**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CC CASE NUMBER: CCT 320/17**

**In the application of**

**FREEDOM OF RELIGION SOUTH AFRICA** **APPLICANT**

**and**

**MINISTER OF JUSTICE AND CORRECTIONAL SERVICES** **1st RESPONDENT**

**MINISTER OF SOCIAL DEVELOPMENT** **2nd RESPONDENT**

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS** **3rd RESPONDENT**

**YG** **4th RESPONDENT**

**THE CHILDREN'S INSTITUTE** **5th RESPONDENT**

**THE QUAKER PEACE CENTRE** **6th RESPONDENT**

**SONKE GENDER JUSTICE** **7th RESPONDENT**

# HEADS OF ARGUMENT OF THE FIFTH TO SEVENTH RESPONDENTS

## A INTRODUCTION

1. On 19 October 2017 the South Gauteng High Court handed down a judgment which found that the common law defence of reasonable chastisement, applicable to parents charged with assault of their children, is not compatible with the Constitution.

2. The 5th, 6th and 7th Respondents, described in the judgment of the court *a quo* as 'the CCL *amici*', made submissions in support of the removal of the defence of reasonable chastisement.[1]

3. Subsequent to the High Court judgment the Applicant, also an amicus in the court a quo, filed an application to appeal to this Court. In our replying affidavit to that application, we indicated that we do not oppose the application regarding the standing of the Applicant. We submit that if the Applicant it is granted standing the 5th, 6th and 7th Respondent should be granted same. Oral argument will be presented on this issue if required.

## B DISCIPLINE THROUGH POSITIVE PARENTING

4. We submit that discipline of children is necessary, however, unlike the Applicant we argue that the promotion of positive parenting introduces

[1] Directions of the Chief Justice, dated 8 August 2018, Record Volume 3 page 273.

additional disciplinary approaches that are beneficial to parents and children and their relationships, as well as providing the foundation for impulse regulation and self-control.

5. Indeed, the very word, discipline, is derived from the same root as the word ‘disciple’, which means ‘someone who believes in and follows the teachings of others’. The root word is *discipulus* – from *discere* (Latin *docere*) – meaning ‘to learn’.[2]

6. The Applicant argues[3] that doing away with the defence of reasonable chastisement will disempower particularly poor parents in households where there are no ‘naughty corners’ and ‘few privileges to take away’. In the Applicants’ view, that takes a narrow, instrumental approach to discipline – it focuses on things and places to mete out punishment.

7. In contrast, we take a relational approach, in which parent/child relationships are enhanced through more talking, explaining, encouraging, expressing disapproval, setting boundaries, being consistent and leading by example – these features are the essence of positive parenting. None of these cost money

[2] Chambers Dictionary.
[3] Applicant’s HOA page 12 para 23.

and are, to many parents, including many of the poorest households, the instinctive way to parent.

8. Other parents for whom it is not instinctive, can be guided and advised through parenting skills development programmes, which the Minister of Social Development's counsel explained, and the court *a quo* found, is already part of the Children's Act and the Department's programmes.

## C ASSAULT AND THE DEFENCE OF REASONABLE CHASTISEMENT

9. The crime of assault is defined as 'unlawful and intentional application of force to the person of another'.[4] It does not matter how light the force is – even a push or a light slap is assault.

10. This is significant because the Applicants argue that a 'loving slap', a 'smack on the bum', 'spanking' of a child is not an assault. All types of force used against another person is an assault. Not all will result in prosecutions.

11. It is incorrect to argue, as the Applicant does, that the existence of the defence makes the assault lawful. It simply means that the parent may raise the defence

[4] Milton JRL *South African Criminal Law and Procedure: Common Law Crimes* (1996) Juta 406.

and if the court is convinced that the bounds of reasonable chastisement have not been breached, then he or she will be acquitted.[5] Therefore, the removal of the defence of reasonable chastisement does not create a new offence.

12. The Applicant argues that the court erred in finding that the existence of the defence obstructs the police in prosecuting parents who assault their children. They argue that '[t]his could only potentially be true if reasonable and moderate chastisement is indeed assault'.[6]

13. We disagree. On the Applicant's approach, the police officer or prosecutor can make a decision as to the reasonableness of the chastisement up front, before the complaint from a child is accepted, or before a prosecutor puts the charge to the accused. This is plainly not how the law is meant to operate. It is the court that has to decide, on the basis of evidence led before it, whether the corporal punishment is reasonable. The defence does not extinguish the crime.

14. The Applicant is concerned that well-meaning parents may be arrested and tried if the defence of reasonable chastisement is not there to protect them. This is a legitimate concern, and one that the court *a quo* considered carefully. The court *a quo* took its cue on this issue from the submissions filed on behalf

[5] Burchell and Hunt *South African Criminal Law and Procedure: Volume 1 General Principles of Criminal Law* (2008) Juta Cape Town p 150.
[6] Applicant's HOA para 30-31 para 61.3.

of the Minister of Social Development, which set out in some detail the provisions of the Children's Act which are aimed at promoting positive parenting.[7] The approach is one of prevention and early intervention.

15. The Applicant speaks of 'diversion' from the criminal justice system,[8] but this is a misunderstanding regarding the Children's Act provisions. The Children's Act empowers children's courts to instruct parents to attend prevention and early intervention programmes which include programmes on parenting skills, including the promotion of positive, non-violent forms of discipline.[9] Children's courts are civil courts, they do not have jurisdiction over criminal matters. So the idea is to avoid the criminal justice system altogether.

16. In the court *a quo*, we pointed out that the doctrine of '*de minimis non curat lex*' (the law does not concern itself with minor issues) would come to the aid of parents who are charged in instances of smacking where minimal force is used. The court *a quo* did not refer to this, however, probably because the court accepted that the approach as espoused by the Department of Social Development was to avoid criminal justice process altogether in instances of corporal punishment that did not involve significant harm.

[7] Record Volume 5 page 429-445.
[8] Applicant's HOA page 47 para 83.
[9] Children's Act section 46(1)(g).

17. The Applicant gives the impression that there will be a flood of prosecutions, but there is no reason to believe this is true. Parents can be charged under the current law, but this rarely occurs. As Professor Mathews explained in her expert affidavit a recent study in Eastern Cape found that 71% of young people reported having been beaten as a child with a belt, stick or other object. A significant proportion of young people (27% of males, 33.4% females) reported being beaten every day or every week. Qualitative interviews with young people reveal that often such beatings are for minor transgressions and only severe beatings that result in injuries get reported to authorities, suggesting that most experiences of physical punishment remain hidden.[10]

## D THE CONSTITUTIONAL RIGHTS IMPUGNED

**Which rights are central?**

18. The Applicant argues that the court erred in finding that 'the constitutional rights implicated are the rights of children, who are afforded particular protection under the Bill of Rights,[11] and that children's rights are the 'actual constitutional rights implicated'.

[10] Breen A, Daniels K, Tomlinson, M. (2015) Children's experiences of corporal punishment: A qualitative study in an urban township of South Africa. *Child Abuse and Neglect*. 48: 131-139.
[11] Record Volume 1, page 44 para 28.

19. The 5th to 7th Respondents disagree that the court a quo erred in making those findings. Children are on the receiving end of corporal punishment. The defence therefore affects their rights most directly. To characterise the case as one which is centrally about 'parental rights' and 'the right to family life' is to elevate rights that are not expressly included in the Constitution above rights which <u>are</u> expressly stated, including the rights of children whose best interests rights are to be given paramount importance.

20. In saying so, we do not suggest that children's rights always trump the rights of others. Nor do we say that the consideration of other affected rights is inappropriate. But we cannot agree that the court *a quo* erred in this regard. In fact that court, through inviting submissions from a range of role players, and by spelling out all the rights in the judgment, took great care to consider the range of rights affected.

21. The Applicant argues further[12] that that the court failed to take into account the various international human rights treaties that South Africa has ratified which protect the family as the natural unit of society, and that a right to family life should be conjured from this.[13]

[12] Applicants HOA page 14-15 para 29.
[13] Ibid.

22. In the *Certification* case,[14] this Court found that the choice of our Constitution makers, in not opting for a general 'right to family life', was in line with the set of prescribed Constitutional Principles that had been adopted. The court remarked that the Constitutional Assembly could have adopted a different approach, but it did not, and its choice was compliant with agreed-upon Constitutional Principles.[15]

23. The Applicant attempts[16] to redefine section 28(1)(b) – the child's right family care, parental care or to appropriate alternative care when removed from the family, as something akin to a parent-centred right to family life. It is not. It is the child's right – as stated in the *Certification* judgment.[17]

**The right to human dignity (section 10)**

24. The right to human dignity is foundational to the constitutional dispensation,[18] and it lies at the heart of the right to be free from all forms of violence.[19]

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[14] Certification of the Constitution of the Republic of South Africa Act, 1996 (CCT 23/96); [1996] ZACC 26; 1996 (4) SA 744 (CC) at paras 96-102.
[15] Para 102.
[16] Applicant's HOA page 40 para 74.
[17] Para 102.
[18] A Chaskalson 'Human Dignity as Foundational Value of our Constitutional Order' (2000) 16 *SAJHR* 193. See also S Woolman 'Dignity' in S Woolman et al (eds) *Constitutional Law of South Africa* 36 -2 (2009) which identifies fie definitions of 'dignity'; I Currie and J de Waal *Bill of Rights Handbook* (2013) 250-253; L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012).
[19] *S v Makwanyane* 1995 3 SA 391 (CC) paras 111, 14. See also *S v Dodo* 2001 3 SA 382 (CC) para 35.

25. In *S v Williams*[20], Langa J made it plain that measures that violate the dignity and self-esteem of an individual must be justified. He viewed the state as the great role model for a society trying move away from a violent past, and concluded that the state must promote respect for human dignity.[21] Those observations are equally applicable to this case.

26. The chastisement defence breaches the child's inherent right to human dignity. When the state fails to protect the child against corporal punishment and treats children as 'second class citizens'[22] it infringes their human dignity.

27. The defence of reasonable chastisement permits the state with to treat children with lesser concern in the context of violence in the home,[23] contrary to this Court's previous interpretation of human dignity, which relates to the 'intrinsic worth' of <u>every</u> individual.[24]

28. In *S v M (Centre for Child Law as Amicus Curiae)*[25] Sachs J stated the following in relation to the need protect children's own dignity:

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[20] 1995 (3) SA 332 (CC).
[21] *S v Williams* para 58.
[22] See Binnie J's partial dissent in Canadian case add reference
[23] *S v Baloyi* 2000 (2) SA 425 at para 7 the Constitutional Court accepted that kicking heavily on the buttocks and pushing a female roughly constitutes assault. However "pushing roughly" is very likely to survive the test of reasonable chastisement when applied to a child.
[24] *S v Makwanyane* 1995 (3) SA 391 at para 328.
[25] 2008 (3) SA 232 (CC).

> "Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniatures adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them."[26]

29. The court *a quo* placed great emphasis on this dictum, finding that it points to a 'critical mind-shift in the relationship between parents, children and the protection of the law'.[27]

30. The court *a quo* correctly found that dignity was infringed in two ways – (i) when a child is subjected to conduct that would be an assault if it were not for the defence; (ii) if an adult is assaulted the law takes its course, if a child is assaulted the defence permits and obliges the state to treat the child with a lesser level of concern and gives the State less power to protect his/her rights – this is inherently degrading.[28]

31. We fully agree with the court *a quo*'s view that 'the effect of the defence is fundamentally to undermine the critical concept of children having their

[26] Para 18.
[27] Record Volume 1 page 54 paras 46-47.
[28] Record Volume 1, page 66 para 72.

own dignity, as noted in *S v M*. Contrary to this constitutional principle, it subsumes the child's right to dignity under that of their parents'.[29]

**The right to equal protection under the law (section 9(3))**

32. In terms of section 9(3) of the Constitution the state may not unfairly discriminate directly or indirectly against anyone on the grounds (among others) of age.

33. The defence of reasonable chastisement is a breach of the child's right to equal treatment and protection under the law as it permits the state to discriminate against the child on the ground of age.

34. In the past reasonable chastisement could be exercised against women; however this defence was officially abolished in England in *R v Jackson* [1891] 1 QB.[30] Today in South Africa it is unthinkable that the law would protect women from violence of any kind or degree at work, but not at home. And yet, that is precisely what the law says about children.

[29] Record Volume 1 page 66 para 73.
[30] 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 vis a vis wives.

35. Adults have full protection against violence from any source, through both criminal and civil law. The defence, which leaves only children exposed to violence from private sources, is not constitutionally defensible.

36. In *S v Williams*, Langa J stressed that children would be more, not less, negatively affected by corporal punishment and that the state owed children a special duty.[31]

37. The law often differentiates between children and adults. This does not necessarily infringe the right to equality – if the differentiation is rational.[32] However, regarding the chastisement defence the differentiation is irrational, because children deserve more, not less, protection.

38. In *S v Baloyi* the Constitutional Court had to determine whether the Domestic Violence Act infringed upon the right to a fair trial.[33] The Magistrate in the matter granted an interdict for the protection of a mother and her child, who were victims of domestic violence by the husband.[34]

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[31] *S v Williams* para 47.
[32] *Prinsloo v Van der Linde* 1997 (3) SA1012 (CC).
[33] Ibid note 66 above *S v Baloyi* at para 1.
[34] Ibid at para 7.

39. The *Baloyi* court found that s 12(1)(c), read with s 7(2) 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.'[35]

40. The court 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.'[36] These comments are equally applicable to children who are victims of ongoing corporal punishment in the home.

41. We submit that the failure to offer the same protection in law to children because of the chastisement defence constitutes impermissible discrimination on the ground of age under section 9(3) of the Constitution.

[35] Ibid note 78 para 11. Our emphasis.
[36] Ibid para 11. Our emphasis.

**The right to be free from all forms of violence whether from public or private sources (Section 12*(1)(c)*)**

42. Section 12*(1)(c)* of the Constitution reads as follows:

> Everyone has the right to freedom and security of the person which includes the right … to be free from all forms of violence from either public or private sources.

43. Section 12(1)(c) of the Constitution explicitly prohibits all forms of violence from both public and private sources. This section is breached by the chastisement defence because it permits corporal punishment –a form of violence, delivered from a private source.

44. This Court has observed that Section 12(1)(c) requires the state to protect individuals both negatively, by refraining from such invasion itself, and positively by restraining or discouraging its functionaries or officials and private individuals from such invasion.[37]

45. The inclusion of 'private' sources in section 12(1)(c) makes it a highly persuasive argument against any form of violence in the home. The

[37] *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) at par 59.

Constitutional Court has held in the *Baloyi* case 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 <u>everyone to be free from private or domestic violence</u>'.[38]

46. The *Christian Education* judgment stated, in relation to corporal punishment in private schools, that section 12(1)(c) obliged the state to take appropriate steps to reduce violence in public and private life, and that coupled with the special duty to protect children, this represents 'a powerful requirement on the state to act'.[39]

47. The absence of a provision similar to section 12*(1)(c)* in many other jurisdictions, such as Canada, is significant when reference is had to their jurisprudence,[40] and issue to which we return later.

48. In *S v Williams* the court stated that corporal punishment is arbitrary. The court based its conclusion that juvenile whipping was unconstitutional in part

[38] *S v Baloyi (Minister of Justice and Another Intervening)* 2002 (2) SA 425 (CC) para 11. Our emphasis.
[39] *Christian Education* para 47.
[40] Article 12 of the Canadian Charter of Rights and Freedoms both prohibit "cruel and unusual punishment". Canadian jurisprudence has interpreted this standard as met only when the punishment was so excessive as to outrage the standards of decency. This is clearly protection of a lower standard to that of section 12 of the South African Constitution.

because the severity of the pain was arbitrary, depending on the amount of forced used by the person administering the whipping.[41]

49. 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 they if they complained about excessive punishment they would risk angering the school or the community.[42] We submit that corporal punishment in the home is equally arbitrary, and a context in which making complaints is equally difficult, if not more so.

50. The court *a quo* placed emphasis on the arbitrariness of the defence – as each parent may differ on what they consider reasonable.[43] This is why the fact that defence permits 'reasonable' chastisement cannot save it from unconstitutionality.

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[41] *S v Williams* 1995(3) SA 632 (CC).

[42] *Christian Education* 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.

[43] Record Volume 1 page 63-64 para 68.

**Section 28 of the Constitution**

51. Section 28(1)(d) provides that every child has 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 and article 16 of the African Charter on the Rights and Welfare of the Child.

52. The inclusion of "degradation" in section 28(1)(d) is significant, linking as it does with 'cruel, inhuman and degrading treatment'.[44] Southern African jurisprudence appears to favour the idea that corporal punishment is inherently degrading.[45]

53. 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 a self-standing right, and a procedural and interpretive principle.[46]

[44] Section 12(1)(e) of the Constitution.
[45] *S v Williams* para 91. The court found that juvenile whipping was cruel and human and degrading). See also
[46] *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC); *S v M (Centre for Child Law as Amicus Curiae).* See also Committee on the Rights of the Child *General Comment no 14 on the Best Interests of the Child* (2013) CRC/C/GC/14 para 6.

54. According to Friedman *et al* it has 'a leg up vis-à-vis other rights and principles'.[47] Although the paramountcy principle does not automatically 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'.[48]

55. This section also draws from the CRC and the ACRWC and the wording of the SA Constitution is more powerful.[49] The best interests principle indicates that the state owes special duties towards children. A defence which gives them less protection from violence than adults is contrary to this injunction.

56. The Applicant attacks the court *a quo*'s application of *S v M (Centre for Child Law as Amicus Curiae)*[50] to this case because it deals with a different context.[51] However, it is not *S v M*'s factual matrix that has caused it to be cited in almost every important child rights case in South Africa since the judgment was handed down by this court in 2007. It is rather the fact that it is the case in which the Constitutional Court gave its most detailed explanation of 'best interests' and 'paramountcy'.

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[47] Friedman et al Children's Rights in Woolman et al *Constitutional Law of South Africa* (RS 0709) 47-45.
[48] *S v M (Centre for Child Law as Amicus Curiae)* para 42.
[49] CRC article 3 and ACRWC article 4 provide that the best interest of a child are a or the primary consideration, whereas section 28(2) provides for the *paramountcy* of the best interests of a child.
[50] *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC).
[51] Applicants HOA page 32-34 para 63.

57. It is the *dicta* relating to best interests and paramountcy that the court *a quo*, very appropriately, applied in determining the violation of section 28(2). Indeed, it is hard to imagine how a court would avoid citing *S v M* when considering that subsection of the Constitution.

58. In *S v M* the court gave an account of the powerfulness of best interests, but also made it clear that best interests is not a 'trump'.[52] The Applicant suggests that the court *a quo* did not understand *S v M*, wrongly applied it, and found that children's best interests act as a trump.

59. This is quite clearly not so. The court *a quo* demonstrated a clear understanding that the best interests' principle is not a trump. The court weighed the best interests of the child against other competing rights. The court ultimately found that children's best interests, together with other rights, were violated by the existence of the chastisement defence. The court *a quo* was alive to the impact that the removal of the defence would have on the rights of parents, particularly those of parents whose religious beliefs include corporal punishment as a central tenet of their faith.[53]

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[52] The Constitutional Court has previously stated this in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC).

[53] Record Volume 1 page 70 paras 82-84.

60. The Applicant makes an extraordinary argument that because *S v M* found that there should be 'no predetermined formula' for the determination of best interests, that it was impermissible for the court *a quo* to find that the reasonable chastisement defence was not in children's best interests because, they say, such chastisement may not be in the best interests of one child, but may be in the best interests of another. Therefore, the Applicant claims, a balancing exercise has to be done on a case by case basis.[54]

61. The Applicant appears to suggest that law can never come up with a generalised position on what would be in the best interests of the child. If that were the case, the Constitutional Court would not have been able to make a decision to end corporal punishment as a sentence for child offenders in *S v Williams* – it would instead have had to require an inquiry in each case as to whether this would be in the best interests of the child.

62. In essence, the Applicant argues that corporal punishment may well be in the best interests of some children, but not others, and that the state should leave that determination to parents.

[54] Applicant's HOA page 33 para 63.3.

63. We argue, on the contrary, that as a general rule, corporal punishment will not be in the best interests of children and the state has a duty to ensure that children who are the smallest, most dependent and most vulnerable people in society have at least no less protection than any other person does against violence from private sources. We submit that that our view is the more constitutionally compliant one.

**Limitations Analysis**

64. The rights involved are profoundly important. Dignity, has been held to be a foundational right and a source of all other personal rights in the Bill of Rights.[55] Section 12 rights are generally considered to be non-derogable, and children's best interests are of paramount importance.

65. Secondly, the factors contained in section 36(1)(b) (the importance of the purpose of the limitation) and 36(1)(d) (the relation between the limitation and its purpose) also weigh in favour of abolishing the defence. This is so because in order to be justifiable, the limitation must serve a purpose which positively contributes to the establishment of an open and democratic society based on human dignity, equality and freedom.

[55] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para144.

66. The contemporary purpose of the defence is said to be the achievement of pedagogical ends – teaching children what is wrong or right. Evidence presented in the court a quo, and discussed below, bears out that corporal punishment is no more effective, and probably less effective in the long run.[56] Thus the limitation is not justifiable. Thus there is no proportionality between the infringement and the purpose it is meant to achieve.

67. Nevertheless, even if corporal punishment (or the chastisement defence) does contribute to some extent towards achieving its purpose, in order to be proportionate (and thus justifiable) the degree to which it achieves that purpose must be adequate in order to be proportionate and thus justified. We submit that expert evidence (presented in the court *a quo* and further, below) shows disproportionality, which we deal with below, or even if it does demonstrate that no proportionality exists, it still shows that the degree of proportionality is insufficient.

[56] See eg Gershoff (2002) "Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review" 128(4) *Psychological Bulletin* 539 at 539; Holden (2002) "Perspectives on the Effects of corporal Punishment: Comment on Gershoff (2002)" 128(4) *Psychological Bulletin* 590 at 591; and Straus *Beating the devil out of them: Corporal punishment in American families* (Lexington Books, New York 1994) at 4.

68. The factor relating to the nature and extent of the limitation is concerned with whether the limitation is serious or trivial, and gauges whether the infringement is or is not more extensive than warranted by its purpose. Since we argue that the principle *de minimis non curat lex* may be applied, the extent of the limitation of all of the child's rights involved is per definition more than trivial.

69. From the vantage point of the child's right to dignity in relation to freedom from violence, the proportionality inquiry is purely factual. Once again, we submit that the evidence (presented in the court *a quo*, and further, below) bears out that corporal punishment is insufficiently effective to support proportionality between means and end. However, from the perspective of the child's right to equality in relation to freedom from violence, the inquiry is an objective one, independent of the expert evidence. Therefore even if the infringement of those rights could be said to be relatively trivial, the infringement would still not be justified.[57]

70. Finally, the fifth factor considers whether less restrictive means to achieve the purpose are available. We submit that a wide range of alternative child disciplining methods exist as alternatives to corporal punishment, which are

[57] Cf *Islamic Unity Convention V Independent Broadcasting Authority* 2002 (4) SA 294 (CC) at para 49; *S v Meaker* 1998 (8) BCLR 1038 (W) at 1054E-G.

equally or more effective. These alternatives are less restrictive of the child's rights than is corporal punishment.

71. While the effect of section 28(2) is not to always trump other rights, we argue that an infringement which may otherwise have passed a limitations analysis with difficulty, must fail to do so when it infringes the best interests of a child.

## E CONSIDERATION OF SOUTH AFRICAN CASE LAW

72. The Applicant argues that the court *a quo* did not sufficiently focus on the difference between corporal punishment in the home, judicially sanctioned punishment, as in *S v Williams*[58] and chastisement in schools, as in *Christian Education*,[59] or did not give sufficient weight to this difference.[60]

73. We disagree. The court *a quo* began the discussion on jurisprudence by pointing out that the courts have considered corporal punishment vis-à-vis children in two contexts, neither of which directly involves the family environment. So the court *a quo* makes that distinction up front.

[58] [1995] ZACC 6; 1995 (3) SA 632; 1995 (7) BCLR 861 (CC).
[59] [2000] ZACC 11; 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).
[60] State where in their HOA they argue this.

74. While discussing *S v Williams*, the court *a quo* found: 'It is so that physical chastisement in the home by a parent differs from corporal punishment in this institutionalised context', and then honed in on the responsibilities of the state as role model par excellence, which the court evidently viewed as being relevant to corporal punishment in the home, too.[61]

75. While discussing *Christian Education,* the court *a quo* was at pains to point out that 'The Court noted in this regard that there was a difference between the two situations in that parental discipline involved "the intimate and spontaneous atmosphere of the home"'.[62]

76. So, in relation to both cases, it is clear that the court *a quo* was aware of the differences and placed appropriate weight on these. We therefore disagree with the Applicant's claim that the court *a quo* erred by not noting or failing to sufficiently weigh, the difference between these cases and the current one.

77. Nevertheless, the court found some commonality too. With regard to *Williams*, the impressionability of children was viewed as providing more, not less, reason for protection. With regard to *Christian Education* the court *a quo*

[61] Record Volume 1 page 50 para 40.
[62] Record Volume 1 page 51 para 42.

noted that the violence in our history and our present, may make it difficult for the state to make exemptions even for the 'most honourable of persons'.[63]

## F THE IMPACT OF CORPORAL PUNISHMENT

78. The Applicant makes many claims regarding the impact of corporal punishment, and social science relating thereto, but has not presented any evidence to this court to support those views, despite having had the same opportunity to do in the court *a quo* as the 5th to 7th Respondents.[64] They mentioned three authors in their submissions to the court *a quo*.[65] That is the sum total of the evidence, and we roundly refuted that evidence it in our supplementary submissions in the court *a quo*.[66]

79. Our expert affidavit[67] deposed to by Professor Shanaaz Mathews sets out South African empirical evidence detailing the prevalence of violence against children, including physical punishment.[68] Unlike the articles referred to by

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[63] *Christian Education* para 42.

[64] *Amici curiae* are allowed to present evidence in High Court matters – see *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others* 2013(2) SA 620 (CC).

[65] Record Volume 5 page 399-402.
[66] Record Volume 5 page 420-423.
[67] Record Volume 4 page 352-368.
[68] Record Volume 4 page 358 para15. See also Burton P, et al (2016) The Optimus Study on Child abuse, Violence and Neglect in South Africa (Research Report). Cape Town, South Africa: Centre for Justice and Crime Prevention, University of Cape Town; ***See also*** Meinck F, et al (2016) Physical, emotional and sexual adolescent abuse victimisation in South Africa: prevalence, incidence, perpetrators and locations. J Epidemiology Community Health 2016:1–7; ***See also*** Breen A, *et al*. (2015) Children's experiences of corporal punishment: A qualitative study in an urban township of South Africa. *Child Abuse & Neglect*. 48: 131–139; ***See also*** Dawes A*, et al*. Corporal punishment of children: A South African national survey. Cape Town, South Africa: Human Sciences Research Council; 2005.

the Applicants which were foreign, Prof Mathews' affidavit focussed centrally on South Africa and on comparative research from developing countries, such as a study across China, India, Italy, Kenya, the Philippines and Thailand[69] that found that corporal punishment was associated with an increase in children's aggression and anxiety symptoms, and presented as a risk factor for parental use of more serious forms of physical abuse.

80. Prof Mathews' affidavit began with a description of the magnitude of the problem, that is, the prevalence of physical punishment against children in South Africa and how this violence is linked to other forms of violence. She drew on her own research and that of other experts in the field, to demonstrate the negative effects of physical punishment. She discussed how physical punishment is ineffective as a means of discipline, both in the short and long term. The research illustrated how harsh discipline can lead to the development of violent male identities. It also discussed the links between domestic violence and physical punishment of children.

81. Prof Mathews presented evidence that physical punishment leads to an increased risk of more severe forms of child abuse, and that re subjected to physical punishment in the home albeit moderate, are at increased risk of using

[69] Gershoff ET et al (2010) Parent discipline practices in an international sample: Associations with child behaviours and moderation by perceived normativeness. *Child Dev*. 81: 487-502.

the same disciplinary methods on their own children, creating a vicious intergenerational cycle that needs to end. Evidence is also showing that positive forms of discipline fosters healthy relationships between parent and child that can only have long lasting positive effects.

82. Our expert's evidence is also supported by recently published findings from a range of published authors, discussed below. Pervasive forms of violence, such as physical punishment at home have become normalized in the lives of children. Such forms of violence are often socially accepted, tacitly condoned, or simply not perceived as abusive.[70]

83. There is overwhelming evidence illustrating the harmful effects of corporal punishment.[71] The harmful effects include direct physical harm;[72] negative impacts on mental and physical health;[73] poor moral internalisation and

[70] United Nations Children's Fund, *A Familiar Face: Violence in the lives of children and adolescents*, UNICEF, New York, 2017. Pg 11

[71] Gershoff, E. T. (2002). Corporal punishment by parents and associated child behaviors and experiences: a meta-analytic and theoretical review. Psychological bulletin, 128(4), 539-579; ***See also*** Gershoff. E. T. (2008), Report on physical punishment in the United States: what research tells us about its effects on children, Columbus, Ohio: Center for Effective Discipline; ***See also*** Gershoff, E. T. & Grogan-Kaylor A. (2016), Spanking and Child Outcomes: Old Controversies and New Meta-Analyses. Journal of Family Psychology; See also Hillis, S. et al (2016). Global prevalence of past-year violence against children: a systematic review and minimum estimates. Paediatrics, 137(3), 1-13.

[72] Beazley, H. et al (2006).What Children Say: results of comparative research on the physical and emotional punishment of children in Southeast Asia and the Pacific, 2005, Bangkok: Save the Children Sweden; Willow, C. & Hyder, T. (1998), It Hurts You Inside: young children talk about smacking, Save the Children & National Children's Bureau.

[73] Afifi, T. O. et al (2005), "Physical punishment, childhood abuse and psychiatric disorders", Child Abuse & Neglect, 30(10), 1093–1103.

increased antisocial behaviour;[74] increased aggression in children;[75] damaged education;[76] damaged family relationships increased acceptance and use of other forms of violence.[77]

84. In South Africa, the *Birth to Twenty Plus cohort study in Johannesburg-Soweto* found that violence against children is a significant cause of personal suffering and long-term ill health, poor psychological adjustment, and a range of social difficulties, including adverse effects intergenerationally.[78]

85. Empirical evidence shows that the personal and social short and long term costs of violence are very high, with effects into subsequent generations.[79]

86. Furthermore, the continued use of physical punishment perpetuates the culture of violence. A South African study found that interpersonal violence is a

[74] Gershoff, E. T. (2002). Corporal punishment by parents and associated child behaviors and experiences: a meta-analytic and theoretical review. Psychological bulletin, 128(4), 539-579.
[75] Gershoff, E. T. (2002). Corporal punishment by parents and associated child behaviors and experiences: a meta-analytic and theoretical review. Psychological bulletin, 128(4), 539-579; Millar, P. (2009), The best interests of children: An evidence-based approach, Toronto: University of Canada Press, cited in Straus, M. A. et al (2014).
[76] Gershoff, E. T. & Grogan-Kaylor, A. (2016), Spanking and Child Outcomes: Old Controversies and New Meta-Analyses. Journal of Family Psychology.
[77] Scott, S. et al (2013), "Early parental physical punishment and emotional and behavioural outcomes in preschool children", Child: Care, Health and Development, 40(3), 337-45.
[78] Richter, L.M., Mathews, S., Kagura, J. and Nonterah, E., 2018. A longitudinal perspective on violence in the lives of South African children from the Birth to Twenty Plus cohort study in Johannesburg-Soweto. *South African Medical Journal*, *108*(3), pp.181-186.
[79] Richter, L.M., Mathews, S., Kagura, J. and Nonterah, E., 2018. A longitudinal perspective on violence in the lives of South African children from the Birth to Twenty Plus cohort study in Johannesburg-Soweto. *South African Medical Journal*, *108*(3), pg 185

learned behaviour that is sanctioned, reinforced, or simply ignored from early childhood.[80]

87. While physical punishment is often not regarded as harmful but as a normal part of disciplining children, evidence shows that exposure to physical punishment is linked to more severe forms of child abuse.[81] The distinction between acceptable physical punishment and unacceptable physical abuse is largely semantic, they are linked with the same detrimental outcomes for children, just to varying degrees.[82]

88. Our expert indicated that both South African and international scholars suggest that the use of physical discipline increases the risk for more severe forms of abuse that can result in serious and permanent physical damage and even death.[83] The increasing nature of the punishment is often due to the continuation of the undesired behaviour, frustrating the parents who respond

[80] Edelstein, I. (2018) "Pathways to Violence Propensity: Results from a Two-Wave Study of Young Males in Urban South Africa," Journal of Psychology in Africa, 28(1), pp. 33–40. Pg 33; ***See also*** Ashburn, K., et al, 2017. Evaluation of the responsible, engaged, and loving (REAL) fathers' initiative on physical child punishment and intimate partner violence in Northern Uganda. *Prevention science*, *18*(7), pp.854-864.[these authors find that exposure to violence at home as a child can increase the likelihood of perpetrating or experiencing violence later in life.

[81] Gershoff ET (2002) Corporal punishment by parents and associated child behaviours and experiences: A meta-analytic and theoretical review. *Psychological Bulletin*, 128(4): 539-579.

[82] Gershoff, E. T. et al. (2018) 'The strength of the causal evidence against physical punishment of children and its implications for parents, psychologists, and policymakers', American Psychologist, 73(5), pp. 626–638. Pg 632

[83] Meinck F, Cluver L, Boyes ME, Loening-Voysey H. 2016. Physical, emotional and sexual adolescent abuse victimisation in South Africa: prevalence, incidence, perpetrators and locations. *J Epidemiology Community Health* 2016:1–7; Gershoff ET (2002) Corporal punishment by parents and associated child behaviours and experiences: A meta-analytic and theoretical review. *Psychological Bulletin*, 128(4): 539-579.

by increasing the severity of the physical punishment. When corporal punishment is used, children essentially grow up with an understanding of violence as an effective tool, and as a means to an end.[84]

89. An Australian study found that corporal punishment is regarded as a type of family violence that is legal, yet its role in the family violence scenario is not yet fully appreciated.[85] The study finds that there is a link between corporal punishment in childhood and involvement in intimate partner violence in adulthood. This corroborates evidence cited by our expert in her affidavit.[86]

90. The legality of reasonable chastisement undermines child protection more broadly and it reinforces the idea that a certain degree of violence against children is acceptable. Allowing 'light' violence which carries a high risk of escalation, increases the risk for children who may be subjected to increasingly severe violence.[87]

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[84] Edelstein, I. (2018) "Pathways to Violence Propensity: Results from a Two-Wave Study of Young Males in Urban South Africa," Journal of Psychology in Africa, 28(1), pp. 33–40. Pg 33; ***See also*** Ashburn, K., et al, 2017. Evaluation of the responsible, engaged, and loving (REAL) fathers initiative on physical child punishment and intimate partner violence in Northern Uganda. *Prevention science*, *18*(7), pp.854-864.[these authors find that exposure to violence at home as a child can increase the likelihood of perpetrating or experiencing violence later in life.

[85] Poulsen, A., 2018. The Role of Corporal Punishment of Children in the Perpetuation of Intimate Partner Violence in Australia. Children Australia, 43(1), pp.32-41.

[86] Mathews S, Jewkes R, Abrahams N. (2011) "I had a hard life": Exploring childhood adversity in the shaping of masculinities among men who killed an intimate partner in South Africa. *British Journal of Criminology*. 51(4); Mathews S, Jewkes R, Abrahams N (2014) *"*So now I'm the man*":* Intimate partner femicide and its interconnections with expressions of masculinities in South Africa. *British Journal of Criminology,* 51(4)

[87] Gershoff ET, Grogan-Kaylor A, Lansford JE, et al. Parent discipline practices in an international sample: Associations with child behaviors and moderation by perceived normativeness. *Child Dev* 2010; 81: 487–502

## G DEVELOPMENT OF THE COMMON LAW

91. We disagree with the Applicant's contention that the court *a quo* erred in raising the constitutional issue of its own accord, and the extent to which it developed the common law.[88]

92. The court *a quo* acknowledged[89] that the determination of the constitutional issue was not 'strictly necessary' to dispose of the appeal, because the development of the common law would be prospective in effect, and would therefore not affect the appellant in the case, YG.

93. We persist with our argument raised in the court *a quo* that the development of the common law should be prospective, on the grounds that to do otherwise would offend the principle of legality. This is in line with this Court's approach in *Masiya v Director of Public Prosecutions* ('*Masiya*').[90]

94. The judgment of the court *a quo* points out that because of the application of the principle of legality, it will always be the case that any order declaring the common law defence of reasonable chastisement unconstitutional will be

[88] Applicants HOA page 24 para 48.
[89] Record Volume 1 page 41 para 22.
[90] Masiya v Director of Public Prosecutions (Pretoria) (Centre for Applied Legal Studies as *amicus curiae*) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2008 (8) BCLR 827.

prospective. This will mean such questions will always be moot in relation to the accused before court. The court went on to point out that '[i]f this mootness were reason enough for a court like this one to refuse to consider the constitutional issue, it would mean that children's rights would continue to be placed in potential jeopardy unless and until the Legislature took action'.[91]

95. The court *a quo* went on to say that such an approach would not only be contrary to children's constitutionally protected best interests, but would also 'place the courts in the invidious position of having to ignore the potential unconstitutionality of the common law rule, and thus bring them into conflict with their duty under section 8(1) to apply the Bill of Rights and their duty under section 39(2) to develop the common law in line with the Bill of Rights'.[92]

96. The court's reasoning on this is sound – if developments of the common law are often likely to be prospective, and if that, without more, always precluded the courts from raising issues of unconstitutionality it would mean the courts could rarely, if ever, play any role in the development of the common law. This would be at odds with the principle that the development of the common law is primarily a duty of the courts.

[91] Record Volume 1 page 40 para 20.
[92] Record Volume 1 page 44 para 28.

97. That is why the courts have developed a more nuanced approach, which allows judges to raise and determine issues of constitutionality, even when those issues are moot for the litigant in the case. In *Director of Public Prosecutions v Minister of Justice*[93] this Court held that raising and dealing with constitutionality is also permissible where it is otherwise necessary and in the interests of justice to do so. *Mighty Solutions v Engen Petroleum*[94] reinforces this position.

98. The case of *Minister of Justice v Estate Stransham-Ford* (‘*Stransham-Ford*’) was relied on by Applicant in the court *a quo,* and they continue to argue that it is applicable.[95] This issue is dealt with at some length in the judgment. The court *a quo* found, correctly in our view, that in *Stransham-Ford* the relief was framed very narrowly in a manner that was personal to him, and is therefore not applicable.[96]

99. The Applicant also argues that that the court *a quo* should not have completely done away with the defence of reasonable chastisement but rather developed clearer definitions of ‘reasonable’ or ‘moderate’ chastisement – which they

[93] [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) para 40.
[94] [2015] ZACC 34 ; 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC).
[95] Applicant’s HOA page 23 para 47.
[96] Record Volume 1 page 42 para 24.

call the ‘callibration approach’. They rely on the majority decision in *Masiya* in this regard, which emphasised an incremental approach to common law development.

100. We disagree that the court erred. Firstly, in this case the court was not faced with the situation that the *Masiya* court faced. The *Masiya* court was being asked to expand the definition of rape to include anal rape. The Court was also being asked to make the crime of rape gender neutral, an amendment which it knew was included in a Bill before Parliament. The majority of the court therefore decided to limit the development to the facts of the case – and only extended the definition to include anal rape of girls, and not boys.

101. The task facing the court *a quo* was different. The crime of assault already exists, and is already sufficiently broad in its ambit to include all kinds of corporal punishment (although some may be considered so minor that the law need not concern itself with them). The existence of the defence of reasonable chastisement does not extinguish the crime. Removing the defence does not create a new offence.

102. Secondly, the court *a quo* did develop the common law in line with the facts of the case. The facts of the case showed that what one parent may subjectively consider reasonable chastisement was very different from what

another parent might consider to be reasonable (as the parents in this case differed from one another), and also different from what a court may ultimately consider to be reasonable.[97] In other words, the defence was shown to be arbitrary, which is something that has concerned this Court previously in the corporal punishment cases of *S v Williams*[98] and *Christian Education SA v Minister of Education*.[99]

103. We disagree with the Applicant's argument,[100]that the court *a quo* strayed into the domain of Parliament. This was not a case where a provision of a statute was declared unconstitutional. It concerned instead the development of the common law, and that is primarily the terrain of the courts.[101]

## H CONSIDERATION OF INTERNATIONAL LAW

104. The United Nations Convention of the Rights of the Child (CRC) places emphasis on the development of the child. At the heart of the CRC is the recognition of the personal autonomy of the child. Article 19 of the CRC states that the child has the right to be free from all forms of physical and mental violence.

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[97] Record Volume 1 page 63-64 para 68.
[98] [1995] ZACC 6; 1995 (3) SA 632 ; 1995 (7) BCLR 861 (CC).
[99] [2000] ZACC 11; 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).
[100] Applicant's HOA page 21 para42-43.
[101] Currie I and De Waal J (eds) *Bill of Rights Handbook (*2013) Juta p 60.

105. In *Christian Education* this court has noted the following in regards to South Africa' obligations arising from ratifying the CRC:

> "The state is further under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people especially children from maltreatment, abuse or degradation. More specially, by ratifying the United Nations Convention on the Rights of the Child, it undertook to take all appropriate measures to protect the child from violence, injury or abuse."[102]

106. In our submissions to the court *a quo* we set out in some detail[103] that the Committee on the Rights of the Child has interpreted article 19 of the CRC through two general comments,[104] which have made it clear that the Committee interprets article 19 to include corporal punishment in the

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[102] *Christian Education South Africa v the Minister of Education* 2002 (2) SA 794 CC at para 40, referring article 19(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 neglect treatment, maltreatment or exploitation, including sexual abuse, while in the care of the parent(s), legal guardian(s), or any other person who has the care of the child.

[103] Record Volume 4 pages 329-334.

[104] United Nations General Comment on the Rights of the Child "General Comment No 8 (2006): The Right of the Child to Protection from Corporal Punishment and other Cruel and Degrading Forms of Punishment; United Nations Committee on the Rights of the Child "General Comment No 13(2011): The Right of Child to Freedom from all Forms of Violence available at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11.

home, and that the defence of reasonable chastisement is viewed by the Committee as being at odds with the CRC.

107. We also provided information about the Concluding Observations adopted by the Committee following South Africa's report to the CRC in 2016,[105] as did the representative of the Minister for Social Development.[106] These directly recommended that the state '[e]xpedite the adoption of legislation to prohibit all forms of corporal punishment in the home, including 'reasonable chastisement'."[107]

108. We also set out Article 20 (1)(c) of in the African Charter on the Rights and Welfare of the Child (1990). It demands that parents administer discipline with humanity and in a manner, which is consistent with the inherent dignity of the Child.[108]

109. The African Committee of Experts on the Rights and Welfare of the Child, in its concluding observations in 2014, called on South Africa to

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[105] Record Volume 4 page 333.
[106] Record Volume 5 page 439-441.
[107] CRC/C/ZAF/CO/2 available on the OHCHR website or at http://www.refworld.org/docid/587ce86b4.html.
[108] African Charter note 19 above article 20 (1) (c) reads as follows:

> "Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development the child and shall have the duty:
> …
> (c) to ensure that domestic discipline is administer with humanity and in a manner consistent with the inherent dignity of the child…"

explicitly ban corporal punishment in the home and to promote and provide information and training on positive disciplining.[109]

110. We also pointed out that South Africa had been urged by other states in the Universal Periodic Review (which falls under the ICCPR)[110] to abolish corporal punishment in the home, including removing the defence.[111]

111. The Applicant argues that the court *a quo* was wrong in finding that the CRC Committee's 'comments' oblige South Africa to prohibit all forms of corporal punishment in the home.[112]

112. General Comments are issued by the Committee on the Rights of the Child from time to time and are authoritative interpretations of the CRC's provisions by the Committee. General Comments are not binding on states parties, but they are persuasive, and they have been relied upon and

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[109] The African Committee of Experts on the Rights and Welfare of the Child *Concluding recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the republic of South Africa initial report on the status of implementation of the African Charter on the Rights and Welfare of the Child* at para 35.
[110] The International Covenant on Civil and Political Rights available at https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.
[111] Record Volume 4 page 334-335.
[112] Applicants HOA page 25 para 51.

referenced by this court in its own interpretations of treaties, including the CRC.[113]

113. The Applicant argues that the court should have taken into consideration the principle that primary responsibility for the upbringing of children is given to their parents, which is included in the ICCPR and the African Charter on Human and People's Rights and that these treaties also provide that children have a duty to respect their parents.[114]

114. In fact, these notions are included in the CRC and the African Charter on the Rights and Welfare of the Child, too.[115] We accept this, but we do not see the responsibility to care for children, and to guide them, and to be respected by them, to be at odds with the outcome of the court's order in the court *a quo*. Caring for children and earning their respect can be achieved without any amount of violence being used.

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[113] Director of Public Prosecutions v Minister of Justice 2009 (2) SACR 130 (CC) add para of footnote no, where the Court quoted CRoC General Comments no. 3 and no. 5. In J v National Director of Public Prosecutions add ref and footnote no the Court referred to the CRoC's General comments no. 10 and no.12.
[114] Applicant's HOA page 15 para 29.
[115] CRC article 8; ACRWC 20.

## I CONSIDERATION OF FOREIGN CASE LAW

### ***Canadian Foundation* case**

115. The Applicant's place great emphasis on the case of *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*.[116]

116. We discussed this case at length in our original submissions to the Court *a quo*,[117] which we sum up below.

117. The majority held that section 43 of the Criminal Code did not offend the Charter right to life, liberty and security of the person, because it did not offend a principle of fundamental justice, it was not unduly vague, did not involve "cruel and unusual" treatment or punishment by the State and therefore did not offend section 12 of the Charter, it did not infringe the dignity or equality principles.

118. A partial dissent by Binnie J, held that section 43 infringed children's equality rights. According to him, to deny children protection against physical

[116] 2004 SCC 4. Hereafter "*Canadian Foundation*".
[117] Record Volume 4 page 314-329.

force at the hands of their parents and teachers was not only disrespectful of a child's dignity, but also turned the child into a second-class citizen.

119. Binnie J held that the majority wrongly dismissed the challenge based on equality because of the alleged correspondence between the needs, capacities and circumstances of children and the diminished protection they enjoy under section 43. This erroneously conflated the discrimination inquiry with a limitations analysis. He further held that the use of force against a child, which in the absence of section 43 would result in a criminal conviction, could not be said to "correspond" to a child's "needs, capacities and circumstances"

120. Arbour J dissented fully, finding that section 43 infringed the rights of children under section 7 of the Canadian Charter. The phrase "reasonable under the circumstances" in section 43 violated children's security-of-the-person interest and the deprivation was not in accordance with the relevant principle of fundamental justice, in that it was unconstitutionally vague.

121. In another separate dissent, Deschamps J held that the ordinary and contextual meaning of section 43 could not bear the restricted interpretation proposed by the majority. She found that that 'reasonable' covered a range of conduct, including serious uses of force against children. She also found that

the provision constituted discrimination on the grounds of age, and that it was a violation of dignity.

122. Finally, Deschamps J found that section 43 perpetuated the notion of children as property rather than human beings and sent the message that their bodily integrity and physical security was to be sacrificed to the will of their parents, however misguided.

**Analysis**

123. The Charter's provision which protects life, liberty and security of the person is different from section 12 of the South African Constitution. Hence the question whether a principle of fundamental justice has been breached is not relevant to a South African case about the common law defence of reasonable chastisement. However, it is noteworthy that while in the Canadian challenge the best interests of the child was not an operative principle, in South Africa it is (in terms of section 28(2) of the Constitution) of paramount importance.

124. Secondly, Section 12 of the Charter requires that the treatment <u>be cruel and unusual</u>. Thus the Court had to find that treatment under 43 breached section 12 in that it was both cruel and unusual. We are relying instead on section

12(1)(c) of the South African Constitution (freedom from violence from public or private sources), which has no equivalent in the Charter.

125. Thirdly, international treaty obligations, do not envisage a recalibration of the chastisement defence, but abolishing it completely. *Canadian Foundation* was decided in 2004. Since then, the CRC Committee has issued general comments 8 (2007) and 13 (2011).

126. Furthermore, the arbitrariness of the 'reasonableness' in the mind of the person doing the punishing has been seen by South African Courts as infringement of the child's rights under section 28 of the South African Constitution or the CRC.

127. Fifthly, the majority's approach to the equality inquiry is arguably correctly criticized by Binnie J. What is more, the inquiry into whether a reasonable person would have perceived the conduct as discriminatory is inapplicable to a South African section 9(1) inquiry where the test is not what a reasonable person would conclude.

128. Sixthly, the reasoning that without section 43 the Penal Code would criminalize force which falls short of what is thought of as corporal punishment is circuitous. Discrimination against children cannot be

perpetuated for the mere reason that the discriminatory legal position is the *status quo*.

129. For the above reasons, the decision in *Canadian Foundation* does not hinder this court in making a finding that the defence of reasonable chastisement is unconstitutional, based on the infringements described above.

***Plonit v Attorney-General***

130. In *Plonit v Attorney-General*[118] the Israel Supreme Court abolished that defence of reasonable chastisement. *Plonit* is on all fours with the present matter, because it deals not with a statue, but with the common law.

131. The Court held that with the passing of time the defence reflected a world view anchored in the culture in which it evolved. The Court considered whether the defence still reflected the current attitude of the Israeli law, and recognised that a decision on the legitimacy of corporal punishment of children was significantly influenced by societal-moral considerations. Those considerations, the court held, were obviously subject to change in accordance

[118] *Plonit v Attorney-General* 54 (1) PD 145 (Criminal Appeal 4596/98).

with societal and cultural developments. Therefore, what seemed fit and proper in the past might not seem so in the present.

132. The Court dealt with the numerous arguments in favour of retaining the chastisement defence, namely its perceived pedagogical purpose; the moderate level of force applied; the justifiability of spanking; and societal values pertaining thereto.

133. The Court held that both from a legal and psychological-education viewpoint, respecting parental discretion was optimal to ensure appropriate decisions in child rearing. But that discretion did not afford a whole-sale parental autonomy regarding decisions affecting children. On the contrary, parental discretion was limited and always subject to the needs, welfare and rights of the child. In fact, the law imposed an obligation on the State to intervene in the family unit and to defend the child when necessary, including from his or her parents.

134. The Court also considered psychological and educational research. It accepted studies which indicated that the use of parental punishment which caused hurt or humiliation was ineffective, undesirable, and hazardous to a child's mental and physical well-being and that moderate punishment often devolved over time into more serious violence. Furthermore, spanking

potentially inculcated violent behaviour, transforming the child into a violent adult. The Court held:

> "A court cannot and is not permitted to close its eyes to social developments and the lessons that have been learned from the educational and psychological studies, which have completely changed the attitude towards education by means of corporal punishment.
>
> Beyond the fact that painful or humiliating punishment fails as an educational system and causes the child physical and emotional damage, such punishment violates the basic right of the population of children in our society to dignity, and to integrity of mind and body.
>
> . . .
>
> . . . corporal punishment of children, or humiliation and derogation from their dignity as a method of education by their parents, is entirely impermissible, and is a remnant of a societal-educational outlook that has lost its validity. . . . The use of punishment which causes hurt and humiliation does not contribute to the child's personality or education, but instead damages his or her human rights. Such punishment injures his or her body, feelings, dignity and proper development. Such punishment distances us from our goal of a society free of violence."

135. The Court addressed the argument that it is inappropriate to extend criminal sanction to parents who apply what some would consider commensurate force (eg a light manual slap on the buttocks). It held that principles of the criminal law satisfactorily allayed any concern of intrusion of the criminal justice system within the family. Filters like prosecutorial discretion and the *de minimis non curat lex* defence would sufficiently protect familial integrity. The Court dealt with misgivings about exposing parents to criminal liability as follows:

> "The proper response to this argument is that in the legal, social and educational reality in which we live, we cannot leave open the definition of 'reasonable' and this compromise at the risk of danger to the health and welfare of children. We must also take into account that we live in a society in which violence is as pervasive as a plague; an exception for 'light' violence is likely to degenerate into more serious violence. We cannot endanger the bodily and mental integrity of the minor with any type of corporal punishment; the type of permissible measures must be clear and unequivocal, the message being that corporal punishment is not permitted."

## J CONCLUSION AND REMEDY

136. We submit that in the light of our submissions the following order is appropriate:

136.1 That the common law defence of reasonable chastisement is unconstitutional, and no longer applies.

136.2 That the development of the common law referred to above of this order shall be applicable only to conduct which takes place after the date of judgment in this matter.

**A M SKELTON**

**COUNSEL FOR THE 5TH TO 7TH RESPONDENTS**

**PRETORIA**

**19 OCTOBER 2018.**