entitled to have their personal space protected.<sup>8</sup> Another reason to appreciate Sweden's approach is that they did not just implement a law banning corporal punishment cold turkey. They implemented a public education campaign to accompany the new legislation on the ban of corporal punishment.<sup>9</sup> Sweden ensured that the ban was well-publicised and the most impressive part was that each and every household with a young child was given a pamphlet explaining the reasons for the ban and provided parents with alternatives to corporal punishment.<sup>10</sup>

In 1979 corporal punishment was expressly abolished.<sup>11</sup> Sweden thus became the first country to ban the use of corporal punishment in all settings. Just over 40 years ago, when Sweden became the poster child for the abolishment of corporal punishment, the UN CRC had not even entered into force. It would take another 10 years for that to happen.<sup>12</sup> Then another 30 years would pass before the UN CRC Committee expressed its view on corporal punishment.<sup>13</sup> Swedish law was amended in 1979 in the Children and Parents Code stating that 'children are entitled to care, security and a good upbringing' ... 'Children are to be treated with respect for their person and individuality ... may not be subjected to corporal punishment or any other humiliating treatment'.<sup>14</sup> This position is then repeated in Chapter 2 article 5 of the Instrument of Government (one of four laws that make up their Constitution), stating 'everyone shall be protected against corporal punishment'.<sup>15</sup> When Sweden did this over 40 years ago many countries thought it had been radical and to some an intrusive

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<sup>7</sup> Ziegret (1983) *Journal of Marriage and the Family* 919.

<sup>8</sup> Ziegret (1983) *Journal of Marriage and the Family* 920.

<sup>9</sup> Joan (1996) *Family Violence Against Children: A Challenge for Society* 21.

<sup>10</sup> *Ibid.*

<sup>11</sup> Corporal punishment of children in Sweden (2018) <https://www.endcorporalpunishment.org> (accessed on 15 July 2019) Save the Children Sweden 1 1.

<sup>12</sup> Leviner P & Sardiello T 'The Swedish Ban on Corporal Punishment of Children in a Multi-Cultural context- Conflicting Logics in the Social Service' in Leviner P (ed) *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (2019) 145 145.

<sup>13</sup> *Ibid.*

<sup>14</sup> Section 1 of the Children and Parents Code 1979.

<sup>15</sup> Constitution of Sweden 1974: The Instrument of Government.



legal development.<sup>16</sup> Nevertheless on the Swedish perspective, they believed the law was the logical conclusion of an evolutionary course over some time.<sup>17</sup>

It should also be noted that many people in Sweden were not happy about the ban. They believed that the government policies would encroach on the family sphere.<sup>18</sup> Today this is the same argument made in countries which have not abolished the use of corporal punishment.<sup>19</sup> Sweden addressed this concern and placed emphasis on the fact that the ban is not there to place any limitations on parental responsibilities and rights but to allow for the responsible upbringing of children.<sup>20</sup> Many people believed that the ban itself lacked 'legal teeth'.<sup>21</sup> This is due to the fact that Sweden did not provide any sanctions should a parent use corporal punishment. Sweden clarified this matter by explaining that the primary purpose of the ban was to influence the social attitudes and not to deter parents with the looming threat of any penalties.<sup>22</sup>

The question that arises is did the ban have its intended effect? The answer seems to be in the affirmative. This is due to a study which found that almost every adult in Sweden understood and was aware that the law does not allow corporal punishment.<sup>23</sup> There seemed to have also been a significant decline in parents who believed corporal punishment was the right thing.<sup>24</sup> Therefore emphasis should be placed on the fact that cultural norms can be changed and one way of executing this is by enacting legislation.<sup>25</sup>

### 7.3 Ireland

In Ireland the Children Act 1908, allowed for the defence of reasonable chastisement, particularly in section 37 which read that 'nothing in this part of this Act [prevention of

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<sup>16</sup> Joan (1996) *Family Violence Against Children: A Challenge for Society* 19.

<sup>17</sup> *Ibid.*

<sup>18</sup> Corporal punishment of children in Sweden (2018) Save the Children Sweden 4.

<sup>19</sup> *YG v S* 2018 (1) SACR 64 (GJ) par 32.

<sup>20</sup> Ziegret (1983) *Journal of Marriage and the Family* 917.

<sup>21</sup> Roberts V 'Changing Public Attitudes Towards Corporal Punishment: The Effects of Statutory Reform in Sweden' (2000) *Child Abuse and Neglect* 1027 1028.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> Corporal punishment of children in Sweden (2018) Save the Children Sweden 5.

<sup>25</sup> Roberts (2000) *Child Abuse and Neglect* 1028.

cruelty to children] shall be constructed to take away or affect the right of any parent, teacher ... having the lawful control or charge of a child ... to administer punishment to such a child'.<sup>26</sup> In 1993 there was a public poster campaign which featured two children whispering to each other that 'slapping children is wrong, pass it on'.<sup>27</sup> Subsequently the Irish Law Commission started investigating the matter. Almost a century later in 2001, Act 1908 was repealed and was replaced with the Children Act 2001.<sup>28</sup> It needs be noted that in the newly adopted legislation there was no mention of a right to administer punishment but it did not explicitly repeal it. Thus the 'reasonable' chastisement defence remained in common law.<sup>29</sup>

Ireland had been examined through the Human Rights Council under the Universal Periodic Review in 2011 and Uruguay had suggested that Ireland explicitly prohibit all forms of corporal punishment in the home. Uruguay further recommended that Ireland equip parents with positive discipline techniques.<sup>30</sup> Ireland acknowledged to some extent the recommendations made to prohibit all forms of corporal punishment by stating that the matter was under review.<sup>31</sup> They further went on to elaborate that legislation either abolishing corporal punishment or legislation which includes a more comprehensive definition of 'reasonable chastisement' would involve a lot of careful consideration.<sup>32</sup> The Government had to reiterate the position on the abolishment of corporal punishment in 2014 as the Human Rights Committee was still concerned at the lack of legal prohibition.<sup>33</sup>

In 2015 a ground-breaking development took place in Ireland, when the common law defence of 'reasonable chastisement' was abolished by way of an amendment to the

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<sup>26</sup> Children Act, 1908.

<sup>27</sup> Slapping Children is Wrong Pass it on (1993) <https://www.rte.ie/documents/news/slappingchildreniswrong.pdf> Irish Society for the Prevention of Cruelty to Children (accessed on 23 July 2019).

<sup>28</sup> Corporal punishment of children in Ireland (2017) <https://www.endcorporalpunishment.org> (accessed on 15 July 2019) Save the Children Sweden 1 1.

<sup>29</sup> *Ibid.*

<sup>30</sup> Reports of the Working Group 21 December (2011) <https://www.refworld.org> para 107(41) and (42).

<sup>31</sup> Corporal punishment of children in Ireland (2017) Save the Children Sweden 4.

<sup>32</sup> *Ibid.*

<sup>33</sup> Reports of the Working Group 21 December (2011) <https://www.refworld.org> para 107(41) and (42).

Offences Against the Persons (Non-Fatal) Act 1997 by the Children First Act 2015. This is the same Act that in 1997 abolished the use of corporal punishment in schools. This was 18 years before the abolishment of the common law defence of 'reasonable chastisement'.<sup>34</sup> In Ireland corporal punishment is further abolished in penal institutions as well as a sentence for crime.<sup>35</sup> By abolishing and adopting legislation which expressly repealed the common law defence of 'reasonable chastisement', Ireland joined 46 other states who had done the same by 2015.<sup>36</sup> A benefit of abolishing the common law defence was that in turn corporal punishment had been abolished in alternative care settings in 2015.<sup>37</sup> Again by virtue of the repeal of the common law defence corporal punishment is unlawful in all day centres.<sup>38</sup>

Section 24A of the Children First Act 2015 now expressly states that the common law defence of 'reasonable chastisement' has been abolished. It came into full effect on 11 November 2015. This took over a decade of mounting pressure from human rights bodies on Ireland to abolish the common law defence and provide children with equal protection from assault as adults have under the law.<sup>39</sup> Senator Jillian Van Turnhout who had tabled the legislation placed emphasis on the fact that this is Ireland's way of breaking the chains from the English common law.<sup>40</sup> She further went on to state that the 'ancient defence' had not been created by the Irish and acknowledged that by repealing the common law defence Ireland has signified that 'all citizens are equal'.<sup>41</sup> The Minister for Children and Youth Affairs said that the implications which the abolishment of the common law defence have brought about is that it has allowed Ireland to move away from colonial legislation towards a more international perspective.<sup>42</sup>

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<sup>34</sup> Offences Against the Person (Non-Fatal) Act 1997.

<sup>35</sup> Article 12(2) of the Criminal Law Act 1997.

<sup>36</sup> Ruch M & Lazarus S 'Troubling Chastisement: A Comparative Historical Analysis of Child Punishment in Ghana and Ireland' (2018) *Sociological Research* 177 186.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> Corporal punishment of children in Ireland (2017) Save the Children Sweden 1.

<sup>40</sup> Ruch & Lazarus (2018) 23(1) *Sociological Research* 186.

<sup>41</sup> Ruch & Lazarus (2018) 23(1) *Sociological Research* 187.

<sup>42</sup> *Ibid.*

It should be mentioned that in the 2016 Universal Periodic Review Honduras recommended that Ireland abolish corporal punishment in all settings.<sup>43</sup> It seems that the reason Honduras has recommended this is that Ireland had not drawn up legislation to deal with corporal punishment in the home. It had been mentioned by the Minister for Children and Youth Affairs that Ireland did not create any new offence but rather just abolished the common law defence which has its roots in a wholly different era and social context.<sup>44</sup>

All these are similar to South Africa except the abolishment of the common law defence as well as the abolishment of corporal punishment in the home. It is inspiring to note that in 2017 Senator Jillian Van Turnhout addressed the question on whether there had been any substantial change after the abolishment of the common law defence. She stated that 'there is anecdotal evidence that parental behaviour and its relation to physical punishment is changing'.<sup>45</sup>

#### **7.4 Conclusion**

What can be taken from the above two countries is that the ban was not to sanction parents if they overstepped but rather it had two intended purposes. Firstly, to have a long term effect of changing parental behaviour to rather make use of positive discipline methods.<sup>46</sup> Secondly, to have the direct effect of making the public more mindful with regards to the social problem of child abuse.<sup>47</sup> The significance of using both Sweden and Ireland is that these two countries both made use of public poster campaign to educate parents on the negative impacts of corporal punishment.<sup>48</sup> Sweden's ban began with the beating of a young child which started the motion of banning corporal punishment. This seems to be very similar to South Africa as the *YG v S* case provided momentum and reopened the contentious debate on whether or not to abolish corporal punishment in the home.

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<sup>43</sup> Report of the working group 18 July 2016 par 83.

<sup>44</sup> Ruch & Lazarus (2018) *Sociological Research* 187.

<sup>45</sup> Bristow D 'Legislating to prohibit Parental Physical Punishment of Children' (2018) *Public Policy Institute for Wales* 1 22.

<sup>46</sup> Ziegret (1983) *Journal of Marriage and the Family* 921. See discussion in chapter 6 par 6.3.

<sup>47</sup> *Ibid.*

<sup>48</sup> See discussion in chapter 6 par 6.2.

South Africa is in a similar position as what Ireland was in and the Constitutional Court decision abolishing the common law defence, now places Ireland and South Africa on the same footing. South Africa is still in some matters applying colonial law and to abolish corporal punishment in the home, meant a move away from colonial law to an international perspective. There is still the need for implementation of legislation to regulate and instil positive discipline in order to protect the most vulnerable group in society.<sup>49</sup>

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<sup>49</sup> Bristow (2018) *Public Policy Institute for Wales* 23.

## Chapter 8: Conclusion

Children's rights have changed significantly over time, in that they are no longer a 'slogan in search of a definition'.<sup>1</sup> Rather children's rights have brought about a complex and increasingly sophisticated body of case law which has been the backbone in many instances for the reform in South African child law since 1994.<sup>2</sup> With the commencement of the Constitution all forms of corporal punishment have become redundant as it is contrary to the spirit and purport of our constitutional dispensation.<sup>3</sup> It is clear from the discussion in this dissertation that corporal punishment in the home is a complete violation of a child's rights. What corporal punishment encapsulates is that firstly, adults have protection against assault and children do not.<sup>4</sup> Secondly that parents may under certain circumstances diminish their child's dignity. Lastly it validates violence in the home and thus contravenes section 12(1)(c) of the Constitution. Corporal punishment is not in line with the constitutional dispensation with regards to the rights of children.

The current international momentum with regards to corporal punishment moves directly into a world where there is a complete ban on corporal punishment in all settings.<sup>5</sup> At some stage the South African government was eager to regulate and legislate on the matter but its intention dwindled. The question as to why this happened still seems puzzling. The ban on corporal punishment in all settings seems to be a clear cut answer. This is due to the overwhelming international human rights law,<sup>6</sup> foreign law,<sup>7</sup> as well as the need to prevent the incident that took place in *YG v S*.<sup>8</sup> What can be taken from the above is that legislation and regulation is appropriate and needed to protect South African children sufficiently. South Africa needs to move away from the past, this being outdated colonial law and move towards the implementation of the standards set out in international and regional instruments.

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<sup>1</sup> Rodham H 'Children Under the Law' (1973) 43 *Harvard Educational Review* 487 487.

<sup>2</sup> Schäfer L *Child Law in South Africa Domestic and International Perspective* (2011) 115 129.

<sup>3</sup> Bekink (2006) *South African Journal of Criminal Justice* 191.

<sup>4</sup> See discussion in chapter 4 par 4.2.

<sup>5</sup> Mezmur (2019) Vol 32 No 2 *Speculum Juris* 1 25.

<sup>6</sup> See discussion in chapter 3 par 3.2.

<sup>7</sup> See discussion in chapter 7 par 7.2

<sup>8</sup> 2018 (1) SACR 64 (GJ).

A further motive to abolish corporal punishment in all settings is to consider the statistics on how regularly corporal punishment is being implemented and the adverse effects it can have. Over 50% of children experience some or other form of corporal punishment. Furthermore research leads to it being evident that the use of corporal punishment only has negative effects, like aggression, delinquency and substance abuse and can further affect children in their adulthood.<sup>9</sup> It should also be mentioned that there is no benefit to corporal punishment. It does not correct behaviour or instil discipline.

It is apparent that even after the Constitutional Court decision the legislature still has to address many outstanding issues. The legislature would need to conduct extensive research before it can insert the appropriate regulatory framework.<sup>10</sup> There would need to be guidelines in place on how law enforcement deals with reported cases of child abuse.<sup>11</sup> The only way the legislature would be able to implement the abolishment of not only the defence of reasonable chastisement but also the use of corporal punishment in the home would be to find a balance between the rights infringed which would be invoked by those wishing to abolish corporal punishment and the rights relied on by those subscribing the opposite.<sup>12</sup> When reference is made to the rights concerned, namely, dignity, freedom from violence, children's rights to be protected from degradation and that the best interest of the child is given paramount consideration it indicates that the balance seems to lean more on the side of those wishing to abolish it.<sup>13</sup>

In an eloquent judgment in 2019 the Constitutional Court finally heard the cries and found the common law defence of 'reasonable chastisement' inconsistent with the Constitution. This is a momentous achievement for South Africa and shows its commitment to the international standards which it accepted. It must be noted that the

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<sup>9</sup> See discussion in chapter 6 par 6.2.

<sup>10</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* par 74.

<sup>11</sup> *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* par 75.

<sup>12</sup> Skelton (2015) *Acta Juridica* 358.

<sup>13</sup> *Ibid.*

Constitutional Court decision declaring the 'reasonable chastisement' defence unconstitutional is a serious step in the right direction, but it is only half the journey. In order to bring it full circle, South Africa would have to implement and prioritise legislation abolishing corporal punishment in the home and parental training and capacity building, as these will hold the ultimate success.<sup>14</sup> With the Constitutional Court ruling there now seems more than ever a need to further harmonize the Children's Act with the Constitution.

[word count:17191]

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<sup>14</sup> Mezmur (2019) *Speculum Juris* 26.



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