

PROTECTING THE VULNERABLE IN SOUTH AFRICA: PROHIBITION OF CORPORAL PUNISHMENT IN THE PRIVATE SPHERE

Lizelle Ramaccio Calvino
B Proc MBA LLM (cum laude) LLD
Attorney of the High Court of RSA
Senior Lecturer, Department of Private Law
University of Zululand

SUMMARY

On 18 September 2019, the Constitutional Court confirmed that the common-law defence of “reasonable and moderate chastisement” is unconstitutional as it unjustifiably violates sections 10 and 12(1)(c) of the Constitution of the Republic of South Africa, 1996. As a result, parents are no longer permitted to punish their child at home by way of inflicting physical punishment behind a facade of discipline. Despite the aforesaid, it should be noted that corporal punishment in the private sphere is not explicitly prohibited by South African legislation. In addition, South Africa’s legislative system lacks an appropriate regulatory framework to administer the anticipated proliferation of assault cases against parents. It is against this backdrop that this article first analyses the current legislative framework regulating the protection of children from physical punishment, and then follows with a succinct overview of the Constitutional Court ruling. The article assesses whether the mere repeal of the common-law defence of “reasonable and moderate” chastisement will be sufficient to eradicate corporal punishment in the private sphere, and if not, whether legislative prohibition and/or other interceding strategies will be required to give effect to the objective of the Constitutional Court ruling. In this regard, by way of comparative research, the legislative framework adopted by Sweden, being the first country in the world to prohibit all forms of corporate punishment of children is evaluated. Lastly, recommendations are made for the incorporation of practical steps, including possible legislative measures, to establish a regulatory framework from a children’s rights perspective to prohibit corporal punishment in the private sphere. Accordingly, for purposes of analysis and consideration, a qualitative approach is applied for purposes of the research. Primary sources such as the Constitution, case law, legislation, governmental documents, statistical data and research reports are consulted in conjunction with journal articles and textbooks.

1 INTRODUCTION

The Biblical quote “spare the rod and spoil the child”¹ and an instilled tradition of physical reprimand have often been used to rationalise the

¹ *Holy Bible New King James Version* (1982) Proverbs 13:24.

practice of corporal punishment as far as child chastisement is concerned.² Although corporal punishment in the public sphere was banned in 1996 with the promulgation of the South African Schools Act,³ corporal punishment in the private sphere was, until recently, still an acceptable practice. In this regard, the common law permitted a parent to inflict “moderate and reasonable chastisement on a child for misconduct provided the chastisement was not done in a manner offensive to good morals or for objects other than correction and admonition”.⁴

On 18 September 2019, in the case of *Freedom of Religion South Africa v Minister of Justice and Constitutional Development*,⁵ the Constitutional Court confirmed that the common-law defence of “reasonable and moderate chastisement” is unconstitutional as it unjustifiably violates sections 10 and 12(1)(c) of the Constitution of the Republic of South Africa, 1996 (the Constitution). Effectively, the judgment repealed the common-law defence of “reasonable and moderate chastisement”, thereby removing a parent’s defence to inflict physical punishment on their child behind a facade of discipline.

Consequently, it can be argued that this ruling is the impetus that the South African government needs to comply with its international and national undertakings, as well as to give effect to the protection afforded to children in terms of the Constitution and the Children’s Act.

2 ACKNOWLEDGING THE NEED TO PROTECT CHILDREN: INTERNATIONAL AND REGIONAL INSTRUMENTS

2.1 International instruments

“Mankind owes to the child the best it has to give.”⁶

The Geneva Declaration of the Rights of the Child, 1924⁷ was the initial instrument on the subject; it identified five principles⁸ that acknowledged

² World Health Organisation “Violence Prevention: The Evidence” www.who.int/violenceprevention (accessed 2020-02-24).

³ S 10 of the South African Schools Act 84 of 1996 states: “(1) No person may administer corporal punishment at a school to a learner. (2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.”

⁴ *R v Janke and Janke* 1913 TPD 382.

⁵ [2019] ZACC 34; confirming *YG v The State* [2017] ZAGPJHC 290.

⁶ Preamble to the *Geneva Declaration of the Rights of Children* <http://www.un-documents.net/gdrc1924.htm> (accessed 2020-02-25).

⁷ League of Nations *Geneva Declaration of the Rights of the Child* <http://www.un-documents.net/gdrc1924.htm>. Commonly referred to as the Declaration of Geneva, it was adopted by the Save the Children Union in Geneva, Switzerland on February 23, 1923.

⁸ The *Geneva Declaration of the Rights of the Child* recognised the following child rights: “1. The child must be given the means requisite for its normal development, both materially and spiritually. 2. The child that is hungry must be fed, the child that is sick must be nursed, the child that is backward must be helped, the delinquent child must be reclaimed, and the orphan and the waif must be sheltered and succored. 3. The child must be the first to receive relief in times of distress. 4. The child must be put in a position to earn a livelihood

parental responsibilities and child-specific rights. With the adoption of the Declaration of the Rights of the Child in 1959, the United Nations General Assembly,⁹ extended the principles to ten principles, which represented the first internationally codified set of children's rights. One most profound addition to the principles of the 1924 Declaration was the acknowledgement of child autonomy.¹⁰ However, the recognition that children are bearers of rights separate from their parents also required that they be given special care and protection as a result of their "physical and mental immaturity".¹¹ Although the 1924 and 1959 Declarations were not legally binding, they formed the foundation on which the Convention on the Rights of the Child, 1989 (CRC) was built.

The CRC denotes the most widely ratified human rights treaty in the world and the first legally binding international instrument that comprehensively addresses children's rights.¹² In terms of the CRC, every person under the age of 18¹³ has the right to be protected from all forms of violence, abuse, neglect and bad treatment by their parents or anyone else who looks after them.¹⁴ In protecting and enforcing children's rights, the CRC mandates that all signatory states promulgate legislation safeguarding children's rights by passing laws that promote such rights.¹⁵ The CRC moreover not only reinforces the best-interests-of-the-child principle but also expands its ambit to include "all decisions and actions that affect children".¹⁶ Although the CRC explicitly provides for the protection of children from all forms of violence, it is noteworthy that the CRC does not specifically make reference to corporal punishment.

and must be protected against every form of exploitation. 5. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men." The Declaration of the Rights of the Child <http://www.un-documents.net/gdrc1924.htm>.

⁹ United Nations General Assembly *Declaration of the Rights of the Child A/RES/1386(XIV)* (1959) Adopted: 20/11/1959 <http://cpd.org.rs/wp-content/uploads/2017/11/1959-Declaration-of-the-Rights-of-the-Child.pdf>.

¹⁰ Principle 2 of the UN *Declaration of the Rights of the Child* states: "The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration." For a list of the ten principles on which the World Welfare Charter was based after being endorsed by the United Nations in 1959 generally, see the *Declaration of the Rights of the Child* <http://cpd.org.rs/wp-content/uploads/2017/11/1959-Declaration-of-the-Rights-of-the-Child.pdf> (accessed 2020-02-25).

¹¹ "Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth" (UN *Declaration of the Rights of the Child A/RES/1386(XIV)* (1959) Adopted: 20/11/1959 <http://cpd.org.rs/wp-content/uploads/2017/11/1959-Declaration-of-the-Rights-of-the-Child.pdf> (accessed 2020-02-25)).

¹² Freeman "The Value and Values of Children's Rights" in Invernizzi and Williams (eds) *The Human Rights of Children: From Visions to Implementation* (2011) 251 284.

¹³ Article 1 of the CRC.

¹⁴ Article 19 of the CRC.

¹⁵ Article 4 of the CRC.

¹⁶ Article 3 of the CRC. Article 3(1) of the CRC states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

2 2 Regional instruments

The CRC provided the foundation for the African Charter on the Rights and the Welfare of the Child (ACRWC)¹⁷ and is accordingly designed in line with the principles of the CRC. The ACRWC, however, also incorporates the unique situation of most African children – *inter alia*, their socio-economic, cultural and traditional circumstances.¹⁸ Fundamental to the ACRWC is the fact that, as in the case of the CRC, the best interests of the child must always be applied in “all actions” concerning children¹⁹ and that member states are obliged to recognise children’s rights and adopt laws to protect those rights.²⁰ In this regard, article 16 of the ACRWC specifically prohibits all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment of a child. As in the case of the CRC, the ACRWC likewise does not make specific reference to corporal punishment.

3 DEFINING CORPORAL PUNISHMENT

Notwithstanding that neither the CRC nor the ACRWC defines corporal punishment, the United Nations Committee on the Rights of the Child²¹ noted that physical punishment of children is contrary to the ethos of the aforementioned conventions and accordingly, that by interpretation, corporal punishment is overtly prohibited by the CRC and the ACRWC.²² This interpretation is shared by the Human Rights Council, which views corporal punishment as a fundamental violation of a child’s right to human dignity and physical integrity as well as a child’s right to equal protection under the law.²³

Corporal punishment is therefore defined by the Committee on the Rights of the Child as “any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light”.²⁴ It therefore includes “physical force such as hitting, kicking, shaking, scratching, pinching, biting or forcing a person to stay in uncomfortable positions, locking or tying them or burning and scalding” them.²⁵ In addition to physical

¹⁷ Organization of African Unity *African Charter on the Rights and Welfare of the Child* CAB/LEG/24.9/49 (1990) Adopted 11/07/1990; EIF: 29/11/1999.

¹⁸ Preamble to the ACRWC.

¹⁹ Article 4(1) of the ACRWC states: “In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.”

²⁰ Article 1 of the ACRWC.

²¹ UN Committee on the Rights of the Child https://www.unicef.org/southafrica/protection_10381.html (accessed 2020-01-16).

²² UN Committee on the Rights of the Child *General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (art 19 and 28, par 2 and 37)* CRC/C/GC/8 (2007) <https://www.refworld.org/docid/460bc7772.html> (accessed 2020-01-20) par 20.

²³ UN Committee on the Rights of the Child *General Comment No. 8 (2006)* par 11 and 16. See Global Initiative to End All Corporal Punishment of Children “South Africa: Briefing for the Human Rights Council Universal Periodic Review – 13th session, 2012” https://lib.ohchr.org/HRBodies/UPR/Documents/session13/ZA/GIEACPC_UPR_ZAF_S13_2012_GlobalInitiativetoEndAllCorporalPunishmentofChildren_E.pdf (accessed 2020-01-20).

²⁴ UN Committee on the Rights of the Child *General Comment No. 8 (2006)* par 11.

²⁵ *Ibid.*

forms of corporal punishment, the Committee also included non-physical forms of corporal punishment such as “punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child”.²⁶ Consequently, in view of the aforementioned and as in the case of all state parties to the CRC, the government of South Africa is obliged to safeguard children from physical and non-physical forms of punishment that may violate a child’s right to dignity and physical integrity.

4 CORPORAL PUNISHMENT WITHIN THE SOUTH AFRICAN CONTEXT

Corporal punishment is endemic, and is not unique or limited to a specific populace. Accordingly, as in the case of many other countries, the practice of disciplining a child by way of corporal punishment is deeply entrenched in the history of South African communities. The influence of colonisation, South Africa’s diverse cultures (each with its own set of norms and beliefs), and the inadequate socio-economic circumstances that the majority of South African’s face do, however, create a breeding ground for the perpetuation of corporal punishment in the private sphere.

One of the dogmas South Africa adopted during British rule was the English defence of “reasonable chastisement”; parents using corporal punishment used the defence against a charge of assault and other crimes. The adoption of the authoritarian system of discipline under colonial rule²⁷ was based on the notion that a child can only be effectively disciplined by instilling a fear of disobedience.²⁸ This belief was furthermore supported by certain religious organisations that perpetuated the use of corporal punishment by adopting and imbedding the philosophy of corporal punishment in their teachings and religious ideology.²⁹

Even after independence in 1910, apartheid laws endorsed the use of corporal punishment when the South African criminal justice system adopted corporal punishment as a form of sanction. This conception paved a way in which the patriarchal, racial and authoritarian apartheid system rooted itself in terms of societal beliefs, acceptance and norms.³⁰ The controlling dogmas of corporal punishment therefore became a socially acceptable method to educate unruly children – correcting a child’s transgression by either physical punishment or by way of fear.³¹

In addition to historical factors endorsing the use of corporal punishment, one cannot ignore the influence that cultural beliefs, traditions and religious dogmas have had on the manner in which diverse cultures view corporal

²⁶ *Ibid.*

²⁷ Pete “A Practice that Smacks of Abuse” 1999 *Children First* 3–6.

²⁸ *Ibid.*

²⁹ Porteus, Vally and Ruth *Alternatives to Corporal Punishment: Growing Discipline and Respect in Our Classrooms* (2001) 34–49.

³⁰ *Ibid.*

³¹ Snyman *Criminal Law 6ed* (2015) 138.

punishment in South Africa.³² The dominant line of patriarchy, which leads to subordination, is especially well embedded in the Afrikaans and African cultures.³³ These beliefs and practices are in turn proliferated by generational repetition, thereby inhibiting change in the social acceptance of corporal punishment.³⁴

Although the research acknowledges the importance of the socio-cultural context of corporal punishment, as well socio-economic factors (especially poverty) that may perpetuate the application of corporal punishment in the private sphere, the focus of the study is limited to legislative measures and interceding strategies to eradicate corporal punishment.

4 1 South African legislation

As a signatory of the CRC and the ACRWC, South Africa is obliged to recognise and accept the universally agreed set of non-negotiable standards and obligations to be honored by the conventions' signatories – *inter alia*, the importance of children's rights, and the right a child has to be protected from violence.³⁵

4 1 1 *The Constitution of the Republic of South Africa, 1996*³⁶

The Constitution does not specifically refer to corporal punishment. It may be argued that the exclusion of a specific mention of corporal punishment in section 28 of the Constitution was deliberate to accommodate religious beliefs and cultural traditions that favour the practice.³⁷ On the other hand, one could also argue that the constitutional provisions are wide enough to encompass protection against corporal punishment, making it unnecessary to make specific reference to corporal punishment.

In this regard, section 12(1) of the Constitution explicitly provides that "[e]veryone has the right to freedom and security of the person, which includes the right ... (c) to be free from all forms of violence from either public or private sources". In addition, section 28(2) of the Constitution provides that in all matters concerning a child, the best interests of the child are of paramount importance.³⁸ Section 28(2) of the Constitution³⁹ therefore

³² Khoi and San culture, the Zulu culture, Xhosa culture, Ndebele culture, Sotho culture, the Shangaan culture, Venda culture, Indian and Cape Malay culture and the cultures brought by the European settlers.

³³ Kruger *Gender Stereotyping and Roles* (unpublished PhD thesis, University of the Orange Free State) 1997.

³⁴ Coetzee "Informed by Bandura's Social Learning Theory: South African Education and the Ideology of Patriarchy" 2001 4 *South African Journal of Education* 21.

³⁵ South Africa ratified the CRC in 1995 and the ACRWC in 2000.

³⁶ The Constitution of the Republic of South Africa, 1996 was adopted on 8 May 1996 and promulgated on 18 December 1996.

³⁷ S 31(1) of the Constitution provides that "[p]ersons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community- (a) to enjoy their culture, practise their religion and use their language".

³⁸ S 30 of the Interim Constitution of the Republic of South Africa 200 of 1993 stated: "For the purpose of this section a child shall mean a person under the age of 18 years and in all

imposes a duty on all courts to consider the best interests of a child and the paramountcy of such interests in all matters concerning the child.⁴⁰ Accordingly, section 28(2) can be regarded as “an extensive guarantee”⁴¹ affording children additional protection.⁴²

As a consequence of the extension of the ambit of the application of the best-interests-of-the-child principle to all matters relating to children, section 28(1) of the Constitution provides children with further legal protection by way of certain socio-economic human rights.⁴³ One of these rights is the right to be protected from maltreatment, neglect, abuse or degradation.⁴⁴ This right was later adopted by the Children’s Act⁴⁵ and is discussed hereunder.⁴⁶

4 1 2 *Children’s Act 38 of 2005*

The circumstances that should be considered in establishing what constitutes the best interests of the child are listed in section 7 of the Children’s Act.⁴⁷ One of the factors listed in section 7 is the need to protect the child from any physical or psychological harm that may be caused by maltreatment, abuse, neglect, exploitation, degradation or exposure to violence.⁴⁸ Although protection from violence is thus afforded to children in

matters concerning such child his or her best interests shall be paramount.” The application of the principle was however restricted to the ambit of s 30(3) of the Interim Constitution.

³⁹ S 28(2) of the Constitution provides that “[a] child’s best interests are of paramount importance in every matter concerning the child”.

⁴⁰ Heaton *South African Family Law* 4ed (2015) 276–277.

⁴¹ *Sonderup v Tondeli* 2001 (1) SA 1172 (CC) par 29.

⁴² Heaton *South African Family Law* 271.

⁴³ S 28(1) of the Constitution states: “(1) Every child has the right–

(a) to a name and a nationality from birth; (b) to family care or parental care, or to appropriate alternative care when removed from the family environment; (c) to basic nutrition, shelter, basic health care services and social services; (d) to be protected from maltreatment, neglect, abuse or degradation; (e) to be protected from exploitative labour practices; (f) not to be required or permitted to perform work or provide services that– (i) are inappropriate for a person of that child’s age; or (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development; (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be– (i) kept separately from detained persons over the age of 18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child’s age; (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.”

⁴⁴ S 28(1)(d) of the Constitution.

⁴⁵ S 7 of the Children’s Act 38 of 2005.

⁴⁶ Ch 2 of the Children’s Act.

⁴⁷ S 7 of the Children’s Act states that the best interests of the child must be applied whenever the provisions of the Children’s Act so require as well as s 9 of the Act that states that “In all matters concerning the care, protection and well-being of a child the standard that the child’s best interest is of paramount importance, must be applied.”

⁴⁸ S 7(1)(f) of the Children’s Act.

the Children's Act,⁴⁹ the Act does not explicitly prohibit corporal punishment, and in particular corporal punishment in the private sphere.

The 2002 draft Children's Bill did, however, include a prohibition of corporal punishment.⁵⁰ In addition, the Bill advocated the revocation of the common-law defence of "reasonable and moderate chastisement" and the adoption of an education awareness approach to change society's perception of corporal punishment.⁵¹ With the division of the Children's Bill,⁵² the Children's Act was promulgated in 2005, leaving the issue of corporal punishment to be dealt with in terms of the Children's Amendment Bill.⁵³ Clause 139 of the Children's Amendment Bill provided that "no child may be subjected to corporal punishment or be punished in a cruel, inhuman, or degrading way".⁵⁴ The clause furthermore provided: "The common law defence of reasonable chastisement available to persons referred to in subsection (1) in any court proceeding is hereby abolished."⁵⁵ It should be noted that the clause did not address corporal punishment in the home but only in the public sphere. Despite submissions being made during public hearings and clause 139 being amended to incorporate appropriate parenting programmes across the country, consensus could not be reached on the topic. Clause 139 was ultimately removed from the Children's Amendment Bill to allow for further investigation while the Children's Amendment Act⁵⁶ was passed towards the end of 2007.

Subsequent to amendments to the Children's Act, article 8 of the Draft Children's Third Amendment Bill⁵⁷ called for the removal of the common-law defence of reasonable and moderate chastisement⁵⁸ while also advocating

⁴⁹ *Inter alia* in terms of ss 7, 9 and 10 of the Children's Act.

⁵⁰ S 142 of the Draft Children's Bill, 2002.

⁵¹ Tarabella Marchesi "Corporal Punishment of Children in South Africa" <https://pmg.org.za/call-for-comment/707> (accessed 2020-02-21).

⁵² The Draft Children's Bill was divided into the Children's Bill (s 75 Bill) and the Children's Amendment Bill (s 76 Bill). The later Bill was to address corporal punishment.

⁵³ Clause 139 of the Children's Amendment Bill B19B of 2006 stated *inter alia*: "(2) No child may be subjected to corporal punishment or be punished in a cruel, inhuman, or degrading way. (3) The common law defence of reasonable chastisement available to persons referred to in subsection (1) in any court proceeding is hereby abolished."

⁵⁴ Clause 139(2) of the Children's Amendment Bill B19B of 2006.

⁵⁵ Clause 139(3) of the Children's Amendment Bill B19B of 2006.

⁵⁶ 41 of 2007.

⁵⁷ Article 8 of the Children's Third Amendment Bill, 2019, GG 42005 of 2019-02-25.

⁵⁸ Article 8 of the Bill stated: "Positive discipline of children – 12A. (1) A person who has care of a child, including a person who has parental responsibilities and rights in respect of a child, must not treat or punish the child in a cruel, inhuman or degrading way, when disciplining the child, to ensure the child's right to physical and psychological integrity as conferred by section 12 (1)(c), (d) and (e) of the Constitution. (2) The common law defence of reasonable chastisement available in any court proceeding to a person contemplated in subsection (1) is hereby abolished. (3) A parent, guardian, care-giver or any person holding parental responsibilities and rights in respect of a child who is reported for subjecting such child to any inappropriate form of punishment, including corporal punishment, must be referred to a prevention and early intervention programme as contemplated in section 144. (4) The Department in partnership with relevant stakeholders must take all reasonable steps to ensure that– (a) education and awareness-raising programmes concerning the effect of subsections (1) and (2) are implemented across the Republic; and (b) programmes promoting positive discipline at home and in alternative care are available across the Republic. (5) When prevention and early intervention services have failed, or are deemed to

that a person who has ill-treated a child (which includes using corporal punishment) should be referred to a prevention and early intervention programme as contemplated in section 144 of the Children's Act.⁵⁹ The proposed amendment includes the implementation of awareness programmes as well as programmes promoting positive discipline.⁶⁰

The new version of the Children's Third Amendment Bill⁶¹ in turn proposed the insertion of section 12A in the Children's Act to address discipline of children specifically.⁶² It is however noteworthy that section 12A does not provide for the programmes envisaged by section 8 as discussed above.

It is thus evident that although legislative progress has been made in terms of the Children's Act to protect child rights, and in particular the right to be protected from violence, children are still one of the last vulnerable groups of society to be effectively protected from all forms of corporal punishment.⁶³ In this regard, there is an inconsistency in that corporal punishment in the public sphere is regulated in contrast to corporal punishment in the private sphere.

4 2 Underpinning the prohibition of corporal punishment in the private sphere: international pressure

Corporal punishment in the public sphere was explicitly prohibited by the South African Schools Act.⁶⁴ Nonetheless, the Committee on the Rights of the Child (the regulatory body of the CRC) and other committees⁶⁵ were concerned about the lack of adequate implementation and governance of the Schools Act, as well as the absence of legislation prohibiting corporal punishment in the private sphere.⁶⁶

be inappropriate, and the child's safety and wellbeing is at risk, the designated social worker must assess the child in terms of section 110."

⁵⁹ S 144 of the Children's Act provides for early intervention programmes.

⁶⁰ S 144 of the Children's Act.

⁶¹ GG 42005 of 2019-02-25.

⁶² Article 7 of the Children's Third Amendment Bill proposes the insertion of section 12A "Discipline of children" in the Children's Act. The article states "(1) Any person caring for a child, including a person who has parental responsibilities and rights in respect of a child, must not treat or punish the child in a cruel, inhuman or degrading way. (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. (3) Any person who is reported for contravening subsection (1) must be dealt with in accordance with section 110 of this Act."

⁶³ Sonke Gender Justice "Policy Briefing: Prohibition of Corporal Punishment in the Home in South Africa" https://www.saferespaces.org.za/uploads/files/Prohibition_of_Corporal_Punishment_in_the_Home_in_South_Africa.pdf (accessed 2020-01-20).

⁶⁴ South African Schools Act, 84 of 1996.

⁶⁵ The Committee on the Rights of the Child, Human Rights Committee, Committee Against Torture; Committee on the Rights of Persons with Disabilities, African Committee of Experts on the Rights and Welfare of the Child.

⁶⁶ Global Initiative to End All Corporal Punishment of Children "South Africa: Briefing for the Human Rights Council Universal Periodic Review" <https://www.ohchr.org/EN/HRBodies/UPR/Pages/MeetingsHighlightsSession13.aspx>.

In 2002, the Committee on the Rights of the Child was briefed by the Global Initiative to End All Corporal Punishment of Children.⁶⁷ Subsequently, corporal punishment of children has been on the agenda of the Committee Against Torture, the Committee on the Elimination of Discrimination Against Women, the Committee on Economic, Social and Cultural Rights, the Human Rights Committee and the Committee on the Rights of Persons with Disabilities.⁶⁸ The paramountcy of the right of the child to be protected from corporal and other cruel or degrading forms of punishment was reiterated by the Committee on the Rights of the Child in its adoption of General Comment No. 8 (2006), emphasising state parties' obligation to prohibit and eliminate corporal punishment in all settings of children's lives.⁶⁹

In the UN Secretary General's Study on Violence Against Children in 2006, the resistance of the South African government, despite recommendations to introduce prohibition by way of international human rights mechanisms, was highlighted.⁷⁰ In 2008, during the first cycle of the Universal Periodic Review, the Human Rights Council recommended that South Africa "commit to criminalise corporal punishment, remove the defense of reasonable chastisement, pledge to raise awareness and provide the required resources to support alternative forms of discipline".⁷¹ In response to the recommendation, the South African government submitted that corporal punishment was addressed in terms of the Domestic Violence Act 116 of 1998.⁷²

During the second cycle of the Universal Periodic Review of South Africa in 2012, it was once more recommended that government: "Prohibit and punish corporal punishment both in the home, as well as in public institutions such as schools and prisons."⁷³ The South African government retorted by stating that adequate legislation exists to prohibit corporal punishment.⁷⁴ In addition to international pressure to ban corporal punishment in the home, national instruments such as the African Committee of Experts on the Rights and Welfare of the Child also advocated the ban of corporal punishment in the home.⁷⁵

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ UN Committee on the Rights of the Child *General Comment No. 8 (2006): The Right of the Child to Protection From Corporal Punishment and Other Cruel or Degrading Forms of Punishment (arts. 19; 28, para. 2; and 37, inter alia)* (CRC/C/GC/8).

⁷⁰ Briefing for the Human Rights Council Universal Periodic Review <https://violenceagainstchildren.un.org/content/un-study-violence-against-children#:~:text=The%20United%20Nations%20Secretary%2DGeneral's,prevent%20and%20respond%20to%20it>.

⁷¹ UN Human Rights Council *Report of the Working Group on the UPR: South Africa, 23 May 2008* <https://www.refworld.org/docid/4857aa23d.html> (accessed 2020-01-20).

⁷² UN Human Rights Council *Report of the Human Rights Council on its Eighth Session A/HRC/8/52* (1 September 2008) par 567.

⁷³ UN Human Rights Council *Report of the Working Group on the UPR: South Africa A/HRC/21/16* (9 July 2012) par 124.88.

⁷⁴ UN Human Rights Council *Report of the Human Rights Council on its Eighth Session A/HRC/21/16* (9 July 2012) par 567.

⁷⁵ African Committee of Experts on the Rights and Welfare of the Child (ACERWC) *Mission Report of the ACERWC to Assess the Situation of Children Affected by the Conflict in*

In 2017, during the third cycle of the Universal Periodic Review of South Africa, it was recommended that the South African government “adopt legislation to prohibit all forms of corporal punishment in the private sphere and expedite the adoption of legislation to prohibit all forms of corporal punishment including “reasonable chastisement” and “to develop, adopt and implement a national strategy to prevent and eradicate all forms of corporal punishment”.⁷⁶ The Human Rights Committee further advocated that South Africa should develop appropriate policies and support services to promote non-violence and positive parenting as well as to address sustainable awareness campaigns to address cultural and religious arguments in favour of corporal punishment. The South African government reacted by “noting” the recommendation and stating that the government “cannot commit to [the recommendation] at this stage”.⁷⁷

4 3 The intervention of the Constitutional Court

The debate surrounding the infliction of corporal punishment in the home was finally and unequivocally put to rest in the case of *Freedom of Religion South Africa v Minister of Justice and Constitutional Development*⁷⁸ (*Freedom of Religion case*).

The case emanated from the Johannesburg magistrates’ court where a parent was convicted of common assault after he was found guilty of kicking and punching his 13-year old son.⁷⁹ The child was found sitting on his bed looking at, what the father believed to be, pornographic material on the family iPad.⁸⁰ It should be noted that the father and his son stringently followed the Muslim faith and that such conduct was strictly against their faith.⁸¹ Owing to the manner in which the child was assaulted, as well as the degree of force applied by his father, a defence of reasonable and moderate chastisement or discipline on religious or cultural grounds could not be justifiably raised against the charge.⁸² On appeal, the constitutional validity of the common-law right of parents to chastise their children moderately and reasonably was deliberated.⁸³

The right of parents to inflict reasonable and moderate chastisement was argued on the basis of their religious rights,⁸⁴ cultures and traditions giving them independent authority to raise their children.⁸⁵ In turn, the

Central African Republic (December 2014) <https://www.refworld.org/docid/555c51244.html> (accessed 2020-02-07).

⁷⁶ UN Human Rights Council *Draft Report of the Working Group A/HRC/WG.6/27/L.14* (18 May 2017) par 6(233) and 6(234); *Draft Report of the Working Group A/HRC/WG.6/27/L.14* (18 May 2017) par 6.

⁷⁷ UN Human Rights Council *Report of the Working Group on the UPR: South Africa A/HRC/36/16/Add.1* (19 September 2017) Addendum par 4 and 32.

⁷⁸ [2019] ZACC 34.

⁷⁹ *S v YG* 2018 (1) SACR 64 (GJ).

⁸⁰ *Freedom of Religion case supra* par 5 and 6.

⁸¹ *S v YG supra* par 4.

⁸² *Freedom of Religion case supra* par 5 and 6.

⁸³ *Freedom of Religion case supra* par 6.

⁸⁴ *Freedom of Religion case supra* par 33.

⁸⁵ *Freedom of Religion case supra* par 8.

unconstitutionality of moderate and reasonable chastisement was argued in terms of various rights (the best interests of the child,⁸⁶ a child's right to human dignity,⁸⁷ freedom of security of the person⁸⁸ and equal protection).⁸⁹ Ultimately, the Constitutional Court decided to consider the merits of the matter based on two key rights, namely sections 12(1)(c) and 10 of the Constitution.⁹⁰

In deriving its finding, the court acknowledged that an integral part of parental responsibilities is to raise a child to become a responsible and disciplined citizen of our country.⁹¹ The court however held that

“parental authority or entitlement to chastise children moderately and reasonably has been an escape route from prosecution or conviction and that violence proscribed by section 12(1)(c) could still be committed with justification if that parental right is retained.”⁹²

In considering whether corporal punishment at home violates a child's right “to be free from all forms of violence from either public or private sources”,⁹³ the court held that “the mere exertion of some force or the threat thereof”, which is the objective of corporal punishment, falls within the ambit of section 12(1)(c) of the Constitution.⁹⁴ Ultimately, the Constitutional Court accepted that “the common law defence of moderate and reasonable chastisement ... is indeed what section 12(1)(c) seeks to prevent”.⁹⁵ In addition, “as there is a sense of shame and a feeling of being less dignified than before, that comes with the administration of chastisement to whatever degree”, corporal punishment also violates a child's right to dignity.⁹⁶ The court concluded that, as less restrictive means are available to discipline a child, there is no justification to limiting a child's rights in terms of sections 10 and 12 of the Constitution, and, accordingly, that the common-law defence of moderate and reasonable chastisement is unconstitutional.⁹⁷ In effect, the ruling criminalised corporal punishment, as a parent can no longer use the common-law defence of “reasonable and moderate chastisement” if charged with the assault of his or her child. Consequently, children are now equally protected from assault.

5 THE WAY FORWARD

In view of the Constitutional Court ruling, parents are no longer permitted to punish their children by way of corporal punishment. It is, however,

⁸⁶ S 28(2) of the Constitution.

⁸⁷ S 10 of the Constitution.

⁸⁸ S 12 of the Constitution.

⁸⁹ S 9 of the Constitution.

⁹⁰ *Freedom of Religion* case *supra* par 30–31.

⁹¹ *Freedom of Religion* case *supra* par 24, 51. See also Burchell and Milton *Principles of Criminal Law* 3ed (2005) 19–28.

⁹² *Freedom of Religion* case *supra* par 43.

⁹³ S 12(1)(c) of the Constitution.

⁹⁴ *Freedom of Religion* case *supra* par 40–41.

⁹⁵ *Freedom of Religion* case *supra* par 43.

⁹⁶ *Freedom of Religion* case *supra* par 47.

⁹⁷ *Freedom of Religion* case *supra* par 71.

questionable whether the repeal of the common-law defence of “reasonable and moderate chastisement” on its own is enough to bring about the effective prohibition of corporal punishment at home.

Studies have shown that, in countries that opted merely to remove the defence of reasonable and moderate chastisement without additional legislative amendment, parents were left with uncertainty as to whether they could still discipline their children, and if so, to what extent.⁹⁸ At the same time, although social approval rates for corporal punishment have decreased in countries where legislation was adopted to prohibit it (such as in New Zealand,⁹⁹ Germany,¹⁰⁰ and Poland),¹⁰¹ the most progress in eradicating corporal punishment at home was made in countries where a multi-faceted approach was adopted.¹⁰² In this regard, the manner in which the Swedish government has changed the complexities of societal behaviours and perceptions of corporal punishment by, *inter alia*, extensive training and awareness-raising campaigns is noteworthy.

5 1 Sweden as a case study

In Sweden, corporal punishment was widespread until the beginning of the twentieth century.¹⁰³ In 1928, corporal punishment was abolished at secondary schools.¹⁰⁴ This was followed by a series of legislative reforms aimed at overtly eliminating all forms of corporal punishment in law.¹⁰⁵

As in the case of South Africa, parents were permitted to reprimand their child by way of corporal punishment, provided the reprimand did not cause severe injury to the child. Although the section in the Swedish Penal Code allowing a parent to reprimand a child was removed in 1957, it was only in

⁹⁸ RAPCAN “Banning Corporal Punishment in the South African Experience” <https://www.childlinesa.org.za/wp-content/uploads/banning-corporal-punishment-the-sa-experience.pdf> (accessed 2020-03-21).

⁹⁹ A study in New Zealand showed that disapproval of child punishment increased by 18 per cent in a year after legislative prohibition was promulgated (Wood *Physical Punishment of Children in New Zealand: Six Years After Law Reform* (2013)).

¹⁰⁰ In Germany, full prohibition of corporal punishment was introduced in 2000. According to a study, parental approval of corporal punishment dropped by 7 per cent within a year after the legislation was promulgated (Federal Ministry of Justice & Federal Ministry for Family Affairs, Senior Citizens, Women and Youth *Violence in Upbringing: An Assessment After the Introduction of the Right to a Non-Violent Upbringing* (2003)).

¹⁰¹ In a 2011 study in Poland, it was found that since the full prohibition of corporal punishment at home in 2010, social acceptance of parents hitting children decreased by 9 per cent in three years (TNS OBOP on behalf of Ombudsman for Children of the Republic of Poland “Social Resonance of the Amendment to the Act on Counteracting Domestic Violence”. (2011) 10).

¹⁰² Durrant “Evaluating the Success of Sweden’s Corporal Punishment Ban” 1999 23(5) *Child Abuse & Neglect* 435–448.

¹⁰³ *Ibid.*

¹⁰⁴ In 1928, the Education Act was amended to forbid corporal punishment in the gymnasium.

¹⁰⁵ The Parental and Guardianship Code was amended in 1949 by replacing “punish” with “reprimand”. Corporal punishment was, however, still a legal defence in terms of the Penal Code and the Parents’ Code. In 1957, the Penal Code defence for caretakers using corporal punishment was repealed, thereby clarify the grounds for criminal prosecution of parents who physically harmed their children. Mild forms of corporal punishment that were allowed in terms of the civil Parent’s Code (Föräldrabalken) were removed in 1966.

1966 that the use of physical discipline by parents was struck from the Parents' Code.¹⁰⁶ Even so, and with the support of a strong children's rights movement, a Commission on Children's Rights reviewed the Parenthood and Guardianship Code after a 3-year-old girl was beaten by her stepfather.¹⁰⁷ The Commission showed that despite the removal of the legal defence for corporal punishment from both the Penal Code and the Parents' Code, it was unclear whether corporal punishment was actually understood to be prohibited. Consequently, in 1979, a paragraph was added to the Parents' Code explicitly and clearly prohibiting physical punishment or other injurious or humiliating treatment, thereby making Sweden the first country in the world to ban all forms of corporal punishment.¹⁰⁸ It should however be noted that the Parents' Code does not carry criminal penalties; thus, the intention of the ban was not to criminalise parents but rather to employ proactive and educational goals to change the mindset of parents to raise children without violence of any kind and to set clear guidelines for parents.¹⁰⁹

Though there was a noticeable increase in the opposition by Swedish society to corporal punishment, a poll conducted in 1971 showed that 60 per cent of the Swedish population was unaware that corporal punishment was not legally defensible.¹¹⁰ As a result, the Swedish government also implemented supportive measures, such as media broadcasts and a public education campaign that introduced positive parenting and non-violent discipline programmes.¹¹¹ As part of the campaign, a comprehensive pamphlet was translated and circulated to every household informing Swedish society of the legislative amendment. The effectiveness of the campaign was evident after a 1981 study concluded that 99 per cent of Swedish society was aware that corporal punishment of a child as a means to reprimand a child's wrongdoing was illegal in Sweden.¹¹²

In addition to the awareness campaigns, the Swedish government adopted a coherent preventive approach as far as parenting was concerned by prioritising measures allowing for supportive intervention, such as day care systems, parental leave and sickness insurance, as well as by providing educational programmes such as baby-care courses, alternative conflict resolution measures and support groups for the early identification of child abuse.¹¹³ As a result of the awareness campaigns as well as educational programmes, Swedish parents supporting the ban on corporal punishment increased from 50 per cent in 1960 to more than 90 per cent of

¹⁰⁶ Durrant 1999 *Child Abuse & Neglect* 435–448.

¹⁰⁷ *Ibid.*

¹⁰⁸ Ch 6 s 1 of the Parents' Code states: "Children are entitled to care, security and a good upbringing. Children are to be treated with respect for their person and individuality and may not be subjected to physical punishment or other injurious or humiliating treatment."

¹⁰⁹ Durrant *Family Violence Against Children: A Challenge for Society* (1996) 19–25.

¹¹⁰ Durrant *Child Abuse & Neglect* 435–448; Durrant and Olsen "Parenting and Public Policy: Contextualizing the Swedish Corporal Punishment Ban" 1997 *Journal of Social Welfare and Family Law* 19 443–461.

¹¹¹ Durrant *Family Violence Against Children: A Challenge for Society* 19–25; Durrant and Olsen 1997 *Journal of Social Welfare and Family Law* 19 443–461.

¹¹² Durrant *Family Violence Against Children: A Challenge for Society* 19–25.

¹¹³ *Ibid.*

parents in 1996, thereby signifying a broad public mind shift to eradicate corporal punishment.¹¹⁴

5 2 Lessons learned from Sweden and recommendations

In South Africa, as was the case in Sweden, corporal punishment has historically been regarded as a socially acceptable and appropriate measure to reprimand a child for wrongdoing. Although the societal shift and decline in support for corporal punishment that transpired in Sweden started with the removal of the common-law defence of moderate chastisement, the true success in eradicating corporal punishment in Sweden was much more broadly based.

From the Swedish experience, it is clear that simply disallowing parents' use of the common-law defence to inflict corporal punishment that is moderate and reasonable does not necessarily result in parents understanding that they are not entitled to hit their children. Accordingly, explicit legislation is required to set a clear message that smacking a child at home is no longer permitted. In addition to clear and explicit legislation prohibiting corporal punishment in the private sphere, there is a need for social and traditional transformation. It is submitted that, as in Sweden, a multi-faceted approach, which includes ongoing legislative amendment, extensive public awareness campaigns and training programmes, is required to effectively bring about societal change and behaviour by definitively disapproving of corporal punishment in all spheres.

6 CONCLUSION

Evidence suggests that merely removing the common-law defence of reasonable and moderate chastisement will not give effect to the Constitutional Court ruling in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development*.¹¹⁵ From the Swedish experience, it is evident that explicit legislative prohibition of corporal punishment in the private sphere will be required. It is furthermore evident that there is a need for social and traditional transformation to ensure that there is a societal mindset shift so that, instead of condoning corporal punishment in the home, society condemns it. Accordingly, there is a need for the development of appropriate policy measures to support sustainable awareness campaigns to address cultural and religious arguments in favour of corporal punishment. These changes will not only comply with government's constitutional responsibility to protect its citizens by reducing the levels of violence in South Africa, but will also ensure that South Africa is in line with various international and regional treaties and conventions that it has ratified.

¹¹⁴ *Ibid.*

¹¹⁵ *Supra.*