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NOTES

THE 'REASONABLE CORPORAL PUNISHMENT' DEFENCE STRUCK DOWN: *YG v S*

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INTRODUCTION

In *YG v S* 2018 (1) SACR 64 (GJ), the Gauteng Local Division, Johannesburg, declared the common-law defence of 'reasonable corporal punishment' ('the defence'), previously available to parents charged with assault of their children, unconstitutional. By doing so, South Africa becomes the fifty-fourth state legally to prohibit corporal punishment of children administered by parents in addition to that inflicted by teachers. In this note I draw attention to a justificatory shortfall in the judgment. I argue that while the court was right to declare the defence incompatible with the Constitution of the Republic of South Africa, 1996 ('the Constitution'), and although it provides good reasons for doing so, it fails to furnish sufficiently compelling arguments to show that the reasons it supplies are good reasons.

THE FACTS AND THE JUDGMENT

Dismissing an appeal from a conviction for assault, Keightley J (Francis J concurring) upheld the trial court's ruling that a father's (the appellant's) bruising physical chastisement of his son, M, for having watched internet pornography, kicking and punching the latter over a period of more than half an hour, exceeded the limits of corporal punishment allowable by the defence and amounted to an assault. (The court affirmed, in addition, the trial court's rejection of the appellant's plea that in subsequently inflicting physical force on the body of his wife, an event triggered by his suspicion that she was having an affair, he had acted in self-defence, but since I am concerned here exclusively with the court's finding in relation to the constitutional status of the defence, I shall set aside this aspect of the judgment in the discussion that follows.) The court's determination that the appellant's exercise of physical force against M exceeded the limits of severity permissible under the defence effectively rendered the question of the defence's consistency with the

Constitution moot. The court nevertheless proceeded to consider the constitutional status of the defence, justifying its pronouncing on this issue as being for three reasons necessitated by the interests of justice: (a) the important interests of the state in knowing whether or not the defence is constitutional, and of parents in knowing whether or not mild or moderate corporal punishment of children is lawful; (b) the duty of courts to develop the common law so as to bring it into conformity with the Constitution; and (c) the reality that the court's holding back from deciding the constitutional issue 'would mean that children's rights would continue to be placed in potential jeopardy unless and until the Legislature took action' (para 28), a prospect which appeared to the court remote in the absence of any indication from the Minister of Social Development ('the Minister'), in her submission to the court, as to when the necessary legislation might be drafted. A further consideration motivating the court to decide the constitutional question was that the Minister was not opposed to its doing so (para 29). The Minister's contentment with the court's determining the constitutional validity of the defence, together with her support for a declaration of the defence's unconstitutionality, to an appreciable degree defused an objection to the effect that the court's decision amounts to an illegitimate encroachment onto the legislature's policy-making domain.

Having established the existence and nature of the defence under the common law (paras 31–5), the court commenced its assessment of the defence's consistency with the Constitution by enumerating the rights engaged by this enquiry: the rights of everyone to human dignity, to equal protection under the law, to be free from 'all forms of violence from either public or private sources' and to be protected against 'cruel, inhuman or degrading' treatment or punishment (ss 10, 9 and 12 of the Constitution respectively), as well as the right of children in particular to protection against 'maltreatment, neglect, abuse or degradation' (s 28). Keightley J referred as well to the principle that 'a child's best interests are of paramount importance in every matter concerning the child' (para 36). Also invoked by the amicus curiae Freedom of Religion South Africa ('FORSA') in support of the defence, the court noted, are parents' right to freedom of religion, belief and opinion, their right to human dignity and the rights of cultural and religious communities (ss 15, 10 and 31), as well as the Constitutional Court's avowal of the 'importance of the family unit' in *Dawood & another v Minister of Home Affairs & others; Shalabi & another v Minister of Home Affairs & others; Thomas & another v Minister of Home Affairs & others* 2000 (3) SA 936 (CC) para 31.

The court proceeded to array South African precedent bearing on corporal punishment, including *S v Williams* 1995 (3) SA 332 (CC), in which the CC declared corporal punishment of juvenile offenders to be in violation of their rights to dignity and to protection against cruel, inhuman and degrading treatment, acknowledging the potential of corporal punishment to erode children's 'regard for a culture of decency and respect for the rights of others' (para 40). The court also took note of the Constitutional Court's rejection of a claim for a religious exemption from the statutory prohibition

on corporal punishment by teachers in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) on the basis of its duty to protect children from 'degradation and indignity inherent in corporal punishment in schools' (para 43). Also referred to by the court was *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC), in which the Constitutional Court observed that taking children's rights seriously requires 'a critical shift in the relationship between parents, children and the protection of the law' and that children have 'the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma' (para 46). The court mentioned legislation giving effect to children's constitutional rights: principally the Children's Act 38 of 2005, but also the Domestic Violence Act 116 of 1998, which includes children as potential complainants (paras 48–50). Finally, Keightley J alluded to the state's international obligations under the United Nations Convention on the Rights of the Child ('CRC'), ratified by South Africa, which encompass the duty to 'take all legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse ... or maltreatment while in the care of parents', and to ensure that children will not be subject to 'torture or other cruel, inhuman or degrading treatment or punishment' (para 53). Acknowledging that the CRC does not explicitly oblige states legally to proscribe corporal punishment, the court referred to two comments by the United Nations Committee on the Rights of the Child (the committee set up to enforce and monitor states' compliance with the CRC) to the effect that all corporal punishment, as a type of violence and a form of degrading treatment, and an act, moreover, that violates children's right to physical and psychological integrity, contravenes the CRC (paras 54–5).

The court considered the bearing of statute, precedent and international law on the constitutionality of the defence. Keightley J rejected FORSA's contention that the entitlement of parents to inflict corporal punishment is an aspect of the liberty and authority vested in them to raise their children as they see fit, provided that they do so in a way that promotes (or at least does not set back) the basic interests of children; and that corporal punishment permitted by the defence should not be deemed 'violence' or 'physical abuse' because it is restricted to 'reasonable' exercises of physical force, and because it conduces to the overall wellbeing of children by instilling discipline in them (paras 65–6). The court countered these arguments by giving reasons to consider even 'mild' or 'moderate' corporal punishment unconstitutional. First, the physical and psychological robustness of children varies from one child to the next, as does their susceptibility to the potential harms of corporal punishment, so that a highly sensitive child may suffer physical harms not experienced by a more resilient child who receives the same amount of corporal punishment (para 67). The second reason has to do with what Keightley J calls 'arbitrariness': because the defence defines legally permissible physical chastisement vaguely as that which is 'reasonable' or 'moderate', parents who wish to inflict it safely — that is, in a way that does no physical

injury or psychological harm to their children — are left with no determinate guidance about how much force they can administer without causing physical injury or psychological harm; and as a result of this vagueness, even benevolently motivated parents may inadvertently inflict corporal punishment of a severity that may be physically injurious or psychologically harmful (para 68). Thirdly, since corporal punishment 'inevitably involves a measure of violence' and 'undoubtedly also breaches the physical integrity of the child', it violates the rights of children to bodily integrity and to be protected from violence contained in s 12 of the Bill of Rights (para 70). Fourthly, since the violation of a child's right to physical integrity 'must inevitably involve a measure of degradation or loss of dignity for the child', and because the law fails to provide the same level of protection for children as for adults in relation to what the law criminalises as assault, children are 'effectively treated as second-class citizens' (para 72), corporal punishment is inherently degrading. Fifthly, this unequal treatment of children relative to adults, in addition to degrading them, amounts to a violation of children's right to equality, protected under s 9 of the Constitution, since it must be accounted age-based discrimination; and this discrimination cannot be shown to be fair given that corporal punishment does not benefit children overall but instead adversely affects their interests in not being subjected to violence, in the protection of their bodily integrity, and in not being degraded (para 76).

The court concluded its assessment of the constitutionality of the defence by asking whether the infringements of children's rights to which it has referred might be justifiable under s 36 of the Constitution; whether, that is, the infringements of these rights might be outweighed by the interests of parents in continuing to administer corporal punishment and the interests of children in continuing to receive it. The court emphasised that its indictment of corporal punishment does not amount to a condemnation of child discipline, which parents will still, in the absence of the defence, be lawfully permitted to carry out — provided they refrain from using physical punishment (para 80). To the concern that doing away with the defence will result in the criminalisation of well-meaning and otherwise law-abiding parents who continue to administer mild corporal punishment and who will as a result be vulnerable to prosecution and conviction for assault, with the consequence that they 'may end up losing their children', the court responded that this is not the aim of criminalising corporal punishment, which is to protect children's rights (para 81). Keightley J firmly rejected FORSA's contention that criminalisation will violate the right to religious freedom of parents who perceive themselves to be under a religious duty to administer corporal punishment: 'children's rights are not subordinated to the religious views of their parents ... . It is so that [religious parents] may have to consider changing their mode of discipline, but in view of the importance of the principle of the best interests of the child, this is a justifiable limitation on the rights of parents' (para 84).

A JUSTIFICATORY DEFICIT

The court is right to criminalise forms of mild and moderate corporal punishment previously permitted by the defence, and the reasons it provides

in support of its decision are sound. Even mild and infrequently administered corporal punishment administered by loving parents, I argue in a recent monograph on corporal punishment, is seriously morally wrongful on the grounds that it violates children's rights to bodily security (including the right not to be subjected to violence subsumed under it), the right not to be punished degradingly, and the right not to be unfairly discriminated against. Furthermore, it exposes children, whose physical robustness and psychological resilience may vary, to the risk of psychological harm, and is susceptible to escalation into physically injurious force (Patrick Lenta *Corporal Punishment: A Philosophical Analysis* (2018) chs 2–4). And since the state is obliged to do what is necessary to protect children's basic interests, corporal punishment ought to be criminalised (Lenta op cit ch 5). But while I find the outcome in this case appealing, my satisfaction with the judgment is mixed with disappointment at a degree of shallowness and thinness of the argument that court presented in justification of its decision.

The court's application of the engaged rights

Only ten of the judgment's 107 paragraphs — paras 67 to 76 — are given over to providing reasons for the court's assessment that mild corporal punishment and the defence which permits parents to administer it violate children's rights, with only another five paragraphs — paras 79 to 84 — devoted to replying to objections raised against the criminalisation of all corporal punishment. Reason-giving concerning these issues is marginalised in favour of an introduction of the various amici, a consideration of whether the high court is authorised to pronounce on constitutionality of the defence, a recitation of the implicated rights, and a protracted discussion of statute, international law and precedent — which together runs to 47 paragraphs (paras 13–60). The reasons for the marginalisation of substantive reasoning and argumentation are not hard to fathom. Although in this case judicial anxiety about encroaching on the policy domain of Parliament (sometimes generated by concerns about the fragile legitimacy of rights-based judicial review given its counter-majoritarian character) was to some extent alleviated by the support expressed by the Minister for scrapping the defence, the court cannot have been unaware that the view of the majority of South Africans is that mild to moderate corporal punishment administered by parents is morally acceptable and should be legally permitted. Given the court's likely anxiety about two judges imposing on everyone else their unpopular interpretation of the rights in question, albeit an interpretation endorsed by the Minister, it is understandable that the court should concentrate its reason-giving on facts which purport to show that it is *legally authorised* — by the Constitution, statute, precedent and international law — both to decide the constitutional question and to strike down the defence as unconstitutional. But the cost of this focus on textual sources of legal authority and their phraseology, and the concomitant confinement to cramped quarters of reason-giving in relation to the court's application of the implicated rights, is a reduction in the quality of justification.

Ajudgment settling a constitutional issue is supposed to *justify* the decision arrived at — in this case criminalisation of even the mildest forms of corporal punishment — by providing persuasive reasons for its acceptance by the ordinary men and women such a change in the law will affect. But to persuade reasonable people, a court must not only specify the reasons for its decision — that the defence possesses a degree of arbitrariness or vagueness; that corporal punishment amounts to violence; that this disciplinary technique violates children's rights to bodily integrity, to be protected against degrading punishment and to be free from unfair discrimination; that the freedom of religious believers must give way when it conflicts with the fundamental rights of children; and that criminalisation of corporal punishment need not result in the criminalisation of loving, benevolently motivated parents — but also show, through argumentation that supports these reasons and provides a satisfactory response to challenges to them, *that these reasons are good reasons*. It is at this level of justification that the judgment is deficient.

Here is an example. One of the reasons the court provided in support of its decision is that corporal punishment is inherently violent. What arguments does it provide in support of this proposition? None. In place of an argument we are told that it is 'obvious' (para 70). But it is far from obvious that mild corporal punishment is violent, and some thoughtful social scientists and legal commentators have denied it (see, for example, Mui Kim Teh 'Corporal punishment — Archaic or reasonable discipline method' (2012) 17 *International Journal of Law and Education* 73 at 82; Diana Baumrind 'Necessary distinctions' (1997) 8 *Psychological Inquiry* 176 at 177). Indeed, I imagine that most South African parents who have hitherto spanked their children from time to time, as the vast majority of South African parents have, will be surprised to hear that they have been perpetrating acts of violence against their children. The court thus needs to provide an argument in support of considering corporal punishment as violent; mere assertion does not suffice. One way to commence this task would be to provide — or if necessary, propound — a definition of violence, or at least of physical violence, that fits with a preponderance of our intuitive judgements, and then to show that even relatively mild corporal punishment counts as violence under it. A convenient place to start is with the definition of violence provided by an authoritative dictionary such as the *Oxford English Dictionary*, which defines violence (sense 1.a) as 'the deliberate exercise of physical force against a person or property'. Corporal punishment, as an exercise of physical force against a person, amounts to violence under this definition. But simply wheeling out this definition will not suffice to show that mild corporal punishment amounts to violence, since violence is sometimes defined in such a way that only exercises of *severe* force count as violence. Those who subscribe to *this* definition of violence may insist that physical force inflicted in the course of mild or moderate corporal punishment is not severe enough to count as violence. So an argument is required to make the point that even moderate, physically non-injurious spanking or slapping is violent. One way to make this point is to insist that few would hesitate to label a husband's

slapping his wife with the aim of disciplining her as domestic violence even if the physical force he employs is moderate and insufficiently severe to cause physical injury. And if the slaps administered by the husband amount to violence, then by the same token 'reasonable' corporal punishment must count as violence — violence in any case admitting of different degrees of severity.

Still more argument is required to show that all corporal punishment amounts to a *violation*, as opposed to merely an infringement, of children's right not to be subjected to violence. Suppose a parent, who happens to be a doctor, slaps his child's face, correctly deeming it necessary to prevent the latter from slipping into an irreversible coma. We would not condemn the parent's action as a violation of the rights of the child, though it is plausibly considered violent. That is because the parent's action can be justified paternalistically as being benignly oriented towards promoting the child's wellbeing on balance and furthering her interests. But many supporters of corporal punishment defend it on the same basis — that it is 'for the child's own good'. If we want to show why all corporal punishment violates the rights of children to protection against violence, we need an argument to show why the paternalist justification of corporal punishment is unsound. The court failed to provide one.

Another example of the justificatory shortfall in the court's judgment relates to the court's second reason for holding that the defence is unconstitutional: it 'undoubtedly also breaches the physical integrity of the child' (para 70) and, as such, constitutes a violation of the right to bodily integrity reflected in s 12 of the Constitution. The court stated in support of this claim that 'the offence of assault under the common law is aimed at protecting bodily integrity', and that corporal punishment would, in the absence of the defence, be a form of assault. But this is too quick. For one thing, it is not clear that corporal punishment need even *infringe* the right to bodily integrity. 'Integrity' usually refers to wholeness or intactness, and corporal punishment in the form of two swift smacks on a child's behind need not intrude into the body or undermine its intactness (David Benatar 'The child, the rod and the law' 1996 *Acta Juridica* 197-214 at 205). But even if we set this point aside, there are ways in which parents might infringe their children's right to bodily integrity without violating it. A parent might subject a child to an injection, such as a vaccination, against the child's will, having received authoritative medical advice that the vaccination is necessary to safeguard the child from contracting a serious disease. The child's right to bodily integrity will have been infringed in this case, but it will not have been violated, the child having benefited significantly on balance in consequence of having received the injection. Someone — perhaps Keightley J — might respond that the cases of corporal punishment and forcibly subjecting a child to a health-protecting vaccination are disanalogous inasmuch as the latter enhances the child's wellbeing overall whereas the former diminishes it. But if *that* is the argument, then once again we need to know why even mild corporal punishment sets back children's interests, particularly given that many people

consider it to be 'for the child's own good' in virtue of its efficacy in driving home moral lessons and eliciting from persistently refractory children obedience to commands paternalistically oriented towards their safety and protection ('Don't put your finger in the electricity socket!', 'Eat your vegetables!' and so forth), while others take the view that even if it has no great benefits the occasional spanking can do no harm.

A possible reason for considering even mild corporal punishment to be bad for children is one mentioned by the court: 'it must inevitably involve a measure of degradation or loss of dignity for the child' (para 72). But why think that very mild corporal punishment — the occasional smack — unacceptably degrades children? Keightley J submits that all corporal punishment violates children's right not to be degraded because 'where conduct breaches a child's right to physical integrity' it *must* have this consequence. But for reasons adumbrated above, she fails to show that all corporal punishment violates children's right to bodily integrity or even their entitlement to bodily security (although the latter right is clearly infringed). Further, many deny that mild corporal punishment, administered occasionally, is inherently degrading (see, for instance, Robert Gregory 'Is corporal punishment degrading?' (1891) 153 *The North American Review* 693 at 696; David Benatar 'Corporal punishment' (1998) 24 *Social Theory and Practice* 237). By no means all children *feel* degraded by it. And as one defender of mild and infrequent corporal punishment has argued, if we do not consider the subjection of criminals to prison conditions that are arguably more degrading than mild corporal punishment to violate their right against degrading punishment, it is far from obvious that we should consider mild corporal punishment of children to violate this right (Benatar op cit at 241–2). What is necessary to show that corporal punishment is inherently degrading are arguments drawing on one or more accounts of degrading punishment which demonstrate that even mild corporal punishment degrades children. Such arguments do not feature in the judgment.

Keightley J also said, in favour of considering children to be unacceptably degraded by corporal punishment, that since it is legally permissible under the defence for parents to carry it out, whereas the law criminalises as assault exercises of physical force of equal severity on the bodies of adults, it follows that the state effectively treats children 'as second-class citizens' compared to adults by providing their rights with a lower level of protection relative to adults' rights (para 72). (In Keightley J's view, this also amounts to a violation of the rights, reflected in s 9 of the Constitution, to equal protection under the law and not to be unfairly discriminated against on the ground of age (paras 75–6).) But why think that this legal discrimination against children on the ground of their age unacceptably degrades them? After all, the law treats (younger) children differently from adults in many ways that it would be implausible to view as objectionably degrading. It prohibits them from engaging in sexual intercourse, from getting married and from carrying out many kinds of work, for example, as well as requiring that they be educated. It is implausible to think that such discriminatory treatment of children

unacceptably degrades them or that it is unfair (and so violates their right to equal treatment). Why? Because these instances of differential treatment safeguard the basic interests and rights of children, something the state has an obligation, as parens patriae, to do. Someone might at this point urge that the defence, by contrast with these forms of differential treatment, adversely affects the interests of children by allowing their parents to hit them. But this needs to be demonstrated, since many disagree, arguing that the age discrimination involved in legally permitting moderate corporal punishment can be justified paternalistically with reference to the benefits accruing to children through the administration of what they deem an effective, and in the view of some, indispensable, disciplinary technique.

The dearth of argumentation in support of the reasons provided by the court could to some extent have been compensated for had it considered and explained its disagreement with some important foreign constitutional jurisprudence relating to corporal punishment meted out by parents — had it explained, for example, why the Chief Justice of the Canadian Supreme Court was wrong to conclude, in her majority judgment in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 SCR 76 that s 43 of the Canadian Criminal Code is constitutionally valid in that it does not fail to respect the child's dignity, is not unfairly demeaning, does not discriminate unfairly and is, on the contrary, 'firmly grounded in the actual needs and circumstances of children' (ibid para 68: s 43 of the Canadian Criminal Code permits parents to inflict corporal punishment 'if the force does not exceed what is reasonable in the circumstances'). Or, moreover, why the European Court of Human Rights was wrong to hold in *Costello-Roberts v The United Kingdom* (1993) EHRR 112 that corporal punishment can only be considered a violation of a child's right not to undergo degrading punishment if it reaches a certain pitch of severity? (Admittedly, *Costello-Roberts* concerned corporal punishment administered by a teacher, but its holding was subsequently affirmed in *A v United Kingdom* [1998] 2 FLR 959 (ECHR), which dealt with corporal punishment carried out by a parent.) Despite Keightley J's judgment exhibiting signs of familiarity with at least one of these decisions — it is unlikely to be coincidental that the phrase 'second-class citizens', which she uses to describe children's status as a result their being deprived of the protection of the criminal law against intentional exercises of physical force on their bodies, also appears in the dissenting judgments of Justices Binnie and Deschamps in *Canadian Foundation* (supra) paras 72, 109 and 231 — she neither engages with, nor cites, foreign case law.

In failing to provide a fuller, deeper justification of its declaration that the defence is unconstitutional, the court not only failed fully to discharge its duty under basic principles of liberal democracy credibly to justify exercises of state power — of which the judiciary's criminalisation of all corporal punishment, an abridgement of the liberty of all parents, is an example — but also squanders an opportunity for pedagogy and persuasion. For if the court is right that all physical chastisement of children violates their fundamental

rights, it is highly desirable that the incidence of corporal punishment should as far as possible be reduced. Yet it is improbable that the criminalisation of corporal punishment will bring about a significant reduction in the incidence of corporal punishment *through deterrence*, since parents who want to inflict corporal punishment will know that they do not have much to fear by way of prosecution and punishment, seeing that the stated policy of the Minister, endorsed by the court in para 81, appears to be one of prosecutorial restraint. More likely to contribute meaningfully to a lowering of the incidence of corporal punishment is criminalisation's affecting an alteration in people's *attitudes*, so that they come to see the act as morally wrongful; and the best way to initiate a change in people's beliefs concerning the moral acceptability of this practice is to persuade those who need persuading that even moderate spanking is seriously wrong by virtue, in part, of its violating children's rights. Supplying compelling arguments to show that corporal punishment necessarily violates several fundamental rights of children goes a considerable way towards achieving that end.

The effects of corporal punishment and the consequences of the defence

To establish that all corporal punishment violates children's rights, it would help to show that it does not significantly enhance children's wellbeing overall, and that it in fact sets back children's interests. For the court to have shown this would have required it to engage with the relevant empirical data bearing on the effects of corporal punishment on children. The court's reluctance to consider this evidence is to some extent understandable; judges often feel out of their depth in the empirical social sciences. Nevertheless, it is difficult to provide a convincing explanation of why even mild corporal punishment is bad for children without mentioning the results of empirical studies relating to its effects — studies whose findings exhibit, in certain respects, a high degree of convergence.

The court mentioned in passing that the defence permits parents to violate children's right to 'psychological integrity' under s 12(2) of the Constitution (para 70), but provides no argument in support of this averment. Keightley J could, however, have referred to a recent overview of the empirical data showing that even parental spanking, as distinguished from more severe exercises of force on the bodies of children, is associated with seriously adverse psychological outcomes for children:

> 'In childhood, parental use of spanking was associated with low moral internalization, aggression, antisocial behaviour, externalizing behaviour problems, internalizing behaviour problems, mental health problems, negative parent-child relationships, impaired cognitive ability, low self-esteem, and risk of physical abuse from parents. In adulthood, prior experiences of parental use of spanking were significantly associated with adult antisocial behaviour, adult mental health problems, and with positive attitudes about spanking.' (Elizabeth T Gershoff & Andrew Grogan-Kaylor 'Spanking and child outcomes: Old controversies and new meta-analyses' (2016) 30 *Journal of Family Psychology* 453 at 457.)

The evidence relating to parental spanking's effects indicates not that every child subjected to it will be psychologically harmed and manifest these types of undesirable behaviour (so that the common response to such evidence that 'I was corporally punished and turned out fine' is beside the point), but that resort to corporal punishment, even when restricted to milder forms such as spanking a child's bottom with the flat of the hand, *increases the probability of negative outcomes*. At the same time, there are no studies indicating that parental spanking promotes healthy child development or is conducive to mental health or wellbeing. The evidence we have about the risk of psychological harm even mild corporal punishment poses lends support to the claim that corporal punishment poses an unnecessary risk to children's psychological integrity. (This evidence suggests that even 'reasonable' parental spanking would count as abuse under the Children's Act 38 of 2005, which defines 'abuse' to include 'exposing or subjecting a child to behaviour that may harm the child psychologically or physically'.) And when we add to this the anxiety not uncommonly occasioned by children's anticipation of corporal punishment and the fear elicited during it, we have strong grounds for concluding that it violates children's psychological integrity.

As a counter to this argument against corporal punishment, someone might try to exploit the distinction, irresponsibly drawn by Sachs J in *Christian Education* (supra), between physical punishment administered by parents in 'the intimate and spontaneous atmosphere of the home' and that carried out by teachers is 'the detached and institutional environment of the school' (ibid para 48). But this distinction, with its implication that parents are more likely than teachers to be concerned for their children's interests and to love them, cannot protect corporal punishment administered by parents from the imputation that it risks psychologically harming children. For one thing, not all parents, sadly, are concerned for their children's wellbeing. For another, even genuine love and affection felt by parents for their children is consistent with the former having a 'false conception' of the interests and needs of the latter. 'Many a child's path to hell has been paved with the best parental intentions' (David Archard *Children: Rights and Childhood* (2015) 103). Thirdly, many studies do not support the hypothesis that negative outcomes associated with corporal punishment, including increased risk of delinquency and aggression, will be moderated by parental 'intimacy' and love.

The court also makes no mention of available evidence concerning the likelihood of mild corporal punishment escalating into exercises of force that are manifestly unacceptably severe (see for example David G Gil *Violence Against Children: Physical Abuse in the United States* (1973); James Garbarino 'The human ecology of child maltreatment: A conceptual model for research' (1977) 39 *Journal of Marriage and the Family* 721; Ross Vasta 'Physical child abuse: A dual-component analysis' (1982) 2 *Developmental Review* 125; John E B Myers *Child Protection in America: Past, Present and Future* (2006) 146–7). One explanation of the potential for 'reasonable' corporal punishment to escalate into an exercise of more severe force, even when administered by

parents who are mindful of the restriction on the severity of lawful corporal punishment imposed by the defence, is that, as Keightley J observed, parents who wish to avail themselves of the opportunity to inflict corporal punishment that the defence affords will have to decide on the severity of physical force that is 'reasonable' in the circumstances, and they may, because the limits implied by the signifier 'reasonable' are vague, inadvertently cross the line separating lawful corporal punishment from more severe forms that even corporal punishment's defenders concede may be physically injurious or psychologically damaging (para 68).

The court neglected in addition to mention a related point counting strongly in favour of the criminalisation of parental corporal punishment: that the limited determinacy of the defence, in addition to exposing children to the risk of excessive corporal punishment, exposes *parents* who are concerned to limit their use of corporal punishment to what is reasonable (and so lawful) to the risk of criminal prosecution and punishment, since they will have to interpret for themselves what level of physical force is reasonable in the circumstances. Parents' judgement concerning how much force is reasonable will perforce be (to some extent) subjective and so will be influenced by their moral, religious and cultural beliefs. And when their view of what qualifies as 'reasonable' corporal punishment conflicts with the views of legal officials, they run the risk of being criminally prosecuted and convicted — as the appellant was in this case. It is plausible to think that parents should not be exposed to the risk of prosecution and conviction as the cost of availing themselves of the liberty accorded to them by the defence to administer corporal punishment.

Keightley J drew support for her decision from a concern previously expressed by the Constitutional Court regarding the extravagantly violent nature of South African society and the state's duty to combat violence: the reference in *Williams* ((supra) para 51) to the unacceptable levels of violence in South Africa and Sachs J's insistence in *Christian Education* ((supra para 43) that the state is under a duty to reduce 'the amount of public and private violence in society generally'. But while she is right that the occurrence of corporal punishment contributes to the overall level of violence by itself *being* a type of violence, she fails to register that it does so too by *engendering* violence through the example it sets for children, who are always liable to extract from it the lesson that it is permissible for those in a position of power to use physical violence to express their disapproval of perceived misconduct and to resolve disputes. Many studies have found that the use of corporal punishment is associated with increased aggression in children, who are more likely to approve of violent punishments (see for instance Zvi Strassberg, Kenneth A Dodge, Gregory S Pettit & John E Bates 'Spanking in the home and children's subsequent aggression towards kindergarten peers' (1994) 6 *Development and Psychopathology* 445; Catherine A Taylor, Jennifer A Manganello, Shawna J Lee & Janet C Rice 'Mother's spanking of 3-year-old children and subsequent risk of children's aggressive behaviour' (2010) 125 *Pediatrics* 1057–65; Dominique A Simons & Sandy K Wurtele 'Relationships

between parents' use of corporal punishment and their children's endorsement of spanking and hitting other children' (2010) 24 *Child Abuse and Neglect* 639; Shawna J Lee, Inna Altschul & Elizabeth T Gershoff 'Does warmth moderate longitudinal associations between maternal spanking and child aggression in early childhood?' (2013) 49 *Developmental Psychology* 2017).

Objections to criminalisation and the limitations analysis

The court rebutted two objections to criminalisation of all corporal punishment carried out by parents. The first is that it will result in the criminal conviction for assault, and punishment of, a greater number of benevolently motivated parents who could 'end up losing their children' (para 80). This objection is for three reasons unsound. First, in countries in which corporal punishment by parents has been criminalised, and in which a policy of prosecutorial restraint resembling the one that the Minister proposes to follow is operative (New Zealand, for example) few care-givers have faced criminal prosecution for administering mild corporal punishment. The policy has been to rely more on the attitude-altering effects of legal prohibition and on the pedagogical effects of educational campaigns that have accompanied it. (This has the added advantage of obviating any appreciable extra strain being placed on the criminal justice system.) Secondly, even if some parents are criminally convicted and punished, it need not be the case that legal officials would be authorised to remove their children from the family home where this would not serve the best interests of the children concerned. Parents could be subjected to punishments that do not rupture the integrity of the family unit, including mandatory attendance at specialised programmes focused on violence against women and children, which would not only be sufficiently burdensome as to constitute hard treatment, but would also confront them with the nature and effects of corporal punishment, with the aim of persuading them to recognise that it violates children's rights and poses a risk of psychological harm to them, and that it ought to be eschewed. Thirdly, outlawing corporal punishment may well result in *fewer* criminal prosecutions of parents overall. On the assumption that fewer parents are likely to inflict corporal punishment in the aftermath of the ban on all corporal punishment, and given the potential for moderate corporal punishment to escalate into force that amounts to assault, fewer prosecutions of parents for assault are likely to take place.

The second objection is that the criminalisation of all corporal punishment would encroach on the right to freedom of religion of parents who perceive themselves to be under a religious obligation to administer it, or who, while not actually considering it to be enjoined by their religion, view it as giving expression to their religious outlook on child-rearing. The court rejected this objection, and for the right reason: any restrictions placed by the criminalisation of all corporal punishment on the religious freedom of parents 'are not such as to warrant retaining a defence that fundamentally undermines the rights of children' (para 84). The purpose of criminalisation is to protect

children's rights and to safeguard their important interest in not being subjected to the risk of psychological harm. In the face of this concern, religious and cultural prerogatives must give way. Unfortunately, the court went on to say that had FORSA's religious freedom claim been framed instead as a claim for a religious exemption, 'this might have provided a stronger basis to argue against the wholesale doing away with the defence' (para 83). What Keightley J presumably means by this is that it is easier to argue for a religious exemption, which would permit only religious parents to administer corporal punishment, than to argue for the retention of the defence, which would allow all parents to administer it. It is easier because fewer children would receive corporal punishment under the religious accommodation, resulting in the rights of fewer children being violated and fewer children being exposed to the risk of psychological harm, than if the defence was to be retained. There is, however, a different and more important sense in which the claim of religious parents to be excused from compliance with the criminal prohibition on corporal punishment *has no more force* than the claim that the defence should be retained on the ground that eliminating it would violate some parents' right to religious liberty. Once it is established that some practice would violate the fundamental rights of children and imperil their basic interests, there is no room for an exemption to permit certain parents to engage in it in accordance with their religious convictions:

> 'The purpose of a law against corporal punishment is not simply to reduce its incidence, although that is part of it. The deeper and broader purpose is to offer children protection against the risk of psychological harm and the violation of their basic rights — for that is what each incident of corporal punishment amounts to. It is, at bottom, concern for the interests and rights of children that underpins — and justifies — the "ultimatum" addressed to parents and teachers to refrain on pain of legal sanction from administering corporal punishment. In the face of that concern, their perceived religious and cultural prerogatives must needs give way. As Richard Arneson and Ian Shapiro put it, '[i]f the parents' free exercise rights genuinely do clash with the children's rights ... then parents must either internalize their own religious freedom or, in the limiting case, decline to be parents.' (Lenta op cit at 175.)

In *Christian Education*, Sachs J declined to grant a religious exemption to permit religious teachers to administer corporal punishment for this sort of reason (*Christian Education* (supra) para 50). Admittedly, the denial of an accommodation from a blanket criminal prohibition of corporal punishment to permit religious parents to administer it has a greater impact on them than the refusal of an exemption in favour of teachers. As Sachs J pointed out, denying religious teachers an exemption to allow them to administer corporal punishment does not prevent religious parents from ensuring that their children receive physical correction in response to the latter's transgressions: 'The parents are not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They can do both simultaneously' (*Christian Education* ibid para 51). That is, it

would still be open to *parents* to administer corporal punishment for disciplinary infractions occurring at school. By contrast, the denial of an exemption from the legal prohibition of corporal punishment by parents confronts them with a stark choice between adherence to the criminal law and adherence to the prescripts of their religion (as some parents interpret them). Sometimes the impact on religious believers of forcing them to choose between the tenets of their faith and the requirements of the law provides sufficient justification for an accommodation. This may be the case where the practice that religious petitioners wish to engage in does not violate the fundamental rights of others. *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC), which involved a claim for a religious exemption in favour of Rastafarians from a criminal prohibition on cannabis possession, was, I think, a case in which an accommodation was justified on exactly these grounds, Rastafarian cannabis possession and use violating no-one's fundamental rights (*Prince* (supra) para 149; for appreciative discussions of Sachs J's minority judgment in *Prince*, see Patrick Lenta 'Religious liberty and cultural accommodation' (2005) 122 *SALJ* 352 at 371–5; Patrick Lenta 'Religious and cultural accommodations to school uniform regulations' (2008) 1 *Constitutional Court Review* 259 at 266–71). But the claim for an accommodation to permit religious parents to hit their children is not such a case and the uniform, exceptionless enforcement of the prohibition must be robustly insisted upon.

CONCLUSION

There is much to admire in the court's judgment, not least the courage of two judges' criminalising a practice viewed by the majority of South Africans, albeit mistakenly, as morally permissible, and by some as morally obligatory. Furthermore, the court provided good reasons for its decision. There is also the occasional pungent formulation, as when Keightley J says that the effect of the defence 'is to render more vulnerable a group of rights-holders that has been singled out by the Constitution to be deserving of special protection, and whose interests are expressed to be of paramount importance' (para 76). But given the significance of the justificatory shortfall to which I have drawn attention, symptomatic of well-founded legitimacy-related anxiety combined, I imagine, with a burdensome caseload and limited resources with which to conduct research, I find myself hoping that the decision will be appealed. The probability of its being overturned (an eventuality that would, I believe, be very bad for children) is sufficiently low in my estimation for it to be outweighed by the desirability of affording the judiciary an opportunity to provide a fuller, more convincing justification for criminalising parental corporal punishment.