

S v Williams: A springboard for further debate about corporal punishment

ANN SKELTON*

In an early judgment of the Constitutional Court, *S v Williams*, Justice Langa found that judicial whippings were unconstitutional because they violated young offenders' rights to dignity and humane treatment. Former Chief Justice Langa was also a member of the unanimous court that found the law prohibiting corporal punishment in schools to be a reasonable and justifiable infringement of their parents' right to religious freedom. However, s 12 of the South African Constitution guarantees everyone the right to be protected from all forms of violence, either from public or private sources. This contribution considers how the court might deal with a challenge to the constitutionality of the common-law defence of reasonable chastisement, which permits corporal punishment of children by their parents in their own homes.

I INTRODUCTION

Whipping of young offenders was a major instrument of crime control during the apartheid era. During the early 1990s the government was doling out 35 000 judicial whippings every year. In an early judgment of the Constitutional Court, *S v Williams and Others*,¹ Langa J (as he then was) found that judicial whippings were unconstitutional because they violated young offenders' rights to dignity and exposed them to cruel, inhuman or degrading treatment. The judgment eloquently pointed out that children, no less than adults, have the right to be treated with dignity and humanity – indeed, their rehabilitation and development depends on it. The state, as the potent, omnipresent teacher should not demonstrate that violence is a solution.

Former Chief Justice Langa was also a member of the unanimous court in *Christian Education SA v Minister of Education*² which found the law prohibiting corporal punishment in schools to be a reasonable and

*Professor and Director of the Centre for Child Law, University of Pretoria; BA LLB (Natal) LLD (Pretoria).

¹ 1995 (3) SA 632 (CC).

² 2000 (4) SA 757 (CC). Langa J also penned the judgment that dismissed the original application for direct access to the Constitutional Court by Christian Education South Africa, handed down on 14 October 1998. *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC). In rejecting the application, Langa J found that, as the challenge to s 10 was clearly confined to the constitutionality of corporal punishment in schools it did not make inroads into corporal punishment more generally and therefore there was no need to depart from the general procedure. This observation is intriguing because it suggests that a challenge to the corporal punishment in the home would have appeared more pressing to the court.

justifiable infringement of their parents' right to religious freedom. These two judgments reflect positively on South Africa in the global concern about violence against children. The court's message is clear – children must be protected from violence from public sources. But s 12 of the South African Constitution guarantees everyone the right to be protected from *all* forms of violence, either from public or *private* sources.

This contribution considers what the Constitutional Court might make of a hypothetical challenge to the common-law defence of reasonable chastisement in relation to corporal punishment of children in the home.³ At first glance, the case seems straightforward. After all, an argument that women should be protected from violence in the workplace but not from violence at home would cause outrage. The common-law defence of reasonable chastisement did, in fact, apply to wives at an earlier time in South African law.⁴ Today it remains only children – ironically the physically smallest and most dependent human beings – who can lawfully be hit. However, the seemingly irresistible logic of this argument is no guarantee of a winning case, particularly considering the emotive nature of the subject matter.

II BACKGROUND TO *S v WILLIAMS*

In 1947 the Lansdown Commission⁵ found that due to a lack of alternatives, corporal punishment for children should be retained, but gave direction for the careful regulation of such sentences, and cautioned that 'those sitting in judgment should deliberate long before ordering the infliction of corporal punishment'.⁶ Despite this, the cane became the major solution to crimes committed by children during the apartheid era, as 'the South African magistrates *corps* attempted to lash recalcitrant youth into submission'.⁷ From 1952, courts were compelled to impose corporal

³ South Africa's common law, articulated in the early cases of *R v Janke and Janke* 1913 TPD 382 and *R v Scheepers* 1915 AD 337, is drawn from the dictum of Cockburn CJ stated in the English case *R v Hopley* (1860) 2 F&F 202: 'By the law of England, a parent . . . may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable.'

⁴ This was inherited in South Africa through English common law. Blackstone's *Commentaries on the Laws of England* (1761–1769) stated that a man may beat his wife in the same way that he can beat his servants or children because he is responsible for their misdemeanours. This power was, however, 'confined within reasonable bounds'. At the time of Blackstone's *Commentaries* the common law was already in some doubt, but the defence of reasonable chastisement in relation to a wife was only officially abolished in *R v Jackson* [1891] 1 QB 671.

⁵ The Penal and Prison Reform Commission, generally known as the Lansdown Commission, was established in 1945 and submitted a report to Parliament in 1947. Its mandate included a review of sentencing, including the use of corporal punishment for both children and adults.

⁶ *Report of the Penal and Prison Reform Commission* (1947) para 491.

⁷ E van der Spuy, W Schärf & J Lever 'The politics of youth crime and justice in South Africa' in C Sumner (ed) *The Blackwell Companion to Criminology* (2004) 167.

punishment of up to ten strokes for certain crimes.⁸ Writing in this journal in 1960 Ellison Kahn⁹ demonstrated the effect of mandatory whipping: In 1940 the annual total number of offenders¹⁰ sentenced to a whipping was 1 864. By 1954 it had risen to an annual total of 13 879. By 1957 the number was 18 442. The enthusiasm for the sentence was not to ebb, despite the fact that it did not bring about any reduction in the commission of serious crimes.¹¹ The Criminal Procedure Act of 1977 merely reduced the maximum number of strokes from ten to seven. Despite strident criticisms by scholars of the continued use of corporal punishment over the years,¹² as well as disquiet raised by the courts,¹³ whipping of young offenders remained shockingly popular over the next 40 years and by the early 1990s the state was carrying out 35 000 whippings of young people per year.¹⁴

It was against this backdrop, soon after the commencement of the interim Constitution, that a magistrate in the Western Cape decided to suspend the operation of a sentence of whipping in terms of s 294 of the Criminal Procedure Act¹⁵ that he had handed down on a young offender named Williams. He sent the matter on special review. It was joined with several other review matters, and was heard by a Full Bench before

⁸ Criminal Sentences Amendment Act 33 of 1952. The offences ranged from housebreaking to rape (and later (Act 29 of 1955) possession of stolen property and theft of, and out of, motor vehicles were added). Only females, males over 50 years or in ill-health, and those declared habitual criminals could escape the punishment of whipping.

⁹ E Kahn 'Crime and punishment 1910–1960: Reflections on changes since union in the law of criminal punishment and its application' 1960 *Acta Juridica* 191 at 210.

¹⁰ This includes all age groups.

¹¹ Kahn (n 9) 211: '[The] deterrent effect of compulsory whipping is nowhere to be seen. If this is so, its retention can only be attributed to some spirit of retribution or revenge.'

¹² Ibid 212: 'The Union is equally out of step with the civilised world in the stress it lays on the correction of juveniles with rod'. See further P Hunt 'Corporal punishment: Juveniles' (1968) 85 *SALJ* 243; J Midgley 'Sentencing in the juvenile court' (1974) 91 *SALJ* 451. In the 1980s academic commentators criticised whipping and identified it as a weapon of an authoritarian and oppressive regime: D van Zyl Smit & L Offen 'Corporal punishment: Joining issue' (1984) 8 *South African Journal of Criminal Law and Criminology* 69; A Roberts & J Sloth-Nielsen 'Whippings, the courts, the legislature and the unrest' (1986) 2 *SAJHR* 224–9; J Sloth-Nielsen 'Corporal punishment: Acceptable state violence?' in D van Zyl Smit & D Hansson (eds) *Towards Justice: Crime and State Control in South Africa* (1990) 195.

¹³ *S v Ximba and 2 Others* 1972 (1) PH 66 (N); *S v Motsotsoana* 1986 (3) SA 350 (N); *S v V en 'n Ander* 1989 (1) SA 532 (A); *S v Vákalisa* 1990 (2) SACR 88 (TK); *S v Daniels* 1991 (2) SACR 403 (C); *S v Sikunyana* 1994 (1) SACR 206 (TK).

¹⁴ D Pinnock *Gangs, Rituals and Rights of Passage* (1997) 2: 'Until lashings as a court-imposed sentence were abolished as a result of a Constitutional Court decision in 1995, between 32 000 and 36 000 young people were beaten annually through the 1990s'; J Sloth-Nielsen *The Role of International Law in Juvenile Justice Reform in South Africa* (unpublished LLD thesis, University of the Western Cape, 2001) 378: 'In the early 1990s as many as 35 000 sentences were imposed on juvenile offenders annually'.

¹⁵ Act 51 of 1977.

proceeding for confirmation to the Constitutional Court.¹⁶ This culminated in the unanimous judgment of Langa J in *S v Williams*.

III *S v WILLIAMS*

S v Williams dealt with a challenge to the constitutionality of what was then called ‘juvenile whipping’. At that time, ‘juvenile’ included persons below the age of 21 years. South African law no longer uses the term ‘juvenile’, and today offenders are distinguished by whether they are ‘children’, meaning below the age of 18 years, or ‘adults’. Section 276 of the Criminal Procedure Act allowed for the whipping of both adult and juvenile male offenders,¹⁷ while s 294 focused on the ‘whipping of juvenile males’. It was common cause from the outset of *S v Williams* that judicial whipping of adults was unconstitutional in terms of the interim Constitution, thus the central question that the court had to decide was whether s 294 was constitutionally invalid.

The applicants argued that the impugned provision infringed the rights contained in ss 8 (equality), 10 (dignity), 11(2) (freedom and security of the person) and 30 (children’s rights) of the interim Constitution. However, the focus of their argument was on freedom and security of the person – in particular that ‘no person shall be subject to cruel, inhuman or degrading treatment or punishment’.

Langa J began his analysis of the argument by considering what the impact was of s 11(2) on the law that permitted judicial whipping. Langa J stressed that the South African definition of the concepts of ‘cruel, inhuman and degrading’ must be based on our own experience and contemporary circumstances, but it was useful to consider international law¹⁸ and foreign case law. He seemed unimpressed by the fine distinctions that had been made between ‘inhuman’ and ‘degrading’ punishment in *Tyrer v United Kingdom*.¹⁹ In that case, the European Court of Human Rights read a similar provision to s 11(1) disjunctively. That court held

¹⁶ Before the full bench of the Cape of Good Hope Provincial Division the state had conceded that the whipping of adults was unconstitutional but persisted in defending the whipping of child offenders. Mr Bozalek (with Mr Hathorn) appeared as *amicus curiae* for the accused, assisted by the Legal Resources Centre. Shortly before the date of the Constitutional Court hearing the state indicated it also wished to abide in relation to the whipping of child offenders. Presumably at the request of the court, a member of the Attorney General’s staff nevertheless agreed to present the opposing argument (see *S v Williams* (n 1) para 2).

¹⁷ Section 295 made it clear that female offenders could not be sentenced to a whipping.

¹⁸ Article 5 of the Universal Declaration of Human Rights; Article 7 of the International Covenant on Civil and Political Rights; Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 5 of the African Charter on Human and Peoples’ Rights.

¹⁹ (1979–80) 2 EHRR 1.

that corporal punishment was degrading, but was not inhuman because it was not sufficiently severe.²⁰

Langa J placed particular emphasis on judgments from neighbouring countries, Namibia and Zimbabwe, which had recently abolished judicial whipping. In his view they were significant not only because of their geographical proximity to South Africa but also because of the English colonial experience and Roman-Dutch legal tradition that all three countries have in common.²¹ He noted that Mahomed AJA²² in *Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State*,²³ had no difficulty in deciding that court-ordered corporal punishment, whether on adults or children, was inconsistent with the Namibian Constitution and amounted to 'inhuman or degrading punishment'.

The Zimbabwe Supreme Court in *S v Ncube, S v Tshuma and S v Ndhlovu*²⁴ declared the practice of judicial whipping on adults to be 'inhuman and degrading', and the same conclusion was reached by that court in a separate case that dealt with juvenile whipping in *S v Juvenile*, where Gubbay JA described it as 'an antiquated and inhuman punishment which blocks the way to understanding the pathology of crime'.²⁵

Langa J concluded from the international and regional comparative law assessment that whether one speaks of 'cruel or unusual punishment' or 'inhuman and degrading punishment', or 'cruel, inhuman and degrading punishment,' the key to determining the meaning of each phrase by the courts rests on the recognition of society's concept of decency and human dignity.

On the question of decency, Langa J rejected the American standard of 'contemporary standards of decency', and opted instead for a South African standard: in deciding whether punishment is cruel, inhuman or degrading the relevant constitutional provisions must be interpreted in accordance with the values which underlie an open and democratic society based on freedom and equality.²⁶ The 'simple message' arising from this, Langa J said, was that punishment must respect human dignity.²⁷

²⁰ See also *Ireland v the United Kingdom* (1979–80) 2 EHRR 25 para 176, where the court held that treatment is 'degrading' when it 'may arouse in the victim feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance'.

²¹ *S v Williams* (n 1) para 31.

²² Mahomed J had been an Acting Judge of Appeal in Namibia in 1991, but at the time that *S v Williams* was written he was a judge of the South African Constitutional Court, and concurred in Langa J's judgment.

²³ 1991 (3) SA 76 (NmSc).

²⁴ 1988 (2) SA 702 (ZSC).

²⁵ 1990 (4) SA 151 (ZS) 168I–169B.

²⁶ *S v Williams* (n 1) para 37.

²⁷ *Ibid* para 38.

Having considered international and foreign law, Langa J observed that the South African Constitution provides South Africans with the opportunity to 'join the mainstream of a world community that is progressively moving away from punishments that place undue emphasis on retribution and vengeance rather than on correction, prevention and the recognition of human rights'.²⁸ In the limitations analysis part of the judgment Langa J explored the state's justification that the sentencing option of whipping young offenders had advantages for the offender and the state because there was a shortage of other sentencing options. He was not persuaded by this pragmatic argument – it was 'untenable', in his view, for young offenders to pay the price for the fact that the government had not yet established special sentencing measures for them.²⁹ He went on to explore the shifts in South African law away from retribution towards prevention and correction.³⁰ He also observed that there was 'a growing interest in moves to develop a new juvenile justice system'.³¹ He proffered the hope that these processes, still in their infancy, could be developed through the involvement of the state and non-governmental organisations which were involved in juvenile justice projects. His remarks were prescient – those fledgling attempts ultimately resulted in the Child Justice Act 75 of 2008.³²

Langa J indicated that notwithstanding what can be learned from international, regional and foreign law, a purposive approach must be followed.³³ He stressed the importance of the context of the 'unprecedented wave of violence' that South African society was subjected to at the time of writing.³⁴ He then went on to link this to South Africa's democratic transition by characterising the political negotiations that

²⁸ *S v Williams* (n 1) para 50. The shift away from retribution and vengeance had already been heralded by *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

²⁹ *S v Williams* (n 1) para 63.

³⁰ He considered the cases of *R v Karg* 1961 (1) SA 231 (A) 236A; *S v Maseti* 1992 (2) SACR 459 (C); *S v Sikunyana* (n 13). In particular he noted the importance of correctional supervision, citing *S v R* 1993 (1) SA 476 (A) 488I.

³¹ *S v Williams* (n 1) para 69.

³² For an account of the process of the development of the Child Justice Act see D Pinnock, A Skelton & R Shapiro 'New juvenile justice legislation for South Africa: Giving children a chance' (1994) *South African Criminal Law Journal* 338; A Skelton 'Developing a juvenile justice system for South Africa: International instruments and restorative justice' 1996 *Acta Juridica* 180; J Sloth-Nielsen 'The juvenile justice reform process in South Africa: Can a children's rights approach carry the day?' (1999) 18 *Quinnipiac Law Review* 469; A Skelton 'Restorative justice as a framework for juvenile justice reform: A South African perspective' (2002) 42 *British Journal of Criminology* 496; J Sloth-Nielsen 'The business of child justice' in J Burchell & A Erasmus (eds) *Criminal Justice in a New Society* (2003) 175; A Skelton & J Gallinetti 'A long and winding road: The Child Justice Bill and civil society advocacy' (2008) 15 *SA Crime Quarterly* 3.

³³ The purposive approach had already been used by the court in two previous judgments; see *S v Zuma and Others* 1995 (4) BCLR 401 (SA) 410F–412H; *S v Makwanyane* (n 28) paras 9–10.

³⁴ *S v Williams* (n 1) para 51.

resulted in the interim Constitution as a rejection of violence. In this context, it was beyond doubt that the 'institutionalised use of violence by the State on juvenile offenders as authorised by s 294 of the Act is a cruel, inhuman and degrading treatment'.³⁵ Langa J was firmly of the view that 'a culture of authority' that legitimates violence by the state was incompatible with the interim Constitution.³⁶

This issue was revisited in the limitations analysis. In weighing the perceived benefits of juvenile whipping against the rights it infringed, Justice Langa observed that this kind of corporal punishment involves the intentional infliction of pain on a human being by another human being 'at the instigation of the state'.³⁷ He also expressed concern that the degree of pain inflicted was arbitrary, depending on the discretion of the person doing the whipping, as the only direction by the court was the number of strokes to be administered. He found that the deliberate infliction of pain as well as the institutionalised nature of it involved an element of cruelty on the part of the state, although he considered it unnecessary to separate out the adjectives 'cruel, inhuman and degrading'.³⁸ He ultimately found that 'so close to the dawn of the 21st century, juvenile whipping is cruel, it is inhuman and it is degrading'.³⁹

Having found that the impugned provisions violated the provisions of ss 10 (dignity) and 11(2) (freedom and security of the person) and that these infringements were neither reasonable nor justifiable, Langa J considered it unnecessary to decide if the provision was also an infringement of the rights in ss 8 (equality) and 30 (children's rights) of the interim Constitution. This is, perhaps, unfortunate; stronger children's rights justifications for the findings may have laid a stronger foundation for a challenge to the defence of reasonable chastisement for assaults on children from private sources.

Although the court did not focus on children's rights, Langa J was very alive to the situation of the young offender. He stated that our society should be laying a strong foundation for the values of the Constitution in young people, as they were the future custodians of the new democratic order.⁴⁰

³⁵ *S v Williams* (n 1) para 52.

³⁶ *Ibid.* The judgment also notes that even prior to the new Constitution, many judges had already expressed the view that whipping was cruel, inhuman and degrading treatment. See the list of cases at n 13 which are also mentioned in *S v Williams* (n 1) at nn 7 to 12.

³⁷ *S v Williams* (n 1) para 89.

³⁸ See, however, *S v Dodo* 2001 (3) SA 382 (CC) where the court treated 'cruel, inhuman or degrading' disjunctively, although they observed that it is not easy to distinguish the concepts. The court found that some impairment of dignity is present where there is an infringement of any of the three (para 35).

³⁹ *S v Williams* (n 1) para 91.

⁴⁰ *Ibid* para 63.

The judgment traversed the argument put forward by the state that there were differences between adults and juveniles, the latter's character and personality being still in formation. Thus they would be susceptible to this type of correction.⁴¹ This was trenchantly rejected by Langa J:

I do not agree. One would have thought that it is precisely because a juvenile is of a more impressionable and sensitive nature that he should be protected from experiences which may cause him to be coarsened or hardened. If the state, as role model *par excellence*, treats the weakest and the most vulnerable among us in a manner which diminishes rather than enhances their self-esteem and human dignity, the danger increases that their regard for a culture of decency and respect for the rights of others will be diminished.⁴²

He also cited with approval the dissenting opinion of Mr Klecker in the European Commission of Human Rights decision in *Campbell and Cosans v United Kingdom*,⁴³ who stated that corporal punishment amounts to a lack of respect for a human being, and its constitutionality cannot depend on the age of that human being.

Langa J foreshadowed the judgment that was to emanate from the Constitutional Court five years later, on corporal punishment in schools. He was disapproving of the distinction made in *Costello-Roberts v United Kingdom*⁴⁴ between strokes inflicted by a policeman and corporal punishment by a headmaster of a child in a boarding school, preferring instead the dictum of White J in a dissenting opinion in *Ingraham v Wright* who observed that where corporal punishment has become unacceptable in society, it cannot be rendered more acceptable just because it is inflicted on children in public schools.⁴⁵

IV CHRISTIAN EDUCATION

The case of *Christian Education* was about corporal punishment in a private school. The court had not distinguished the question of violence from public or private sources when *S v Williams* was written because the

⁴¹ *S v Williams* (n 1) para 46.

⁴² *Ibid* para 47. Although Langa J makes no mention of article 40(1) of the Convention on the Rights of the Child, his pronouncement is a model reflection of that key article: 'States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society'.

⁴³ [1980] 3 EHRR 531, 556.

⁴⁴ [1993] 19 EHHR 112.

⁴⁵ 430 US 651, 692. See also S Pete & M du Plessis 'A rose by any other name: "Biblical correction" in South African schools' (2000) 16 *SAJHR* 97 at 108–9 where the authors make the point that there is very little difference between judicially ordered corporal punishment and school corporal punishment.

interim Constitution did not include what is now s 12(1)(c) of the final Constitution: The right ‘to be free from all forms of violence from either public or private sources’.

However, that section *was* in place by the time the court heard *Christian Education*. Just one year after *S v Williams* was handed down, s 10 of the South African Schools Act⁴⁶ abolished corporal punishment in schools. This provision was challenged by a voluntary umbrella body of 196 independent Christian schools. They claimed that the provision infringed their individual, parental and community rights freely to practise their religion.⁴⁷ The rights in the final Constitution that they identified as being violated by the law were s 14 (privacy), s 15 (freedom of religion, belief and opinion), s 29 (the right to education – in particular the right to establish and maintain independent schools), s 30 (the right to language and culture) and s 31 (cultural, religious and linguistic communities).

The Minister of Education, the respondent in the matter, presented an opposing argument that allowing corporal punishment of children in any school would infringe the children’s constitutional rights in s 9 (equality), s 10 (dignity), s 12 (freedom and security of the person) and s 28(1)(d) (a child’s right to be protected from maltreatment, neglect, abuse or degradation) of the Constitution. The Minister’s affidavit provided the context: ‘South Africans have suffered, and continue to suffer, a surfeit of violence’. The Minister asserted that the state had an obligation to ensure that learners’ constitutional rights are protected and that education is conducted in a manner that upholds the spirit, content and values of the Bill of Rights.

Sachs J, writing for a unanimous court of which Langa J (by this time the Deputy President of the court) was a member, based his decision on an assumption (without making a finding) that the impugned provision did limit the applicants’ religious rights under ss 15 and 31 of the Constitution.⁴⁸ However, that limitation was then subjected to a justification analysis in terms of s 36 of the Constitution. The court had to decide not only whether the infringement of the right could be justified but, more precisely, whether the failure to provide an exemption from the general rule to accommodate the applicants’ religious views was also reasonable and justifiable.

In considering the availability of less restrictive means the court indicated that the state is under a constitutional duty to take steps to diminish the amount of public and private violence in society and to protect children from maltreatment, abuse or degradation. It stressed that by ratifying the Convention on the Rights of the Child South Africa

⁴⁶ Act 84 of 1996.

⁴⁷ *Christian Education* (n 2) para 2.

⁴⁸ *Ibid* para 27.

undertook to take all appropriate measures to protect children from violence, injury or abuse. Sachs J went on to highlight the fact that in every matter concerning a child, the child's best interests must be of paramount importance.⁴⁹ He cited foreign law which established that the best interests principle does not yield to the religious rights of parents.⁵⁰

Sachs J was persuaded by the argument that the state had a duty to protect pupils from degradation and indignity, without exception and for the benefit of all children.⁵¹ He drew on *Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of the State*⁵² in support of the view that punishment in schools was an invasion of the dignity of pupils, and was open to abuse.

Sachs J wrestled with the question of whether the express delegation of consent by parents for their children to receive corporal punishment might have a bearing on the extent of the state interest. He found the answer to this question in s 12(1)(c). He stated that the right to be 'violence-free' is additional to (and not a substitute for) the right not be punished in a cruel, inhuman or degrading way. The state must 'take appropriate steps to reduce violence in public and private life', which, coupled with special duty to protect children, represents a powerful obligation on the state.⁵³ He finally concluded that a law that prevented parents from authorising teachers on school premises to carry out corporal punishment was not unconstitutional.⁵⁴

Christian Education did not oblige the court to decide on whether corporal punishment in the home would amount to a form of violence from a private source. Sachs J expressly left this question open: 'Whether or not the common law has to be developed so as to further regulate or even prohibit caning in the home, is not an issue before us'.⁵⁵

However, Sachs J went on to compare corporal punishment in the home and in the institutional environment of a school. The difference he identified as significant was that school beatings happen 'not in the intimate and spontaneous atmosphere of the home, but in the detached and institutional environment of the school'.⁵⁶ This reasoning has implications for the hypothetical challenge regarding corporal punishment in the home, and will be discussed later in the contribution.

⁴⁹ *Christian Education* (n 2) para 41.

⁵⁰ *P v S* 108 DLR (4th) 287, 317; *Prince v Massachusetts* 321 US 158 (1944).

⁵¹ *Christian Education* (n 2) para 43.

⁵² Above n 23.

⁵³ *Christian Education* (n 2) para 47.

⁵⁴ *Ibid* para 55.

⁵⁵ *Ibid* para 48.

⁵⁶ *Ibid* para 49.

V PROSPECTS OF A CHALLENGE TO THE DEFENCE OF REASONABLE CHASTISEMENT

Several South African authors have raised the question whether corporal punishment in the home complies with children's constitutional rights.⁵⁷ Some have suggested that if such a case were to be brought before the Constitutional Court, the form that it should take would be a challenge to the common-law defence of reasonable chastisement.⁵⁸ The South African Law Reform Commission ('SALRC') proposed that the defence of reasonable chastisement should be abolished through a legislative amendment in the then Children's Bill.⁵⁹ The proposed clause was elaborated upon by government and became clause 139 of the Children's Bill.⁶⁰ The version presented to Parliament went beyond the SALRC's proposals, and amounted to a ban on corporal punishment. The clause became very controversial during parliamentary debates and was eventually excised from the final version that became the Children's Act 38 of 2005.⁶¹ The Department of Social Development is again considering amendments to the Children's Act, and there is some indication that the current Minister favours either a ban on corporal punishment or the removal of the defence of reasonable chastisement.⁶² However, such pronouncements are subject to change when public pressure mounts, and of course it is the legislature, and not the executive, that will have the final say.

In assessing the prospects of a Constitutional Court challenge, it is apposite to consider what arguments could be advanced by those arguing in favour of getting rid of the reasonable chastisement defence, and those in favour of retaining it. It is not possible to determine with any certainty which of these groups might bring such an application. In the absence of law reform, it is likely to be those wanting to abolish the defence. Interestingly, given the government's apparent stance on the issue, the

⁵⁷ S Pete 'To smack or not to smack? Should the law prohibit South African parents from imposing corporal punishment on their children?' (1998) 14 *SAJHR* 430; B Bekink 'When do parents go too far? Are South African parents still allowed to chastise their children through corporal punishment in their private homes?' (2006) 19 *SACJ* 173; J Sloth-Nielsen 'Children' in DM Davis & MH Cheadle (eds) *South African Constitutional Law: The Bill of Rights* (2006) 511. B van Heerden et al surmised in *Boberg's Law of Persons and the Family* 2 ed (1999) 679–80 that there is 'a strong possibility that this last vestige of corporal punishment violates the provisions of ss 10, 12(1), 28(1)(d) and 28(2)'.

⁵⁸ A Friedman, A Paizes & A Skelton 'Children's rights' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2009) 47–23.

⁵⁹ South African Law Reform Commission *Report on the Review of the Child Care Act* Report Project 110 (2002) 120–1.

⁶⁰ Children's Bill [B 19 of 2006].

⁶¹ S Waterhouse 'Status of corporal punishment in the South African Amendment Bill Law Reform Process' (2007) *Article 19* 1 at 3.

⁶² 'Spare the rod, parents told' *Independent on Saturday* 25 August 2012: 'Social Development Minister Bathabile Dlamini revealed this week that her department intended proposing legislation to "address" parental corporal punishment'.

relevant Minister is unlikely to oppose such an application. It is almost certain that a public interest group would enter the fray to argue the position of those who want to retain the defence.⁶³ Of course, if the common-law defence is at some time in the future abolished by the legislature, the roles may quite easily be reversed. Any new law abolishing the defence would in all likelihood be challenged by a group of parents or by a public interest body or religious grouping. For the sake of brevity, I will refer to the defence of reasonable chastisement as ‘the chastisement defence’ in the discussion of the various arguments below.

(1) *Arguments that could be adduced in a challenge to the defence of reasonable chastisement*

It may be argued that the chastisement defence infringes children’s constitutional rights in ss 9 (equality), 10 (dignity), 12 (freedom and security of person) and 28 (children’s rights). Those wishing to retain the common-law defence would probably rely on ss 14 (privacy), 15 (freedom of religion) and 31 (cultural and religious rights) of the Constitution. They may also attempt to invoke a ‘right to family life’ notion, although such a right is not expressly included in the Constitution. As will become apparent from the discussion, some of these rights are interrelated, but I will attempt to explore them sequentially.

(a) *Equality*

Children’s right to equal protection under the law, it can be argued, is infringed by the existence of the reasonable chastisement defence. Adults have full protection against violence from any source, through both criminal and civil law. Children are protected from public sources of violence, but not from private sources of violence when their parents are administering corporal punishment. As observed in the introduction, an argument that women should be protected from violence in the work-place but not at home would be considered outrageous.

However, the law often differentiates between children and adults. Mere differentiation does not necessarily infringe the right to equality – if the differentiation is rational.⁶⁴ Those upholding the chastisement defence would have to show that it has a legitimate purpose and is neither

⁶³ In the past such positions have been argued by the Christian Lawyers’ Association; see *Christian Lawyers’ Association v Minister of Health* 1998 (4) SA 1113 (T) where the Christian Lawyers’ Association unsuccessfully challenged the Choice on Termination of Pregnancy Act on the basis that it infringed the right to life of the unborn child; or by the Justice Alliance of South Africa; see *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Another* 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC) in which Justice Alliance of South Africa as first *amicus curiae* supported the Minister of Justice in attempting (unsuccessfully) to defend the impugned provisions that criminalised consensual adolescent sexual activity.

⁶⁴ *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC).

arbitrary nor irrational.⁶⁵ They would also need to show that it is fair under s 9(3). They would probably claim that the purpose of the defence is to allow correction and education by parents of their children. However, even if the general purpose is constitutionally valid, the specific purpose of the provision is still open to scrutiny.⁶⁶ There is thus a reasonable possibility that a challenge on the grounds of equality could be sustained.

In *S v Williams*, Langa J sought out dissenting opinions in foreign law that considered the age of the person being whipped to be inconsequential. Once it had been decided that whipping was cruel, inhuman or degrading, that would apply regardless of the age of the victim.⁶⁷ Indeed, Langa J stressed that children would be more, not less, negatively affected by corporal punishment and that the state owed children a special duty.⁶⁸

In *Christian Education*, the Minister of Education argued that all children (whether in public or private schools) were entitled to equal protection under the law. Sachs J did not engage with this argument. He preferred the argument that the state has a duty to protect all children from degradation and indignity.⁶⁹ In any event, the equality argument being discussed here is a different one – it is about whether the common law, which leaves only children exposed to violence from private sources, is constitutionally defensible.

(b) Dignity

The right to human dignity is foundational to the South African constitutional dispensation.⁷⁰ It is not only a right in itself, but is also a value that guides the interpretation of other rights. So, in the current debate, it is significant that dignity lies at the heart of the right not be tortured or punished in a cruel, inhuman or degrading way, to be free from all forms of violence,⁷¹ and not to be unfairly discriminated against. It also plays an important role in the ‘balancing exercise to bring different rights and values into harmony’.⁷²

In *S v Williams*, Langa J made it plain that measures that violate the dignity and self-esteem of an individual have to be justified. He viewed

⁶⁵ C Albertyn & B Goldblatt ‘Equality’ in Woolman & Bishop (n 58) 35–20.

⁶⁶ *Van der Merwe v Road Accident Fund* 2006 (4) SA 176 (CC) para 33.

⁶⁷ Mr Klecker in *Campbell v Cosans v United Kingdom* (1980) 3 EHRR 531, 556; White J in *Ingraham v White* 430 US 651, 692.

⁶⁸ *S v Williams* (n 1) para 47.

⁶⁹ *Ibid* para 43.

⁷⁰ A Chaskalson ‘Human dignity as foundational value of our constitutional order’ (2000) 16 *SAJHR* 193. See also S Woolman ‘Dignity’ in Woolman & Bishop (n 58) 36–2 which identifies five definitions of ‘dignity’; I Currie & J de Waal *Bill of Rights Handbook* 6 ed (2013) 250–3; L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012).

⁷¹ *S v Makwanyane* (n 28) 14. See also *S v Dodo* (n 38) para 35.

⁷² Chaskalson (n 70) 204.

the state as the great role model for a society trying to move away from a violent past, and concluded that the state must promote respect for human dignity.⁷³ He held that the fundamental concept underpinning the prohibition of cruel, inhuman or degrading treatment was ‘human dignity’.⁷⁴

(c) *Freedom and security of the person*

Any challenge to the chastisement defence would rely heavily on paras (c) and (e) of s 12(1) of the Constitution. These sections will be discussed in turn.

Section 12(1)(c)

Section 12(1)(c) – to be free from all forms of violence from either public or private sources – was a new clause in the 1996 Constitution. According to Bishop and Woolman⁷⁵ this innovation was inspired by article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination (1966) which contains similar wording.⁷⁶

Section 12(1)(c) of the Constitution aims to put a stop to all forms of violence that inevitably would violate the security of a person. The Constitutional Court has observed that s 12(1)(c) requires the state to protect individuals both negatively, by refraining from inflicting violence on its citizens, and positively by restraining or discouraging such conduct on the part of its own functionaries and officials and private individuals.⁷⁷

It is hugely significant that s 12(1)(c), providing freedom ‘from all forms of violence from either public or private sources’, has no parallel in many other constitutions. Thus, it becomes a very useful tool in differentiating how the South African Constitutional Court might rule on corporal punishment from private sources compared with other constitutional courts or similar bodies, whose foundational documents do not contain the same emphatic protection.

The inclusion of ‘private’ sources in s 12(1)(c) renders it compelling vis-à-vis violence in the home. The Constitutional Court has held in respect of domestic violence that ‘[t]he specific inclusion of private sources emphasizes that serious threats to security of the person arise from private sources . . . [and] has to be understood as obliging the State directly to protect the right of everyone to be free from private or domestic violence’.⁷⁸ Sachs J stated that the section obliged the state to

⁷³ *S v Williams* (n 1) para 58.

⁷⁴ *Ibid* para 35.

⁷⁵ M Bishop & S Woolman ‘Freedom and security of the person’ in Woolman & Bishop (n 58) 40–8 n 49.

⁷⁶ See further Currie & De Waal (n 70) 281.

⁷⁷ *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) para 59.

⁷⁸ *S v Baloyi (Minister of Justice and Another Intervening)* 2002 (2) SA 425 (CC) para 11.

take appropriate steps to reduce violence in public and private life and that, coupled with the special duty to protect children, this represents ‘a powerful requirement on the state to act’.⁷⁹

However, both Langa J in *S v Williams* and Sachs J in *Christian Education* seemed to consider the institutional nature of the corporal punishment they were dealing with to be particularly egregious, and distinguishable from corporal punishment in the home. Langa J does not make any comparison with corporal punishment in the home, but he does mention the ‘institutional’ nature of judicial whipping several times,⁸⁰ and stresses the fact that it is a ‘stranger’ who administers the punishment.⁸¹ Sachs J in *Christian Education*⁸² quotes Mahomed AJA who stated in *Ex Parte Attorney-General, Namibia*⁸³ that corporal punishment in schools remains degrading, notwithstanding the fact that the teacher is ‘less of a stranger’ than a criminal justice official. Sachs J compares corporal punishment ‘in the intimate, spontaneous atmosphere of the home’ with the ‘detached and institutional environment of the school’.⁸⁴ These remarks suggest that the court perceives there to be a difference between violence from public and private sources. Is this only when children are the victims?

In *S v Baloyi*, which dealt with the constitutionality of interdicts relating to family violence against an adult woman, Sachs J, writing for a unanimous court, did not make this differentiation. Indeed, in that context, if he had referred to ‘the intimate, spontaneous atmosphere of the home’ as he did in *Christian Education*, there would in all likelihood have been howls of derision from the women’s sector. The *Baloyi* court found that s 12(1), read with s 7(2)⁸⁵ of the Constitution, has ‘to be understood as obliging the state directly to protect the right of *everyone* to be free from private or domestic violence.’⁸⁶ Sachs J further observed that what distinguishes family violence from other kinds of crime ‘is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished.’⁸⁷ These comments are equally applicable to children who are victims of ongoing corporal punishment in the home. The Constitutional Court’s approach to vio-

⁷⁹ *Christian Education* (n 2) para 47.

⁸⁰ *S v Williams* (n 1) paras 89–90.

⁸¹ *Ibid* paras 17 and 90.

⁸² *Christian Education* (n 2) para 46.

⁸³ *Ex Parte Attorney-General* (n 23).

⁸⁴ *Christian Education* (n 2) para 49.

⁸⁵ ‘The state must respect, protect, promote and fulfil the rights in the Bill of Rights.’

⁸⁶ *Baloyi* (n 78) para 11 (emphasis added).

⁸⁷ *Ibid*.

lence from private sources in *Baloyi* will certainly be used by those arguing against the retention of the chastisement defence to deflect the difficulties that arise from the distinction that the court made in *Williams* regarding violence delivered by strangers and in *Christian Education* between the spontaneous atmosphere in the home versus the detached environment of school.

There may be demur from those upholding the chastisement defence that corporal punishment does not amount to violence. However, this view would certainly be countered by reference to s 12(1)(c) which clearly states ‘any form of violence’. The dissenting judgment of Berker CJ cited by Sachs J may also be useful in offsetting the ‘not violence’ argument, where he says that even if very moderately applied, the fact remains that *any* type of corporal punishment results in some impairment of dignity and degrading treatment.⁸⁸

Furthermore, General Comment 8 issued by the Committee on the Rights of the Child is instructive:

There is no ambiguity: ‘All forms of physical or mental violence’ does not leave room for any level of legalised violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them.⁸⁹

The Committee’s General Comment 13 on Violence Against Children⁹⁰ reiterates that there are no exceptions to be made when interpreting ‘any form of violence’:

The Committee has consistently maintained the position that all forms of violence against children, however light, are unacceptable. ‘All forms of physical or mental violence’ does not leave room for any level of legalized violence against children. Frequency, severity of harm and intent to harm are not prerequisites for the definitions of violence. States parties may refer to such factors in intervention strategies in order to allow proportional responses in the best interests of the child, but definitions must in no way erode the child’s absolute right to human dignity and physical and psychological integrity by describing some forms of violence as legally and/or socially acceptable.⁹¹

Section 12(1)(e)

The right not to be treated or punished in a cruel, inhuman or degrading way set out in s 12(1)(e) is also an important right. In *S v Williams*, Langa J

⁸⁸ *Ex Parte Attorney-General* (n 23) para 90.

⁸⁹ Committee on the Rights of the Child *General Comment 8* (2006), CRC/C/GC/8 para 18.

⁹⁰ Committee on the Rights of the Child *General Comment 13* (2011), CRC/C/GC/13.

⁹¹ *Ibid* para 17.

noted that '[g]enerally this right is guaranteed in absolute, non-derogable and unqualified terms; justification in those instances is just not possible'.⁹² Corporal punishment in the home varies in severity, and defenders of the reasonable chastisement defence may argue that the type that is protected by the defence is not cruel or inhuman – because it would then exceed the bounds of reasonableness. Even if the court could be persuaded by such an argument, the fact remains that punishment that is protected by the defence might often be degrading.

Those challenging the chastisement defence may well rely on *S v Williams* to bolster an argument that corporal punishment in the home is arbitrary. The court based its conclusion that juvenile whipping was unconstitutional in part on the fact that the severity of the pain was arbitrary, depending on the person administering the whipping. In the proportionality analysis in *Christian Education*, Sachs J highlighted a similar issue: It would be difficult to monitor the administration of corporal punishment which would be administered with different force at different schools, and there would always be the risk of abuse. He observed that this would render children vulnerable because if they complained about excessive punishment they would risk angering the school or the community.⁹³ It can certainly be argued that corporal punishment in the home is equally arbitrary, if not more so.

(d) Children's rights

There are two sub-sections of s 28 that are directly relevant to this debate: sub-sections (1)(d) and (2).

Section 28(1)(d)

Section 28(1)(d) affords every child the right 'to be protected from maltreatment, neglect, abuse or degradation'. This section draws its inspiration from article 19 of the Convention on the Rights of the Child (CRC).⁹⁴ The pronouncements of the Committee on the Rights of the

⁹² *S v Williams* (n 1) para 21.

⁹³ *Christian Education* (n 2) para 50. Despite the fact that corporal punishment was abolished in 1996, it is sobering to note that teachers continue to beat children on an extraordinarily scale. The General Household Survey for 2012 revealed that approximately 2.2 million learners reported being exposed to corporal punishment in schools in 2012. See Statistics South Africa *General Household Survey 2012* (2013) 11.

⁹⁴ Article 19 reads as follows:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for

Child in their General Comment 8 on ‘Corporal Punishment’ and General Comment 13 on ‘Violence Against Children’ are also persuasive. In the past, the Constitutional Court has paid significant attention to the Convention⁹⁵ and, in some instances, to general comments.⁹⁶ In General Comment 8 the Committee made it clear that ‘the existence of any defence in cases of corporal punishment of children does not comply with the principles and provisions of the Convention, since it would suggest that some forms of corporal punishment are acceptable’.⁹⁷

Article 16 of the African Charter on the Rights and Welfare of the Child is equally important as a regional law source that can guide the court’s interpretation. The article is to the point: ‘Children should be protected from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse.’

The words ‘degrading treatment’ are significant. These words are not included in the CRC, and the phrase resonates with s 28(1)(d) which features the word ‘degradation’ which links with ‘cruel, inhuman and degrading treatment’. Southern African jurisprudence appears to favour the idea that corporal punishment is degrading.⁹⁸ Moreover, under the South African Constitution, the state has the special duty described earlier to protect children from degrading treatment.

Section 28(2)

Section 28(2) of the Constitution provides that ‘[a] child’s best interests are of paramount importance in every matter concerning the child’. This section is both a self-standing right in itself, and is a principle that the courts use to guide the interpretation of other rights.⁹⁹ According to Friedman, Paizes and Skelton it has ‘a leg up *vis-à-vis* other rights and principles’.¹⁰⁰ Although the paramouncy principle does not automati-

identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

⁹⁵ The Constitutional Court has referred to the CRC in a wide range of cases. See R Ngidi ‘The role of international law in the development of children’s rights in South Africa: A children’s rights litigator’s perspective’ in M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 173–91; A Skelton ‘South Africa’ in JE Doek & T Liefwaard (eds) *Litigating the Rights of the Child* (2015) 13–30. See further J Sloth-Nielsen & H Kruuse ‘A maturing manifesto: The constitutionalisation of children’s rights in South African jurisprudence 2007–2012’ (2013) 4 *International Journal of Children’s Rights* 646–78.

⁹⁶ *Director of Public Prosecutions, Transvaal v Minister of Justice* 2009 (4) SA 222 (CC) para 13; *Governing Body of the Juma Masjid Primary School v Essay NO (Centre for Child Law and Another as Amici Curiae)* 2011 (8) BCLR 761 (CC) para 37; and *J v National Director of Public Prosecutions* 2014 (2) SACR 1 (CC) n 45.

⁹⁷ Committee on the Rights of the Child (n 89) para 40.

⁹⁸ See *Ex Parte Attorney-General* (n 23); *S v Ncube* (n 24); and *S v Juvenile* (n 25).

⁹⁹ *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC).

¹⁰⁰ Friedman, Paizes & Skelton (n 58) 47–45.

cally trump other rights, 'it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely the interests of children who may be concerned'.¹⁰¹

The uniqueness of the South African constitutional protection of best interests is important when considering the majority decision in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*.¹⁰² The applicants challenged a law¹⁰³ that justified the reasonable use of force by parents and teachers for correction of children in their care. The majority held by six to three that the impugned provision did not infringe the right to life, liberty and security of person because it did not offend a principle of fundamental justice. The reason for this, McLachlin CJ explained, was that in the Canadian legal system the best interests of the child is not a principle of fundamental justice. Furthermore, the court found that the impugned provision was not unduly vague or overbroad – it did not extend to discipline that resulted in harm or the prospect of bodily harm. As the law only allowed force that was reasonable it could not at the same time be both reasonable and an outrage to the standards of decency. The majority also found that the provision did not breach the equality provision because children needed guidance and discipline and the law allowed parents and teachers to carry this out without risking criminal prosecution, unless they exceeded the bounds of reasonableness.

Arbour J's dissenting judgment held that the impugned provisions infringed the rights of children under the Canadian Charter. In her dissent, Deschamps J held that the impugned provision infringed the equality guarantee of children. This was so because it created a distinction between children and others on the basis of age, and the distinction amounted to discrimination. The government's decision not to protect children from some assaults violated their dignity, and treated them as the 'property' of their parents.¹⁰⁴ Binnie J's partial dissent also found that the impugned provision, on the face of it, amounted to an infringement of equality. However, he was of the view that the infringement was saved by the limitations clause because the restriction of intrusion into family life was a pressing and substantial need.

At first glance it appears that the *Canadian Foundation* case is a dangerous precedent for those seeking to challenge the chastisement defence, especially as the Canadian Charter is generally viewed as comparable with the South African Constitution. However, it is notable that the *Canadian Foundation* court found that the best interests of the child was not a

¹⁰¹ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 42.

¹⁰² 2004 SCC 4.

¹⁰³ Section 43 of the Criminal Code (RSC 1985 c. C-46), which allowed the use of force by way of correction of a child if the force does not exceed what is reasonable under the circumstances.

¹⁰⁴ *Canadian Foundation* (n 102) para 226.

fundamental principle of justice, while the South African courts view best interests as a justiciable right, and one that is of paramount importance. Furthermore, the test of ‘an outrage to standards of decency’ is not applicable in South African law – the appropriate test will relate to proportionality and reasonableness.

A more helpful foreign case for those making a children’s rights argument is *Plonit v Attorney General*.¹⁰⁵ The Israeli Supreme Court handed down this decision prohibiting all forms of corporal punishment of children and eliminating the defence of ‘reasonable force’. The court found that ‘corporal punishment as an educational method not only fails to achieve its goals, it also causes physical and emotional damage to the child which may leave their mark on him or her even in adulthood.’¹⁰⁶ The *Plonit* court emphasised critical judgments from the Canadian High Courts¹⁰⁷ which had indicated that s 43 was in conflict with the Convention on the Rights of the Child, to which Canada was a signatory. Inexplicably, these judgments were not mentioned in the Canadian Supreme Court’s judgment. The Israeli Supreme Court in *Plonit* found itself bound by an international obligation to prohibit corporal punishment. It concluded that any type of corporal punishment ‘distances us from our goal of a society free of violence. Accordingly, let it be known that in our society parents are now forbidden to make use of corporal punishment or methods that demean and humiliate the child as an educational system’.¹⁰⁸

(e) *Privacy and ‘right to family life’*

The contribution now turns to a brief discussion of the arguments that those wishing to retain the chastisement defence may raise. Those who are pro-corporal punishment are likely to invoke s 14 (the right to privacy), probably coupled with a ‘right to family life’ argument.

While the right to dignity will be invoked by those wishing to do away with the chastisement defence, it will almost certainly also be relied upon by their opponents, in their quest to depict abolition of the defence as an invasion of the right to family life. Although this right is not expressly included in the Constitution, a quasi-right to family life has been carved out of the dignity clause. In *Dawood v Minister of Home Affairs* the

¹⁰⁵ 54 (1) PD 145 (Criminal Appeal 4596/98). An unofficial English translation is available at www.endcorporalpunishment.org/pages/pdfs/Israel_Judgment.pdf (accessed on 8 January 2015). Page references are to his translation.

¹⁰⁶ *Ibid* 6.

¹⁰⁷ *R v James* [1998] OJ 1438 (QL); *R v JOW* [1996] OJ 4061.

¹⁰⁸ *Plonit* (n 105) 11.

Constitutional Court held that the Constitution protects the rights of persons to marry and to raise a family.¹⁰⁹

However, the existence of such a right does not necessarily entail the protection of corporal punishment in the home. In *X, Y and Z v Sweden*¹¹⁰ the European Commission of Human Rights dismissed an argument that the Swedish Code of Parenthood (which did not permit the use of corporal punishment) infringed the right to family life. The Commission found that the Swedish law of assault and molestation was a standard measure for limiting violence and its application to physical chastisement of children aimed at protecting weak and vulnerable members of society.

X, Y and Z v Sweden did not deal with the abolition of the criminal law defence of chastisement directly. However, the concern expressed in the case that abolishing the defence would result in many parents being brought before the courts to face charges has subsequently not materialised in countries where the defence has been abolished.¹¹¹ The *de minimis non curat lex* principle, coupled with reasonable prosecutorial discretion, minimises the risk of too great an infringement into family life.¹¹² Furthermore, the state has an obligation to take direct measures to protect the rights of everyone to be free from family violence – and the definition of family violence in the Prevention of Family Violence Act 133 of 1993 includes violence against children.¹¹³ Finally, parents' right to family life would have to be weighed against children's best interests. A question that will be posed is whether the intrusion into family life is warranted by the need for protection of children, and whether that intrusion, in the long run, will operate in their best interests¹¹⁴

(f) Religious rights

Freedom of religion (s 15) and the rights of religious communities (s 31) could well be invoked by religious groupings seeking an exemption from the general law. Sachs J, in *Christian Education*, pointed out that while the state should avoid putting believers to painful and burdensome choices, religious groupings cannot claim an automatic right to be exempted by

¹⁰⁹ *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC). See also *Booyesen v Minister of Home Affairs* 2001 (4) SA 485 (CC).

¹¹⁰ 1983 (5) EHRR 147.

¹¹¹ T Ezer 'Children's rights in Israel: An end to corporal punishment' (2003) 5 *Oregon Review of International Law* 139 at 168; A Nicholson 'Choose to hug, not to hit' (2008) 46 *Family Court Review* 11, 12; New Zealand Police *Eleventh review of police activity since enactment of the Crimes (Substituted Section 59) Amendment Act 2007* (2013) available at <http://www.police.govt.nz> (accessed on 15 December 2013).

¹¹² This was a strong point in the Arbor J dissent in *Canadian Foundation* (n 102).

¹¹³ *S v Baloyi* (n 78) at para 11.

¹¹⁴ J Sloth-Nielsen & B van Heerden 'Signposts on the road to equality: Towards the new millennium for parents, children and families in South Africa' in J Eekelaar & T Nhlapo (eds) *The Changing Family: Family Forms and Family Law* (1998).

their beliefs from the law of the land.¹¹⁵ In *MEC for Education, KwaZulu-Natal v Pillay*¹¹⁶ Langa CJ stressed the voluntary nature of religious practice, which would be relevant in a limitations analysis. If a person feels subjectively that a particular religious practice is central to his or her religious identity, that would be worthy of protection. However, 'even the most vital practice of a religion or culture can be limited for the greater good'.¹¹⁷

Those arguing to retain the defence on religious grounds would no doubt stress that while *Christian Education* prevented parents for authorising teachers to hit their children, it fell short of answering the question of whether religious grounds could shore up an exemption for religious groups hitting their own children.

(2) *Limitations analysis*

A consideration of the rights infringements is the first stage of the Bill of Rights inquiry. Having established the infringement of rights, the court will then consider whether those infringements can be justified. A full discussion of what might be argued in the limitations analysis is beyond the scope of this contribution. However, it is possible to identify factors that may predominate. In order to do so, I proceed from the assumption that the application will be brought from interested parties who wish to have the chastisement defence removed from the common law.

The nature of the right would be the first issue to be considered. It would not be difficult to show that corporal punishment causes harm,¹¹⁸ and that dignity, freedom from violence and degrading punishment as well the protection of children are all fundamental rights.

Those wishing to retain the chastisement defence would have to show that the purpose of the limitation in s 36(1)(b) and the relation between the limitation and its purpose are in keeping with an open and democratic society based on human dignity, equality and freedom. They will no

¹¹⁵ *Christian Education* (n 2) para 35.

¹¹⁶ 2008 (1) SA 474 (CC).

¹¹⁷ *Ibid* para 95.

¹¹⁸ The acceptance by the Israeli Supreme Court in *Plonit v Attorney General* (n 105) of the harm occasioned by corporal punishment is significant. In addition, South African research that may be used in support of the assertion of harm include A Dawes et al *Partner Violence, Attitudes to Child Discipline and the Use of Corporal Punishment: A South African National Survey* (2004); A Dawes et al 'Corporal punishment of children: A South African survey' Paper prepared for distribution at the regional consultation of the UN study on violence against children (2005); P Burton (ed) *Someone Stole my Smile* (2007). International research includes ET Gershoff 'Corporal punishment by parents and associated child behaviors and experiences: A meta-analytic and theoretical review' (2002) 128(4) *Psychological Bulletin* 539; MA Straus *Beating the Devil Out of Them: Corporal Punishment in American Families* (1994) 4; ET Gershoff & SH Bitensky 'The case against corporal punishment of children: Converging evidence from social science research and international human rights law and implications for US public policy' (2007) 13(4) *Psychology, Public Policy and Law* 231.

doubt stress the corrective and educational purpose. Even if corporal punishment can be found to fulfil this purpose the means must still be proportionate to the end.

The nature and extent of the limitation will consider how extensive the infringement is. Here arguments about the arbitrariness of the application of corporal punishment will have to be overcome. The findings in *S v Williams* and *Christian Education* that any form of corporal punishment is degrading will be of great value to those arguing against the chastisement defence. Conversely, any inroads into the rights of parents are tempered by the fact that the *de minimis non curat lex* principle ensures that there will not be a flood of prosecutions for minor incidents. In fact, the Children's Act already provides for measures to support parents to learn positive discipline methods¹¹⁹ and so referral to such programmes is a preventive approach, but could also operate as a possible diversion option. It is important to remember that the state has a responsibility to prevent corporal punishment through social and educative programmes, and not only to respond after the event.

The availability of less restrictive means to achieve the purpose will prove to be a significant hurdle to those wishing to uphold the chastisement defence. If less restrictive means exist to achieve the educational and corrective purpose for which corporal punishment is intended, then the chastisement defence should not pass constitutional muster.

VI CONCLUSION

This contribution examined Langa J's jurisprudence in *S v Williams* and chronicled how that was developed further by the Constitutional Court in *Christian Education*. It then considered what those judgments foreshadow about how the Constitutional Court may deal with a possible future challenge to the constitutionality of the common-law defence of reasonable chastisement, which permits corporal punishment of children by their parents in their own homes.

The rights infringements that those wishing to abolish the chastisement defence would invoke will need to be balanced against the rights that will be relied on by those arguing for the retention of the chastisement defence – most likely parents or religious groupings. The balance appears to favour the abolition of the chastisement defence, especially in the light of the nature of the rights concerned – in particular dignity, freedom of violence from public and private sources, and children's rights to be protected from degradation and to have their best interest be given paramount consideration. Although a similar challenge failed in the Canadian Supreme Court, it appears that significant differences between the Canadian and

¹¹⁹ Section 144(1)(b).

South African Constitutions, particularly in relation to ss 12(1)(c) and 28(2), would shore up an argument for a different outcome in the South African Constitutional Court. The legacy of Langa J in *S v Williams* might well find a suitable resting place in a future challenge to the defence of reasonable chastisement.