



## “Don’t Try this at Home?”: Reasonable or Moderate Chastisement, and the Rights of the Child in South Africa with *YG v S* in Perspective

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### Abstract

In October 2017, in *YG v The State*, the High Court in Gauteng handed down a judgment that declared the common-law defence of “reasonable or moderate chastisement” unconstitutional. This article, while not a case comment, focuses on this case, and discusses some of the arguments highlighted by the defendant as well as one of the *amici curiae* in support of the reasonable chastisement defence. It also assesses the extent to which those arguments carry weight when assessed against the international human rights framework by which South Africa is bound. The recommendations that South Africa received from various human rights treaty bodies in relation to the prohibition of corporal punishment in the home setting takes centre stage. The article also draws on examples from foreign law, and offers an appraisal of a non-exhaustive list of substantive rights, namely, the best interests of the child, the equal protection of the law, as well as the right to freedom of religion or belief, in the context of corporal punishment in the home setting. A conclusion sums up the discussions, by underscoring that a judgment in the Constitutional Court that declares the common-law defence of reasonable chastisement as unconstitutional could serve as the touchstone for the possible expansion of the effective protection of the rights of children against all forms of violence in South Africa.

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## 1 INTRODUCTION

A recently published report, *Know Violence in Childhood*<sup>1</sup> estimates that of the 1.7 billion children who experienced violence, corporal punishment affected nearly 80 per cent. In 2014 UNICEF also underscored that worldwide around six in ten children worldwide aged two to fourteen experience regular physical punishment.<sup>2</sup>

Reporting by the Global Initiative to End Corporal Punishment shows that more than half of all UN Member States (53 states) have now either prohibited all corporal punishment of children or clearly committed to doing so (55 states).<sup>3</sup> This is proof that globally, the number of children that live in countries that have prohibited corporal punishment in all settings is increasing. International human rights law, in particular, the Convention on the Rights of the Child (CRC), plays a significant role in positively influencing domestic progress aimed at prohibiting corporal punishment in all settings.

What started as a bold move in Sweden in 1979 as the first country to prohibit corporal punishment in all settings, continues to expand its reach in all four corners of the world. For instance, France proposed in the National Assembly in 2018 an amendment to the Civil Code to prohibit anyone with parental authority from using corporal punishment; Mexico approved an amendment to article 423 of the Federal Civil Code to prohibit corporal punishment; Seychelles in 2017 passed article 68(3) of the Education (Amendment) Bill and prohibited corporal punishment in all schools; in Scotland there is an ongoing effort to remove the legal defence of “justifiable assault”; while in Wales government has expressed its commitment to remove the defence of reasonable chastisement and has embarked on a twelve weeks consultation.<sup>4</sup> In October 2016, the National Assembly of Slovenia amended and supplemented the Law on Prevention of Family Violence to explicitly prohibit corporal punishment.<sup>5</sup>

There are also examples where corporal punishment is prohibited, including in the home setting, as a result of a judicial decision. For instance, the defence of reasonable chastisement was declared unconstitutional by the Supreme Court in Israel.<sup>6</sup> In Africa too, there are a few examples of where the judiciary has declared corporal punishment, including in the home setting, to be unconstitutional or to be in violation of children’s rights. Such case law exists in Kenya, Namibia, and Zimbabwe.<sup>7</sup>

South Africa too has not been immune to some of these positive developments. For instance, already more than two decades ago, South Africa prohibited corporal punishment in the school setting.<sup>8</sup> However, a prohibition in the private sphere — in the home setting — is

- 1 Know Violence in Childhood “Ending Violence in Childhood: Global Report, 2017” 31 <https://www.globalreport.knowviolenceinchildhood.org> (18 March 2018).
- 2 For full compilation of the data see UNICEF “Violent Discipline” <https://data.unicef.org/topic/child-protection/violence/violent-discipline/> (18 March 2018).
- 3 According to the Global Initiative to End All Corporal Punishment of Children, 57 more states have committed to reforming their laws to achieve a complete ban. See Global Initiative to End All Corporal Punishment of Children <https://endcorporalpunishment.org/countdown/> (18 March 2018).
- 4 End Corporal Punishment, Newsletter No 39, March 2018 <http://www.endcorporalpunishment.org/resources/newsletters/document-store/global-newsletter-39.pdf> (30 March 2018).
- 5 Law No. 542-08/16-9/2.6.
- 6 Associated Press “Israeli Supreme Court Bans Hitting Children” 27 January 2000 <https://www.deseretnews.com/article/809203/Israeli-Supreme-Court-bans-hitting-children.html> (18 March 2018).
- 7 See Matheka “Court Finds Teacher Guilty of Corporal Punishment” *Daily Nation* 2 July 2018 <https://www.nation.co.ke/news/Teacher-found-guilty-corporal-punishment-/1056-4643014-g7p1v5/index.html> (20 July 2018).; In Namibia, the Supreme Court found in *Ex parte: Attorney-General in Re: Corporal Punishment by Organs of State* (SA 14/90) [1991] NASC 2 (5 April 1991) that the imposition of corporal punishment on adult and juvenile offenders to be inhuman and degrading treatment contrary to the Constitution; The Zimbabwe High Court has declared, in two decisions, that the imposition of corporal punishment on children is unconstitutional. See *S v Chokuramba* (HH 718-14 CRB R 87/14) (31 December 2014) and *Pfungwa v Headmistress of Belvedere Junior Primary School* (HH 148-17 HC 6029/16) [2017] ZWHHC 148 (3 March 2017).
- 8 Even though the South African Schools Act 84 of 1996 secured prohibition of corporal punishment in the school setting, the reality leaves much to be desired. In fact, the section of the Act was challenged in Court and made it to the Constitutional Court. See *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11; 2000 4 SA 757; 2000 10 BCLR 1051 (18 August 2000). The case was triggered as a result of the passing of the South African Schools Act in 1996, which in s 10 prohibited any person from administering corporal punishment at a school to a learner (s 10(1)). It further provided that whosoever contravenes the provision is “guilty of an offence and liable on conviction to a sentence which could be imposed for assault.” (s 10(2)). The main question for determination in the case was whether parliament violated the rights of parents of children in independent schools, who because of their religious convictions have accepted its use. The appellant, an umbrella body of 196 independent Christian schools in South Africa argued that the law violated

not present, and the Children's Act 38 of 2005 does not yet contain a prohibition of corporal punishment in the home setting. While two Amendment Bills of the Children's Act were tabled in parliament in 2015, none of them actually contained a prohibition of corporal punishment in the home setting. The Third Amendment Bill (insertion of Section 12A in Act 38 of 2005 of August 2018 version) contains wording that will prohibit corporal punishment in the home setting, but has not been introduced in parliament.

In the sphere of court decisions, in October 2017, in *YG v The State*,<sup>9</sup> the High Court in Gauteng handed down a judgment that declared the common-law defence of "reasonable or moderate chastisement" unconstitutional. Expectedly, the reactions to the judgment have been mixed, ranging from those who applauded the ruling to those who bemoaned the judgment as an assault on parental rights and religious freedom, and labelled it as being detached from the South African context. The nature of the mixed reactions is probably not more visible than in some of the headings of the media reports (as can be confirmed through a quick Google news search) that were published in the aftermath of the judgment.

This article, while not a case comment *per se*, focuses on the rights of the child in South Africa with *YG v The State* as an anchor, and assesses its overall merit on the basis of the international human rights framework by which South Africa is bound. The article starts by offering a summary of the High Court decision. It subsequently discusses some of the arguments highlighted by the defendant as well as one of the *amici curiae* in support of the reasonable chastisement defence, and assesses the extent to which those arguments carry weight when assessed against the international human rights framework. Following this, the recommendations that South Africa received from various human rights treaty bodies in relation to the prohibition of corporal punishment in the home setting takes centre stage. Based on experience both in South Africa and elsewhere, a subsequent section charts some of the potential scenarios that would arise and need to be addressed in the aftermath of the judgment. The article does not engage the procedural aspects that could be raised in the context of the case, such as whether the court *quo erred* in raising the constitutional issue of its own accord or whether the application for leave to appeal have any prospect of success. However, a select number of substantive rights, namely, the best interests of the child, the equal protection of the law, as well as the right to freedom of religion or belief, in the context of corporal punishment in the home setting are explored. A conclusion sums up the discussion.

## 2 YG v S: A BRIEF

On 19 October 2017, in *YG v The State*,<sup>10</sup> the High Court handed down a judgment that declared the common-law defence of "reasonable or moderate chastisement" by parents unconstitutional. The case landed in the High Court as a man appealed his conviction on two charges of assault with the intent to do grievous bodily harm — the first on his thirteen year old son [M] and the other on his wife [YG].

The assault against the son — M — was reportedly inflicted because the father suspected that his son had been watching pornography and lied about it. The level of violence used in the first assault was in contention. The Appellant argued that he had used his open palms to punish his son, but a testimony by a medical doctor indicated that the bruising in question was inflicted by the use of a fist rather than by open palms. The Appellant invoked his right of "reasonable chastisement" as a defence, which led to the main point of contention whether such a defence can pass constitutional muster especially when assessed against the rights of the child.

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a number of sections of the Constitution — especially the right to privacy (s 14 of Constitution), the right to freedom of religion, belief and opinion (s 15(1)); the right to education (s 29(3)); the right to language and culture (s 30); and the rights of cultural, religious and linguistic communities (s 31). The Court was of the view that the matter before it "does not oblige us to decide whether corporal correction by parents in the home, if moderately applied, would amount to a form of violence from a private source" (para 48 of judgment). The Court reasoned, among others that, is it not unreasonable to expect the appellants "to make suitable adaptations to non-discriminatory laws that impact on their codes of discipline", and that save for this one aspect, "the appellant's schools are not prevented from maintaining their specific Christian ethos" (para 41 of judgment). The Court concluded that it is necessary to uphold the "generality of the law in the face of the appellant's claim for a constitutionally compelled exemption" (para 52 of the judgment).

<sup>9</sup> *YG v The State*, High Court of Gauteng Local Division, Case No. A263/2016.

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

The case was joined by four *amici curiae*. The Centre for Child Law at the University of Pretoria represented the Children's Institute, Quaker Peace Foundation, and Sonke Gender Justice. On the other hand, Freedom of Religion South Africa (FORSA) joined as *amicus curiae* in support of the arguments made by the Appellant, that the common-law defence of reasonable chastisement is valid and should not be declared to be in violation of the rights of the child.

The judge rightly posed the question: "Is the reasonable chastisement defence constitutionally compatible?"<sup>11</sup> Before answering this, the judge rehashed that the South African Constitution "imagines children as their own constitutional beings"<sup>12</sup> and offers a background in relation to "parental powers" and its link to reasonable chastisement defence,<sup>13</sup> and acknowledged that the "existing case law and authorities are littered with reference to parental right to use reasonable and moderate chastisement."<sup>14</sup>

The judgment lists the constitutional rights that are implicated. These rights, are "the right to human dignity (section 10); the right to equal protection under the law (section 9(3); the right to be free from all forms of violence from either public or private sources (section 12(1) (c)); the right not be treated or punished in a cruel, inhuman or degrading way (section 12(1) (e)); the right of children to be protected from maltreatment, neglect, abuse or degradation (section 28(1)(d)); the right to and the constitutional principle that a child's best interests are of paramount importance in every matter concerning the child (section 28(2))."<sup>15</sup>

While the submission by FORSA underscored the importance of parental discipline, and emphasised that restriction of this power "would not be in the best interests of the child", the Court begged to differ. It did so on the basis of four central arguments. The Court took exception to the fact that while case law has provided the various factors that needed to be taken into account in deciding whether a chastisement was reasonable, "the common law does not lay down strict guidelines as to what constitutes reasonable chastisement".<sup>16</sup> It also argued that the constitutional protection from "all forms of violence" as well as the right to bodily and psychological integrity would not bode well for the defence.<sup>17</sup> Furthermore, the Court underscored that "[h]uman dignity lies at the heart of" the protection provided by section 28(1)(d) of the South African Constitution,<sup>18</sup> and that section 9(1) and (3) on equal protection of the law would be violated by the defence of reasonable chastisement.<sup>19</sup>

The Court reasoned that the parental defence "to inflict moderate and reasonable chastisement on a child for misconduct provided that this was not done in a manner offensive to good morals or for objects other than correction and admonition", violates the above-listed constitutional rights. Section 28(2) of the Constitution that provides that "[a] child's best interests are of paramount importance in every matter concerning the child" took central stage in the Court's reasoning. The Court articulated that children, who are a more vulnerable group deserving of special protection [and whose best interests are of paramount importance in the Constitution] should not be granted less protection than adults to whom a reasonable chastisement defence does not apply.<sup>20</sup>

The Court had to consider whether the violations above could be justified, based on its purpose, importance, as well as effect.<sup>21</sup> An assessment of whether the least restrictive means of achieving the purpose was also undertaken.<sup>22</sup> In doing so, the arbitrariness present in the application of the defence of reasonable chastisement did not sit well with the Court, especially given section 28 of the South African Constitution. The Court also disagreed with the assertion by FORSA that the reasonable chastisement defence was justified because of the religious rights of parents.<sup>23</sup>

11 *Ibid* para 61.

12 *Ibid* para 61.

13 *Ibid* paras 63 and 64.

14 *Ibid* para 63.

15 *Ibid* para 36.

16 *Ibid* para 67.

17 *Ibid* para 69.

18 *Ibid* para 71.

19 *Ibid* para 75.

20 *Ibid* para 72.

21 *Ibid* para 77.

22 *Ibid* para 78.

23 *Ibid* para 84.



The Court summoned, among others, a range of sources from international human rights law. It stated unequivocally that because of its status as a State Party to the CRC, South Africa is bound by the protections accorded to children therein.<sup>24</sup> The recommendations received by South Africa from the UN Committee on the Rights of the Child (CRC Committee) as well as the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the issue of corporal punishment were also given weight. In addition, explicit reference is made in the judgment to General Comments No 8 on corporal punishment<sup>25</sup> as well as General Comment No 13 on violence against children.<sup>26</sup> After recognising its constitutional obligation to apply the Bill of Rights<sup>27</sup> and also to develop the common law and bring it into compliance with the Bill of Rights,<sup>28</sup> the Court confirmed the assault charges against YG as well as M. The common-law defence of reasonable chastisement was also declared unconstitutional.<sup>29</sup>

### 3 INTERNATIONAL LAW AND THE SOUTH AFRICAN COURTS

A brief discussion of the status of international law in the South African courts is important to add context to the subsequent sections of this article. South Africa is one of the many countries in Africa that have explicitly constitutionalised the extent to which international law plays a role in domestic law and jurisprudence.<sup>30</sup> Section 39 of the Constitution, titled "Interpretation of Bill of Rights" provides in part:

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum—
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and
  - (c) may consider foreign law.<sup>31</sup>

It is fitting then that this provision is commonly known as the "interpretation clause".

There are a large number of cases that rely on section 39 of the Constitution for their interpretation of a section of the Bill of Rights. As early as 1996, in *S v Makwanyane*, involving the question of the constitutionality of the application of the death penalty, the Constitutional Court indicated that "international agreements and customary law provide a framework within which ... the Bill of Rights can be evaluated and understood"<sup>32</sup> and "may provide guidance as to the correct interpretation of particular provisions".<sup>33</sup>

Subsequent case law,<sup>34</sup> as well as literature,<sup>35</sup> are of the view that the role of international human-rights law for the purpose of interpretation is not limited to that which South Africa has ratified. However, it should be noted that the instruments ratified by South Africa would have more persuasive force. The *Grootboom* case is instructive here, as the applicability or otherwise of the International Covenant on Economic Social and Cultural Rights (ICESCR) was not settled. The Court reasoned that while the "weight to be accorded to any particular ... rule of international law will vary", it was convinced that "where the relevant principle of international law binds South Africa, it may be directly applicable".<sup>36</sup>

24 *Ibid* 53.

25 *Ibid* 54.

26 *Ibid* 55.

27 Section 8(1) of the Constitution.

28 Section 39(2) of the Constitution.

29 *Ibid* para 71.

30 An illustration of this is the reliance of foreign legal material by the South African Constitutional Court. In the period between 1994 and 2011, the South African Constitutional Court handed down 437 judgments citing and referring to 3047 foreign decisions. See Rautenbach "The South African Constitutional Court's Use of Foreign Precedent in Matters of Religion: Without Fear or Favour?" 2015 *PELJ* 1546, 1550.

31 Section 39(2) provides that "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

32 *S v Makwanyane* 1995 3 SA 391 (CC) paras 36–7.

33 *Ibid*.

34 See *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC) para 26.

35 Dugard 'The Role of International Law in Interpreting the Bill of Rights' 1994 *SAJHRL* 208.

36 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 28.

Moreover, norms that have risen to the level of customary international law would also be binding on South Africa (unless they are inconsistent with the Constitution or an Act of parliament)<sup>37</sup> not because government has ratified any binding international human rights instrument in relation to the issue, but by the mere fact of South Africa being a member of the international community.<sup>38</sup>

Fortunately, section 233 of the Constitution provides that in interpreting law, an interpretation that is consistent with international law is the preferred approach. According to De Wet, these provisions actually give a court “considerable scope in reducing a possible conflict between legislation and international law, whether it is customary international law or treaty law”.<sup>39</sup>

Based on this background, it is necessary to make a compelling case that South African courts have an obligation — especially with emphasis on the strong “must consider international law” wording used in section 39(1) of the Constitution — to accord weight to the CRC and the African Charter on the Rights and Welfare of the Child (ACRWC).<sup>40</sup> A combined reading of sections 39 and 232 of the Constitution also makes it incumbent on South African courts to take stock of the provisions of these instruments.

#### 4 SOUTH AFRICA’S HUMAN RIGHTS OBLIGATIONS: INTERNATIONAL HUMAN RIGHTS BODIES AND CORPORAL PUNISHMENT

There is a degree of discord at international level on the stand the South African government has taken on the issue of corporal punishment in the home setting. For instance, the Human Rights Council,<sup>41</sup> a subsidiary body of the UN General Assembly that South Africa is a founding member of, and on which it had served two consecutive terms<sup>42</sup> before returning for a third term in January 2014,<sup>43</sup> had already reviewed the government three times in the Universal Periodic Review (UPR) process.<sup>44</sup> The UPR process is described as “a unique process which involves a review of the human rights records of all UN Member States”.<sup>45</sup> Unlike the treaty body system, it is “a State-driven process, [...] which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations”.<sup>46</sup>

On all three occasions (2008, 2012, and 2017) the South African government has received recommendations to prohibit corporal punishment in all settings, including in the home. In 2006, Slovenia recommended to the South African government that it should “commit not only to removing the defence of reasonable chastisement but also to criminalising corporal punishment”.<sup>47</sup> In 2012, the Mexican government recommended that South Africa should “[p]rohibit and punish corporal punishment both in the home, as well as in public institutions such as schools and prisons”.<sup>48</sup> In the same vein, in 2017, the number of states making a similar recommendation to the South African government increased to two — namely the governments of Israel and Liechtenstein. Such an increase is probably because of the recognition that government has not complied with two previous similar recommendations. The government of Israel recommended that South Africa should “[a]dopt legislation to prohibit all forms of corporal punishment in the private sphere”.<sup>49</sup>

37 Section 232 of the Constitution.

38 Section 233 of the Constitution.

39 De Wet “‘Friendly but Cautious’ Reception of International Law in the Jurisprudence of the South African Constitutional Court” 2005 *Fordham International Law* 1533.

40 The CRC ratified on 16 June 1995 and the ACRWC ratified on 7 January 2000.

41 For details on the mandate, composition, activities of the Human Rights Council visit <<http://www.ohchr.org/EN/HRBodies/HRC/Pages/Home.aspx>>.

42 From 2006 to 2010.

43 In 12 November 2013, the UN General Assembly elected South Africa to serve on the UN Human Rights Council.

44 In 2008, 2012 and 2017. The UPR is created through the UN General Assembly on 15 March 2006 by Resolution 60/251.

45 OHCHR, Universal Periodic Review <<http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>> (accessed 25-10-2017).

46 *Ibid.*

47 23 May 2008, A/HRC/8/32, Report of the Working Group on the Universal Periodic Review: South Africa para 67(1).

48 See Global Initiative to End All Corporal Punishment of Children “Country Report for South Africa: Universal Periodic Review of South Africa’s Human Rights Record” [https://endcorporalpunishment.org/reports-on-every-state-and-territory/south-africa/#\\_ftn4](https://endcorporalpunishment.org/reports-on-every-state-and-territory/south-africa/#_ftn4). (18 March 2018).

49 18 May 2017, A/HRC/WG.6/27/L.14, Draft report of the Working Group paras 6 (233).

Liechtenstein asked the South African government to “[e]xpeditiously the adoption of legislation to prohibit all forms of corporal punishment in the home, including ‘reasonable chastisement’”.<sup>50</sup>

In accordance with the Resolution of the Human Rights Council on the UPR process, states can either accept or note recommendations.<sup>51</sup> The South African government neither “accepted” nor “noted” the 2008 recommendation on corporal punishment. Government “accepted” the 2012 recommendation.<sup>52</sup> In what appears to be a reversal of its 2012 position, the government only “noted” the 2017 recommendation on prohibiting corporal punishment in the home setting.<sup>53</sup> The format, content, adoption and follow-up of the recommendations are governed by the same Resolution.<sup>54</sup> In relation to adoption, the Resolution requires that

[r]ecommendations that enjoy the support of the State concerned will be identified as such. Other recommendations, together with the comments of the State concerned thereon, will be noted. Both will be included in the outcome report to be adopted by the Council.<sup>55</sup>

In other words, states should explain clearly and in writing their responses to recommendations, which responses are ultimately included as an addendum.

In response to the 2008 recommendation, the government indicated that legislation on domestic violence in South Africa addresses corporal punishment in the home setting,<sup>56</sup> which seemed to at least intimate that corporal punishment is prohibited in the home setting, which, of course, is not an accurate reflection of the reality. In response to the 2012 recommendations, which it accepted, the government still went ahead and provided a comment that is not specific to any setting, that “[c]orporal punishment is outlawed in the South African government system and perpetrators of this inhumane form of punishment and violence are reported to law enforcement and accordingly punished”.<sup>57</sup> In 2017, government explained that all “noted” recommendations, by definition including the one on corporal punishment in the home setting, are those “which South Africa is in the process of considering and cannot commit to at this stage”.<sup>58</sup> This last response was provided as recently as September 2017, just a little over a month after the hearing of the YG case in August.

Apart from the UPR recommendations, human rights treaty bodies have also provided similar recommendations. The High Court judgment rightly takes note of the Concluding Observations of the CRC Committee (2016) and of the ACERWC (2015).

Already a decade earlier, in 2006, during the review of the Initial Report of South Africa, the CRC Committee indicated that “it remains concerned that corporal punishment is still permissible within families”.<sup>59</sup> In this respect, the Committee recommended that government should “take effective measures to prohibit by law the use of corporal punishment in the family and, in this context, examine the experience of other countries that have already enacted similar legislation”.<sup>60</sup>

50 18 May 2017, A/HRC/WG.6/27/L.14, Draft report of the Working Group paras 6 (234).

51 United Nations Human Rights Council: Institution Building 18 June 2007, A/HRC/RES/5/1.

52 OHCHR, “South Africa, Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State Under Review” A/HRC/21/16/Add.1 and Annex A <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/167/64/PDF/G1216764.pdf?OpenElement>> (20 March 2018).

53 OHCHR, “Report of the Working Group on the Universal Periodic Review, South Africa” A/HRC/36/16 para 139.233 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/216/43/PDF/G1721643.pdf?OpenElement> (20 March 2018). Also see OHCHR “South Africa, Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State Under Review” A/HRC/36/16/Add.1 para 32 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/272/57/PDF/G1727257.pdf?OpenElement> (20 March 2018).

54 United Nations Human Rights Council: Institution Building 18 June 2007, A/HRC/RES/5/1.

55 United Nations Human Rights Council: Institution Building 18 June 2007, A/HRC/RES/5/1 para 32.

56 23 May 2008, A/HRC/8/32, Report of the Working Group para 67(1); 1 September 2008, A/HRC/8/52, Report of the Human Rights Council on its Eighth Session para 567.

57 18 September 2012, A/HRC/21/16/Add.1, Report of the Working Group: Addendum, annex.

58 19 September 2017, A/HRC/36/16/Add.1, Report of the Working Group: Addendum, paras 4 and 32.

59 CRC Committee: Concluding Observations, South Africa Initial Report (February 2000) (CRC/C/15/Add.122) para 28.

60 *Ibid.*

The Human Rights Committee, the body that monitors the implementation of the ICCPR<sup>61</sup> also shared similar recommendations. In April 2016, government was asked to “take practical steps, including through legislative measures, where appropriate, to put an end to corporal punishment in all settings”.<sup>62</sup> This recommendation was shared after the Committee expressed concern, among others, that “corporal punishment in the home is not prohibited”.<sup>63</sup> The Committee Against Torture (CAT) too<sup>64</sup> explicitly addressed the obligation to “ensure that legislation banning corporal punishment is strictly implemented”.<sup>65</sup>

From these recommendations, five central messages can be deciphered. First, the obligation to prohibit and address corporal punishment in all settings is an obligation that emanates from multiple human rights instruments that South Africa has ratified. Secondly, the need for legislation to prohibit corporal punishment in all settings, including in the home setting, is emphasised. Thirdly, legislation should be accompanied by “efforts to raise the awareness and build the capacity of families, of communities and of professionals working for and with children”<sup>66</sup> and the promotion of positive discipline. Fourthly, the recommendation to ensure that legislation is “strictly implemented” supports the assertion that even when legislation banning corporal punishment is in existence, non-implementation of the law contributes to lack of accountability. The reference to “strictly implemented” should, maybe arguably, not be read to imply that parents will be prosecuted for every single violation. Finally, the repetition of these recommendations from multiple human-rights bodies for a long period should be taken to underscore the urgency that needs to be accorded to ban corporal punishment in all settings.

## 5 JUDICIAL DECISION-BASED PROHIBITION OF CORPORAL PUNISHMENT: SOME LESSONS BASED ON FOREIGN LAW

As discussed above, the importance of foreign law in the interpretation of the Bill of Rights of the South African Constitution is explicitly acknowledged in section 39 (1)(c). The words used, “may consider foreign law”, is permissive.<sup>67</sup> Therefore the reference to “foreign law” includes jurisprudence that may be relevant for the disposition of a case.<sup>68</sup> There are some countries around the world whose prohibition of corporal punishment is based on judicial decisions. The countries include Israel,<sup>69</sup> Italy,<sup>70</sup> Portugal,<sup>71</sup> and Zimbabwe.<sup>72</sup> A look at some of their experiences could shed light on some of the possible approaches to, as well as implications for, the prohibition of corporal punishment in the home setting.

In looking at foreign law, the experience of Israel is instructive for a number of reasons, including because the decision comes from its highest court (the Supreme Court) and that as a common-law country, the decision is binding on all other courts. In the *State of Israel v Plonit*<sup>73</sup> the Israeli Supreme Court had to deal with a case precipitated by the corporal punishment

61 OHCHR “Monitoring Civil and Political Rights” <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx> (20 March 2018).

62 Human Rights Committee: Concluding Observations, South Africa Initial Report (April 2016) (CCPR/C/ZAF/CO/1) para 25.

63 *Ibid* para 24.

64 OHCHR “Committee Against Torture” <https://www.ohchr.org/en/hrbodies/cat/pages/catindex.aspx> (20 March 2018).

65 Committee Against Torture: Concluding Observations, South Africa Initial Report (December 2006) (CAT/C/ZAF/CO/1) para 25.

66 CRC Committee: Concluding Observations, South Africa Second Periodic Report (October 2016), (CRC/C/ZAF/CO/2) para 35 (c).

67 The wording in the 1993 Interim Constitution provided that in interpreting the chapter on fundamental rights, a court “may have regard to comparable foreign case law.” See s 35(1) of the 1993 Interim Constitution.

68 See in general Lollini “Legal Argumentation Based on Foreign Law: An Example from Case Law of the South African Constitutional Court” 2007 *Utrecht Law Review* 60; Botha “Comparative Constitutional Law in the Classroom: A South African Perspective” 2010 *Penn State International Law Review* 531 <<http://www.ialsnet.org/meetings/constit/papers/BothaHenk%28SouthAfrica%29.pdf>> (20 March 2018).

69 Criminal Appeals (Cr. App.) 4596/98, *State of Israel v Plonit*, 54 Piskei Din (P.D.) 145 (Rhona Schuz translation) as cited in Bitenisky (2006) *Corporal Punishment of Children: A Human Rights Violation* 205.

70 Cambria, Cass, sez. VI, 18 Marzo 1996, Foro It II 1996.

71 See Global Initiative to End All Corporal Punishment of Children “Country Report for Portugal: Prohibition of Corporal Punishment” <<https://endcorporalpunishment.org/reports-on-every-state-and-territory/portugal/>> (20 March 2018).

72 *S v Chokuramba and Pfungwa v Headmistress of Belvedere Junior Primary School*.

73 The name “Plonit” is used in Hebrew to refer to a female party to a case and to respect her privacy.



of two children aged five and seven by their single mother. It was indicated in the case that the mother inflicted corporal punishment on her children daily.<sup>74</sup> The objects often used were identified as slippers or household implements, including a vacuum cleaner.<sup>75</sup> While no serious injuries were sustained, testimony confirmed that the children had come to school with punishment marks on their bodies.<sup>76</sup> As a result the mother was convicted of assault: the Supreme Court confirmed it by characterising her actions as abusive, and also rejected the parental defence for corporal punishment.<sup>77</sup> Until this time, article 24 of the Civil Wrongs Ordinance 1944 had explicitly catered for a defence for the use of corporal punishment, by stating that "it will be a defence if ... the defendant is the parent or guardian or teacher of the plaintiff ... and he or she punished the plaintiff in an amount reasonably necessary in order that the plaintiff correct his or her behavior." In the absence of legislation that criminalises physical discipline in Israel, the Supreme Court relied on both the 1992 Basic Law: Human Dignity and Liberty as well as the CRC.<sup>78</sup> Other than its ban of corporal punishment, an additional aspect of the *Plonit* judgment that made it controversial is its recognition and endowment of the right to be free from violence with a constitutional status.<sup>79</sup> It is also worthy of note that the Court still accepted as permissible the "reasonable use of force to prevent injury to the child or to others" or "to preserve order".<sup>80</sup>

One of the limitations of a judicially-based prohibition, in the absence of subsequent law reform, is that it often fails to articulate the message that the first purpose of the prohibition of corporal punishment in the home setting should be educational, and not punitive. Questions by the public, such as, "what will happen to parents who continue to practise corporal punishment after prohibition?" often attract charged and sensational responses, such as the assumption that a large number of parents will be imprisoned for violations.<sup>81</sup> A potential shortcoming of the *Plonit* judgement is that a minority of the Court did not agree with the rejection of the defence of reasonable chastisement.<sup>82</sup> This could have created more room for disagreement and hampered the positive the impact of the judgement by the majority. Fortunately, however, few months after the judgment, article 24 of the Civil Wrongs Ordinance 1944 was repealed by law, underscoring the importance of legislative measures subsequent to a judgment prohibiting corporal punishment in all settings.

In another context, in 1996, the Supreme Court of Italy heard the *Cambria* case<sup>83</sup> where the lawyers of the accused argued that the beatings administered by the father on his daughter were not intended to be ill-treatment but to legitimately exercise his parental right and duty to discipline his daughter. Articles 571 and 572 of the Penal Code of 1975 were central to the conviction of Mr Cambria in the lower courts for corporally punishing his daughter. The former provision proscribed "[w]hoever misuses means of correction or discipline to harm a person subject to his authority,"<sup>84</sup> while the latter criminalised ill-treatment.

74 *State of Israel v Plonit* 10.

75 *Ibid* 6.

76 *Ibid*.

77 See Ezer 2003 "Children's Rights in Israel: An End to Corporal Punishment" *Oregon Review of International Law* 139, for a detailed discussion on this.

78 *State of Israel v Plonit* 37.

79 Ezer 2003 *Oregon Review of International Law* 142.

80 Cr.A. 4596/98, *Roe v State of Israel*, 54(I) P.D. 145, 182. There are a number of judgments from the Israeli courts on the issue of corporal punishment including Cr.A (Be'er-Sheva) 7161/02 *The State of Israel v ZY* (2 December 2003); Cr.C 40362/05 *The State of Israel v Onimaya Theodor* (4 July 2006); Cr.C (Ashkelon) 1414/06 *The State of Israel v Zur Yehoshua* (9 September 2007).

81 See, for example, Bower "'Spanking Judgment': Parents Won't go to Jail for 'Every Little Smack'" *news24* (24 October 2017) <https://www.news24.com/Columnists/GuestColumn/spanking-judgment-parents-wont-go-to-jail-for-every-little-smack-20171024> (20 March 2018). Swain "'Spanking Judgment' Encroaches on Parents' Freedom" *news24* (24 October 2017) <https://www.news24.com/Columnists/GuestColumn/spanking-judgment-encroaches-on-parents-freedom-20171024> (20 March 2018).

82 *State of Israel v Plonit* 52–55.

83 Judge Ippolito, Supreme Court of Cassation, 18 March 1996. See too Bitensky 2006 "Corporal Punishment of Children: A Human Rights Violation" 247–54 (offering a detailed discussion of the Italian Supreme Court's decision in *Cambria*).

84 See Global Initiative to End All Corporal Punishment of Children: Country Report for Italy (August 2017) <<https://endcorporalpunishment.net/reports-on-every-state-and-territory/italy/>> (20 March 2018)

The Supreme Court dismissed the earlier conviction of “abuse of the means of correction” and underscored that physical punishment, regardless of how it is used, could not be considered to be a legitimate use of correction.<sup>85</sup> In arriving at this conclusion, the Court relied on domestic law as well as a number of provisions of the CRC, including articles 3 and 19. At the time Judge Ippolito, who wrote the opinion, indicated his expectation that the new norm in the judgment would “filter into society”.<sup>86</sup> In addition, the optimism was fuelled by the fact that the lower courts in Italy often comply with decisions that are made by the Supreme Court.

However, the Supreme Court judgment has not been confirmed by legislation. Therefore, Italy is among the few EU Member States<sup>87</sup> that have not explicitly banned corporal punishment in the home setting. In its Concluding Observations to Italy in 2011, the CRC Committee observed that “the State party has not yet passed legislation explicitly prohibiting all forms of corporal punishment in all settings ... despite the Supreme Court ruling on prohibition of corporal punishment”.<sup>88</sup> The Committee underscored the importance of reforming “domestic legislation to ensure the explicit prohibition of all forms of corporal punishment in all settings, including in the home”.<sup>89</sup>

An argument can also be formulated that one of the limitations of a judicial decision-based prohibition is that it often does not prescribe the penalties for a violation. For instance, neither of the two judgments referred to above talk about penalties. However, with the exception of few countries — Cyprus comes to mind<sup>90</sup> — the same can also be said of a number of domestic laws that are intended to prohibit corporal punishment. Laws in Austria, Finland, Norway and so on, fit this mould, though it is probably not difficult to find a statutory basis such as assault or battery to prosecute offenders, if and when necessary.<sup>91</sup>

In the aftermath of judicial decisions<sup>92</sup> prohibiting corporal punishment, concerns that parents will be prosecuted for different levels of corporal punishment often permeate public debate. Judicial decisions that give some guidance on prosecutorial restraint are useful to address such concerns. For instance, in *Plonit*, the Supreme Court went into some detail to reassure that “the prosecution has discretion not to go to trial in the absence of the public interest”<sup>93</sup> and re-asserted the concept of “*de minimis*” — that the law does not concern itself with minor matters, leading to the conclusion that “routine physical contact between a parent and child” should not lead to prosecution.<sup>94</sup>

The lack of political will towards prohibition could also make judicial decisions that ban corporal punishment, susceptible to being undermined. Arguably, the example of Zimbabwe could shed light in this regard. There are currently two pertinent High Court decisions in Zimbabwe — one from 2014<sup>95</sup> and another from 2017 — that declared corporal punishment unconstitutional. In the 2014 case, while the Criminal Procedure and Evidence Act of Zimbabwe allows corporal punishment of juvenile offenders, the judgment by Justice Muremba in *S v Willard Chokuramba*<sup>96</sup> outlawed corporal punishment. It did so by interpreting section 53 of

85 *Ibid.*

86 *Ibid.*

87 Along with Belgium, Czechia, France, Slovakia and the UK.

88 CRC Committee, Concluding Observations: Italy (3rd and 4th periodic Report) (CRC/C/ITA/CO/3-4) (October 2011) para 34.

89 *Ibid* para 35.

90 See Bitensky “Spare the Rod, Embrace our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children” 1998 *University of Michigan Journal of Law* 371, citing Act of 17 June 1994, Law 147(1), official Gazette of the Republic of Cyprus No. 2886.

91 See Bitensky “The United Nations Convention on the Rights of the Child and Corporal Punishment of Children: Ramifications for the United States” 1998 *Georgia Journal on Fighting Poverty* 229.

92 Or, for that matter, in the aftermath of passage of laws prohibiting corporal punishment too.

93 Cr.A. 4596/98, *Roe v. State of Israel*, 54(I) P.D. 145, 182.

94 Cr.A. 4596/98, *Roe v. State of Israel*, 54(I) P.D. 145, 182.

95 *S v Chokuramba and Pfungwa v Headmistress of Belvedere Junior Primary School*.

96 Even though the South African Schools Act 84 of 1996 secured prohibition of corporal punishment in the school setting, the reality leaves much to be desired. In fact, the section of the Act was challenged in Court and made it to the Constitutional Court. See *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11; 2000 4 SA 757; 2000 10 BCLR 1051 (18 August 2000). The case was triggered as a result of the passing of the South African Schools Act in 1996, which in s 10 prohibited any person from administering corporal punishment at a school to a learner (s 10(1)). It further provided that whosoever contravenes the provision is “guilty of an offence and liable on conviction to a sentence which could be imposed for assault.” (s 10(2)). The main question for determination in the case was whether parliament violated the rights of parents of children in independent schools, who because of their religious convictions have accepted its use. The appellant, an umbrella body of 196 independent Christian schools in South Africa argued that the law violated

the Constitution of Zimbabwe.<sup>97</sup> In 2015, the Constitutional Court provisionally suspended the 2014 judgment. This means that, since all decisions of unconstitutionality need to be confirmed by the Constitutional Court,<sup>98</sup> and the 2014 judgment is suspended, the practice of imposing corporal punishment on male juvenile offenders by the judiciary continues.

An argument can be made that judicial decisions prohibiting corporal punishment can be susceptible to violations in the absence of a follow-up by a legislative measure. However, in South Africa, it is worth noting that even though the South African Schools Act 84 of 1996 secured prohibition of corporal punishment in the school setting, the reality leaves much to be desired. According to the 2012 National School Violence Survey, approximately 50 per cent of learners asserted that they have been subjected to corporal punishment in school.<sup>99</sup> As a result, the effort to ban corporal punishment either by judicial decision, or legislation, or both, if not accompanied by the necessary political will as well as awareness raising and training, runs a serious risk of being ineffective.

## 6 REFLECTIONS ON A SELECT NUMBER OF RIGHTS

The YG judgment reflected on a number of child-rights issues that are covered by the CRC and the African Charter on the Rights and Welfare of the Child (ACRWC or the African Children's Charter). The human rights of others, especially parents, were also a focus of the judgment. The following sub-sections focus on three of these, namely the best interests of the child, equal protection of the law, and the right to freedom of religion. The intention of the examination is not to offer a comprehensive discussion of these three issues, and how their application should be interpreted in South Africa in the context of corporal punishment in the home setting. Rather, some of the shortcomings of the arguments advanced by the appellant in relation to these three issues is explored, and the guidance that can be drawn from some of the most relevant international human rights instruments [especially the CRC and the ICCPR] and interpretations of the respective rights by the CRC Committee as well as the Human Rights Committee are analysed.

### 6.1 Best Interests of the Child

The best-interest principle has become a term of art used within the context of a number of children's rights including child care, custody, and discipline matters. The concept has been the subject of a significant amount of academic analysis<sup>100</sup> though consensus around its conceptualisation and application still eludes academicians, practitioners, and many other stakeholders. For instance, as Exon notes, "[s]ome may think that blood is thicker than water" and, hence, "a biological relationship is superior in the adoption realm".<sup>101</sup> Yet, others might place "precedential value on geography, nationality, religion and culture" or "money and prestige".<sup>102</sup>

Despite such limitations, in a large number of jurisdictions where the CRC principles have been incorporated into domestic law, including in constitutions, the best interests of the child

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a number of sections of the Constitution — especially the right to privacy (s 14 of Constitution), the right to freedom of religion, belief and opinion (s 15(1)); the right to education (s 29(3)); the right to language and culture (s 30); and the rights of cultural, religious and linguistic communities (s 31). The Court was of the view that the matter before it "does not oblige us to decide whether corporal correction by parents in the home, if moderately applied, would amount to a form of violence from a private source" (para 48 of judgment). The Court reasoned, among others that, is it not unreasonable to expect the appellants "to make suitable adaptations to non-discriminatory laws that impact on their codes of discipline", and that save for this one aspect, "the appellant's schools are not prevented from maintaining their specific Christian ethos" (para 41 of judgment). The Court concluded that it is necessary to uphold the "generality of the law in the face of the appellant's claim for a constitutionally compelled exemption" (para 52 of the judgment).

97 Section 53 of the Constitution provides that "no person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment."

98 See Global Initiative to End All Corporal Punishment of Children "Zimbabwe High Court Declares Corporal Punishment Unconstitutional" <<https://endcorporalpunishment.org/zimbabwe-high-court-declares-corporal-punishment-unconstitutional/>> (10 May 2018?)

99 See, Burton and Leoschut (2013) *School Violence in South Africa. Results of the 2012 National School Violence Survey* (Monograph Series No. 12) 44.

100 Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* (2007) 41.

101 Exon "The Best Interest of the Child: Going Beyond Legalese to Empathize with a Client's Leap of Faith" 2004 *Journal of Juvenile Law* 3–4.

102 *Ibid* 4.

is one of those principles that is most represented.<sup>103</sup> The role of best-interests as a tool that can “support, justify or clarify a particular approach to issues arising under the Convention”<sup>104</sup> as well as a “mediating principle which can assist in resolving conflicts between different rights where these arise within the overall framework of the Convention”<sup>105</sup> have resonance. It could also serve as a “gap-filling” provision when *lacunae* are identified.<sup>106</sup> This bodes well for the interpretation of the CRC Committee that outlined the three aspects of “best interests”: namely, a “substantive right”; a “fundamental, interpretative legal principle”; and “a rule of procedure”, in assessing and determining the best interests of the child.<sup>107</sup>

The indeterminate nature<sup>108</sup> of the principle is one common ground used to criticise best interests. As one writer put it:

For a determinate answer to the question of what would be in the child’s best interests, (a) all the options must be known, (b) all the possible outcomes of each option must be known, (c) the probabilities of each outcome occurring must be known and (d) the value attached to each outcome must be known.<sup>109</sup>

However, despite the absence of an accepted definition of “best interests”, general observations about the principle can be proffered. More often than not, if a certain measure goes against any of the other three pillars of the CRC and the ACRWC, for instance, the rule against discrimination,<sup>110</sup> it is unlikely that it would pass the best interests of the child test.

Corporal punishment has been found to be incompatible not only with articles 19, 5, 6, 28(2), 37(a) and (c) and 39, but also article 3 of the CRC — on best interests. As Freeman asserts, all forms of abuse and neglect are often identified as practices that must be eliminated if article 3(1) is to be implemented by States Parties.<sup>111</sup>

The High Court has already surmised that not pronouncing on the constitutionality of the common-law defence of reasonable chastisement until parliament acts would be contrary to section 28(2) of the Constitution on children’s best interests.<sup>112</sup> This appears to be a correct approach. It finds support in the assertion by the CRC Committee that best interests is also a “rule of procedure” meaning that “[w]henever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned”.<sup>113</sup> Moreover “how the child’s interests have been weighed against other considerations, be they broad issues of policy or individual cases” should be part of the determination process.<sup>114</sup>

The argument that parental *discipline* contributes to children’s best interests is acceptable within the constitutional discourse, only if *discipline* is not interpreted to include corporal punishment. However, it would be an overstatement to make the assertion that “restrictions on the parental power of discipline by removing the reasonable chastisement defence would not be in the best interests of the child”.<sup>115</sup>

103 See, for instance, Lundy *et al* *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries* (2016) 4.

104 Alston “The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights” 1994 *International Journal of Law, Policy and the Family* 15–16.

105 *Ibid* 16.

106 Freeman “Article 3: The Best Interests of the Child” in Alen *et al* (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (2007) 2.

107 CRC Committee, General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (2014) para 6.

108 See, for example, Peskind “Determining the Undeterminable: The Best Interest of the Child Standard as an Imperfect but Necessary Guidepost to Determine Child Custody” 2005 *Northern Illinois University Law Review* 449.

109 Elster “Solomonic Judgments: Against the Best Interest of the Child” 1987 *University of Chicago Law Review* 12.

110 For instance, when the principle is incorporated in national law, it should not reflect either direct or indirect discrimination on the basis of any of the prohibited grounds under the CRC and the ACRWC.

111 Freeman “The Best Interests of the Child” 52.

112 *YG v The State* para 28.

113 General Comment No 14 para 6(c).

114 *Ibid*.

115 *YG v The State* para 65.



In fact, half-measures, including those aimed at accommodating some degree of reasonable chastisement, send the wrong signals on violence against children. Two critical examples are worthy of mention here. In the United Kingdom (UK), reasonable chastisement was downgraded as a defence to only apply to common assaults (where there is no body mark left as a result of the chastisement).<sup>116</sup> In Canada, a 2004 decision of the Supreme Court limited reasonable chastisement to the application of minor force by hand by parents to children between the ages of two and twelve. Research has shown that the messages that parents in the two respective countries deciphered from these measures mostly focused on the “right to use force” rather than on the limitations imposed.<sup>117</sup>

The assertion that a “parent knows what is best for the child”<sup>118</sup> finds support in the CRC, for instance under article 18(1) which provides that parents or guardians will have the best interests of the child as “their basic concern”. However, to conclude that a parent who corporally punishes his or her child is “acting in the child’s best interests”<sup>119</sup> is a stretch.

The obligation that states have in relation to best interests under the CRC actually plays a meaningful role in the balancing exercise between protecting children from abuse and neglect, on the one hand, and respecting the rights and duties of parents, on the other. A state that removes the rights of parents to corporally punish their children is not undermining best interests, but is rather upholding them. Questions have been raised whether it is possible to uphold best interests by limiting permitted punishment only to “moderate punishment”, or by imposing an age limit below which hitting is not allowed, or by proscribing the use of any implement, or by providing a list of impermissible implements?<sup>120</sup>

While the submission by FORSA underscored the importance of parental discipline, and emphasised that restriction of this power “would not be in the best interests of the child,” the Court begged to differ. It did so on the basis of four central arguments. The Court took issue with the fact that while case law has provided the various factors that needed to be taken into account in deciding whether chastisement was reasonable, “the common law does not lay down strict guidelines as to what constitutes reasonable chastisement”.<sup>121</sup> It also argued that the constitutional protection from “all forms of violence” as well as the right to bodily and psychological integrity would not bode well for the defence.<sup>122</sup> Furthermore, the Court also underscored that “[h]uman dignity lies at the heart of” the protection provided by section 28(1)(d) of the South African Constitution, and that sections 9(1) and (3) on equal protection of the law, and the right not to be discriminated against because of age respectively, would be violated by the defence of reasonable chastisement.<sup>123</sup>

Section 28(2) of the Constitution that provides that “[a] child’s best interests are of paramount importance in every matter concerning the child” took centre stage in the Court’s reasoning. The Court articulated that children, who are a more vulnerable group deserving of special protection (and whose best interests are of *paramount* importance in the Constitution), should not be granted less protection than adults in respect of whom a reasonable chastisement defence does not apply. This approach accords well with the assertion that what are provided in the CRC are minimal standards and that states (*primary* consideration), under article 41 of the CRC, should adhere to provisions that “are more conducive to the realisation of the rights of the child” that may exist in their law.

While many assertions made by FORSA in its Notice of Application for Leave to Appeal (Application) are worthy of reflection, one that deserves special attention at this juncture. This is the contention that the High Court misunderstood and wrongly applied in *S v M* as it upheld children’s best interests as an overriding consideration.<sup>124</sup> This was so, FORSA submitted, because *S v M* had underscored its disfavour of a predetermined formula for the determination

116 See Freeman “Upholding the Dignity and Best Interests of Children: International Law and the Corporal Punishment of Children” 2010 *Law & Contemporary Problems* 218, and accompanying sources.

117 For a discussion of this in Canada, see Durrant, Sigvaldason and Bednar, “What did the Canadian Public Learn From the 2004 Supreme Court Decision on Physical Punishment?” 2008 *International Journal of Children’s Rights* 242–43.

118 FORSA Constitutional Court Affidavit para 73.

119 *Ibid.*

120 Freeman “The Best Interests of the Child” 70.

121 *YG v The State* para 67.

122 *YG v The State* para 69.

123 *YG v The State* para 75.

124 FORSA Notice of Application for Leave to Appeal (Application) (9 November 2017) Case number A263/2016 para 8.4.

of best interests as it deprives children of an individualised assessment of what would and would not be in the best interests of the child.<sup>125</sup>

This assertion is nothing short of flawed. It could suffice to refer to the relevant part of the *S v M* judgment<sup>126</sup> where the Constitutional Court clearly indicated the *paramount* importance of best interests,<sup>127</sup> but highlighted that it needs to be weighed against other legitimate interests. In *S v M*, the Constitutional Court rightly recognised that “it is precisely the contextual nature and inherent flexibility of section 28 that constitutes the source of its strength”.<sup>128</sup> The reasoning in *S v M* that “[t]o apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned”<sup>129</sup> is about best-interest assessment and determination. Freeman agrees with the assessment that what is in a child’s best interests is often value laden and indeterminate.<sup>130</sup> But, he rightly maintains “there are some givens and that violence against a child may be considered one matter upon which there should be consensus”.<sup>131</sup>

There is a long list of issues that can categorically be classified, without the need to make an individualised assessment, as being against the best interests of a child. This seems to be the reason why the CRC Committee, in its General Comment on best interests, categorically underscored that a best interest assessment “must also include consideration of the child’s safety, that is, the right of the child to protection against all forms of physical or mental violence, injury or abuse (art. 19)”.<sup>132</sup>

In fact, it is much easier to list what is generally against the best interests of a child, than what is in children's best interests. This is more so for rights that are civil and political in nature, such as, prohibition on torture; right to be protected from recruitment and use in armed conflict; protection against child labour, sexual, economic and other exploitation; and so forth. As a matter of principle, assessing and determining what is in the best interests of a child is what usually requires an individualised approach. Often it is the determination of what is *in* the best interests of a child that would require a balancing, for instance, the preservation of the family environment with the right to be protected from abuse by family members, or the weighing that needs to be done between a “protection right” against an empowerment one.

Anyone who argues that a violation of article 19 of the CRC can be categorised as being in the best interests of a child would be hard-pressed to substantiate such an argument. In particular, the reference to “[a]ll forms of physical or mental violence” in article 19 of the CRC appears to leave no space for exceptions.<sup>133</sup> This may be the reason why there is no reservation entered into article 19 by a state. And if such reservation were attempted, there is a certainty that it would be invalid, as it would go against the object and purpose of the Convention.

## 6.2 Equal Protection of the Law

In international human-rights law, non-discrimination, equality before the law, and the equal protection of the law, form a fundamental principle for the protection of human rights. Arguably, one of the limitations of the CRC, unlike the ICCPR,<sup>134</sup> is that it does not contain an explicit equal protection of the law provision. As far as corporal punishment and equal protection are concerned, the argument that is advanced is that the inclusion of reasonable chastisement as a defence leaves children with less protection than adults under the criminal law of assault. A look into the history of reasonable chastisement also sheds some light on its aversion to equal protection of the law. In 1981, Freeman highlighted that a case from 1860 is the basis that

125 *Ibid* para 8.5.

126 *S v M* (CCT 53/06) [2007] ZACC 18; 2008 3 SA 232 (CC); 2007 12 BCLR 1312 (CC) (26 September 2007) paras 45 and 112.

127 As it is explicitly enshrined in s 28 of the Constitution.

128 *S v M* para 24.

129 *Ibid*.

130 Freeman 2010 *Law & Contemporary Problems* 216.

131 *Ibid*.

132 General Comment No 14 para 73.

133 CRC Committee, General Comment No 13 (2011) on the right of the child to freedom from all forms of violence para 17.

134 Article 26 of the ICCPR provides that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

outlines the general limits of corporal punishment. The relevant paragraph stated:

If it be administered for the gratification of passion or rage, or if it be immoderate and excessive in its nature or degree or if it be protracted beyond a child's power of endurance or with an instrument unfitted for its purpose or calculated to produce danger to life or limb, in all such cases the punishment is excessive, the violence unlawful, and if evil consequences to life and limb ensue, the person inflicting it is answerable to the law.<sup>135</sup>

This very history of the concept of "reasonable chastisement" is indicative of its flawed conceptualisation and inherent limitations to pass a constitutional muster. It is also untenable to argue that the discrimination against children on the basis of age that allows for corporal punishment is not arbitrary. Reasonable chastisement allows discrimination against a group of persons who have not attained an "arbitrarily" established nominal age of eighteen years. Moreover, in a post-CRC, and post-apartheid, constitutional dispensation, does it not beg the question if the interpretation of equal protection of the law should be interpreted in the light of present-day circumstances, or continue to latch on to the use of archaic doctrines for its interpretation?

There is ample evidence from comparative international law research that shows that the defence of reasonable chastisement violates the guarantee of equal protection of the law. This evidence is found, for instance, at the European Court,<sup>136</sup> and the Inter-American Court.<sup>137</sup> In the domestic sphere, equal protection of the law is so central to preventing corporal punishment in all settings, that in some contexts the proposed legislation to ban corporal punishment emphasises the concept in its title.<sup>138</sup>

Children, as one class of persons, are treated unequally to another class of persons (adults), as a result of the reasonable chastisement defence that adults can invoke. Laws, that as an exception allow persons below the age of eighteen to marry (usually those aged sixteen years and above), apply for a driving licence, or consent to terminating pregnancy, all conditioned with parental consent, assume, or even expect, parents to safeguard, or at least contribute to, their child's best interests. These are also good examples of cases where, instead of leaving children to their full autonomy, legislation transfers "responsibility for decisions about competence ... from public to private authority — here, the authority of the parents".<sup>139</sup>

However, from the point of view of equal protection of the law, this is not without its detractors. For instance, these laws often seem to differentiate between those that are older children (above sixteen years) and those that are younger (below sixteen years). However, since the law in these instances treats all sixteen-year-olds the same way as far as the three activities are concerned, it probably can pass the constitutional law muster. Since each parent may decide to grant or deny consent for these activities on the basis of a plethora of private values and beliefs, it can be argued that these older children are not subject to rules of general applicability.<sup>140</sup> It may also further be advanced that such an exercise of authority by parents does not accord well with the liberal-rights theory upon which the CRC seems to rely.<sup>141</sup> Article 5 of the CRC that espouses the "evolving capacity of the child" also supports this differentiation.

In the context of the legal system of the United States, when a court reviews a challenge to a state or federal law on the basis of the equal protection clauses of the Constitution, the law should be rationally related to a legitimate state purpose.<sup>142</sup> A law would be subject to a heightened level of judicial scrutiny if it uses a suspect classification or violates a fundamental right.<sup>143</sup> In the context of corporal punishment, the classification of children not to benefit from the equal protection of the laws on battery and assault has been labelled as "suspect

<sup>135</sup> *R v Hopley* [1860] 2 F. & F. 202.

<sup>136</sup> *UK v Costello-Roberts* [1993] 19 EHRR 112.

<sup>137</sup> Resolution of the Inter-American Court of Human Rights, Request for Advisory Opinion: Juridical Status and Human Rights of the Child, Advisory Opinion OC-17/02, Inter-American Court of Human Rights Series A No. 17 (28 August 2002) [54].

<sup>138</sup> See, for instance, Children (Equal Protection from Assault) (Scotland) Bill (August 2017).

<sup>139</sup> Teitelbaum "Children's Rights and the Problem of Equal Respect" 2006 *Utah Law Review* 182.

<sup>140</sup> *Ibid* 183.

<sup>141</sup> *Ibid*.

<sup>142</sup> See Pollard "Banning Corporal Punishment: A Constitutional Analysis" 2002 *American University Law Review* 475–81.

<sup>143</sup> *Ibid*.

classification" for a number of reasons.<sup>144</sup> These reasons include: the fact that children do not have a choice in being a class member as childhood is an immutable trait; incorrect stereotyped characteristics unfairly disadvantage children as a class; children as a class have historically suffered purposeful unequal treatment; and that childhood is characterised by political powerlessness as children neither vote, nor have the financial, social, and cognitive powers to command extraordinary protection.<sup>145</sup>

Children, like everyone, are entitled to equal protection of the law under section 9(1) of the South African Constitution and have the right not to be discriminated against on the basis of their age, as entrenched in section 9(3) of the South African Constitution. To allow children to be subjected to any level of physical violence under the guise of accommodating reasonable chastisement has been characterised by the High Court as being "antithetical to the constitutional right prioritising the best interests of the child".<sup>146</sup>

There is a practical concern that many who oppose the ban on corporal punishment often voice that equal protection of children with adults that leads to a ban on corporal punishment "will lead to more interference in family life, more paternalism by the state, more prosecution of parents, and as a result, more children will be deprived of their family environment and end up in state care".<sup>147</sup> It is imperative to inquire if the evidence of the practice of states that have banned corporal punishment supports such a concern.

In Sweden, a ban on corporal punishment was passed through an amendment to the Parenthood and Guardianship Code in 1979. The amended section read:

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 corporal punishment or any other humiliating treatment.<sup>148</sup>

The experience of Sweden, the first country to ban corporal punishment, shows that, between 1975 and 1979, in the five years before the smacking ban, five children died at their parents' hands in "disciplinary" incidents.<sup>149</sup> However in the twenty years after the ban in 1980, only one child suffered a similar fate. Also, while reporting of parental assaults on children has increased, prosecution rates have not.<sup>150</sup> It is reported that just two years after the ban, the government's effort on awareness raising was so successful that 99 per cent of the public were aware of its efforts.<sup>151</sup>

As advised by the CRC Committee, the "first purpose of law reform to prohibit corporal punishment of children within the family is prevention: ... underlining children's right to equal protection and providing an unambiguous foundation for child protection and for the promotion of positive, non-violent and participatory forms of child-rearing".<sup>152</sup>

### 6.3 Right to Freedom of Religion

The right to freedom of religion and belief is an important feature of societies. Its recognition traverses the Universal Declaration of Human Rights (UDHR), the ICCPR, and a range of international and regional human rights instruments. In accordance with the CRC (and also the ACRWC) children too have the right to freedom of religion and belief.<sup>153</sup> The right to freedom of religion and belief is inherently controllable through the thought processes of believers, which makes its identification difficult.<sup>154</sup> In this respect, the right can be differentiated from disability, race, sex and gender that are not inherently controllable,<sup>155</sup> and are not that difficult

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

<sup>146</sup> YG v *The State* para 76.

<sup>147</sup> Freeman and Saunders "Can we Conquer Child Abuse if we don't Outlaw Physical Chastisement of Children" 2014 *International Journal of Children's Rights* 700.

<sup>148</sup> Children and Parents CODE ch 6 s 1(1979) (Sweden).

<sup>149</sup> Freeman and Saunders 2014 *International Journal of Children's Rights* 700 and citations therein.

<sup>150</sup> *Ibid.*

<sup>151</sup> See Durrant "The Swedish Ban on Corporal Punishment: Its History and Effects" in Frehsee *et al Family Violence against Children: A Challenge for Society* (1996). 23–25.

<sup>152</sup> CRC Committee, General Comment No 8, "The Right of the Child to Protection from Corporal Punishment and other Cruel or Degrading Forms of Punishment" 2006 para 38.

<sup>153</sup> *Ibid.*

<sup>154</sup> Eekelaar "Corporal Punishment, Parents' Religion and Children's Rights" 2003 *Law Quarterly Review* 370.

<sup>155</sup> *Ibid.*



for the purposes of identification.

The right to freedom of religion is central to the YG case. For instance, in the High Court the Appellant indicated that the corporal punishment he inflicted on the child was as a result of the child watching pornographic material, which was “forbidden in their religion”.<sup>156</sup> In its founding affidavit, FORSA argues that the High Court implied that children’s rights are always higher in the hierarchy of rights than the constitutional right to freedom of religion;<sup>157</sup> and that the High Court almost interpreted the Scriptures by indicating that corporal punishment is in error of their beliefs. None of this is an accurate characterisation of the High Court’s position, as it neither compiled a hierarchy of rights, nor engaged in an act of interpreting the Scriptures.

To draw from elsewhere, one of the relevant findings of the European Court in relation to the *R (on the application of Williamson)* case is that the protection provided under article 9 of the European Convention on Human Rights (ECHR) is to hold and to manifest beliefs, irrespective of whether any such belief is religious. It also underscored that the Court has the mandate to determine whether such a belief is held in good faith.<sup>158</sup> It, however, is not common practice to inquire into the validity of the belief.

The analysis of the link between corporal punishment inflicted on children, and parents’ rights to religion and belief, can raise a number of pertinent questions. Does the religious text provide in clear and sufficient terms for the belief on the value of corporal punishment? Is the practice uniform, agreed constitutive element and requirement of the religion in question? Or it is just simply an action inspired or motivated by a religious text or belief system? In the context of the ECHR, is corporal punishment an act that is “qualified as religious for the purposes of Convention protection”<sup>159</sup> or is it a “constitutive element of the belief system in issue”?<sup>160</sup>

Eekelaar, in commenting on a case from the UK<sup>161</sup> of a group of parents and teachers challenging the prohibition of the administration of corporal punishment in independent schools by teachers,<sup>162</sup> draws attention to the view expressed by one of the judges that: “the parents’ beliefs in the value of corporal punishment were not sufficiently coherently related to the religious texts on which they relied to amount to religious beliefs or practices within the protective clauses” as he classified the act of corporal punishment as not “a clear, uniform and agreed requirement of the religion in question”.<sup>163</sup> A distinction between acts that are inspired by the religion, as compared to acts that are required by the religion, might also form a reasonable differentiation.

What is also notable is that there are an increasing number of examples of faith communities, including Christians, supporting a ban on corporal punishment in all settings.<sup>164</sup> The World Conference of Religions for Peace’s “A Multi-Religious Commitment to Confront Violence against Children” adopted in 2006 is one example of an initiative that advocates the total banning of corporal punishment in all settings.<sup>165</sup>

156 YG v The State para 6.

157 FORSA Notice of Application for Leave to Appeal (Application) (9 November 2017) Case number A263/2016 para 10.2.

158 See *R (on the application of Williamson) v Secretary of State for Education and Employment* [2002] EWCA Civ 1926; [2003] Q.B. 1300 (CA (Civ Div))

159 *Ibid.*

160 *Ibid.*

161 Eekelaar *Law Quarterly Review* 370.

162 Section 548 of the Education Act 1996.

163 Eekelaar *Law Quarterly Review* 370.

164 End Corporal Punishment “Faith-based Support for Prohibition and Elimination of Corporal Punishment of Children – A Global Overview” (May 2015) <http://endcorporalpunishment.org/wp-content/uploads/thematic/Faith-support-summary-2015-05.pdf> (20 March 2018).

165 *Ibid.*

## 7 CONCLUSION

The “transgenerational” nature of spanking, which is a practice entrenched in legacy and family values, fuels the resistance to change.<sup>166</sup> However, over the years, the enduring power of corporal punishment has been eroded; in prisons, schools, and alternative care. Notably, however, it continues mostly stubbornly in the home setting. The current international impetus on corporal punishment points in the direction of banning it in all settings. The number of law reforms undertaken in the last few years that ban corporal punishment in all settings is a cause for optimism.

The guidance from relevant international human rights law, especially the CRC, and its interpretation by the CRC Committee, appears relatively compelling. After all, the word “dignity” appears in eight places in the Convention, and the role that *best interests* plays is significant.

The extent to which political will to accept a prohibition of corporal punishment in all settings exists in South Africa has received mixed signals in recent years. Three examples can be singled out. During the YG case in the High Court, the Department of Social Development made a submission supporting a ban. However, as discussed above,<sup>167</sup> few recommendations made to Government to prohibit corporal punishment through the UPR process have not been accepted. And more recently, the Third Amendment Bill to the Children’s Act<sup>168</sup> contains a proposal to ban corporal punishment in the home setting.

In South Africa, the use of Alternative Dispute Resolution Mechanisms (ADRM) as a means to dispose of cases under the Child Justice Act as well as for adult offenders charged with less serious offences has increased significantly in the last decade.<sup>169</sup> For example, in 2017/2018, it is reported that about 159 663 cases have been disposed of through ADRM, as compared to 14 808 cases in 2002/2003.<sup>170</sup> Apart from offering an expedited process as well as an opportunity for victims to be compensated for loss suffered, the ADRM process alleviates the pressure on the volume of cases handled by the courts.<sup>171</sup> It is reasonable to expect that most corporal punishment cases against parents would be handled through the ADRM process, thereby reinforcing the point that prosecution of parents for corporal punishment is a remote possibility.

One of the important observations made by the High Court judgment is “the levels of child abuse and domestic violence in our country”<sup>172</sup> and its synergy and link with corporal punishment. A decision in the Constitutional Court that declares the common-law defence of reasonable chastisement as unconstitutional could serve as the touchstone for the possible expansion of the effective protection of the rights of children against all forms of violence in South Africa.

Should a decision declaring the reasonable chastisement defence unconstitutional be the eventual outcome, it will be a very significant step that, however, will take South Africa only part of the way. The extent to which parental training and capacity building is prioritised will have significant impact on ultimate success, as well as on the speed with which progress can be marked.

166 See Pollard “Banning Child Corporal Punishment” 2003 *Tulane Law Review* 583 and citations therein.

167 See s 4 above for more details.

168 Version of the Bill is available at <https://pmg.org.za/call-for-comment/704/>.

169 Africa Criminal Justice Reform (ACJR) (Dullah Omar Institute for Constitutional Law, Governance and Human Rights) “FACT SHEET 8: Accountability and the Prosecution Service” (2018, Final draft) 10–12.

170 See the relevant National Prosecuting Authority Annual Reports for the various statistics on the use of ADRM.

171 ACJR “FACT SHEET 8: Accountability and the Prosecution Service” 10.

172 YG v *The State* para 68.