CORPORAL PUNISHMENT AND THE COSTS OF JUDICIAL MINIMALISM

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Abstract. In this comment on the Constitutional Court's judgment, *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* [2019] ZACC 34, in which it declared the common law defence of 'reasonable corporal punishment' unconstitutional, I draw attention to the costs of the Court's embrace of judicial minimalism. I argue that the narrowness of the judgment – the Court's restricting the grounds of its decision to just two – and its shallowness – the Chief Justice's eschewal of theoretical ambition in particular – results in a failure credibly to justify the restriction of parents' freedom to raise their children as they see fit. Not only does this justificatory shortfall risk eroding the Court's perceived legitimacy, it also neglects appropriately to educate citizens about the wrongfulness of all parental corporal punishment, undermining the judgment's potential to bring down the incidence of this practice.

Keywords. corporal punishment, children, judicial minimalism, right to dignity, violence

INTRODUCTION

In a note on *YG v S* 2018 (1) SACR 64 (GJ), in which the Gauteng Local Division, Johannesburg, declared unconstitutional the common law defence of 'reasonable corporal

punishment' that previously had shielded parents from exposure to criminal liability for inflicting moderate physical chastisement upon their children, I endorsed the outcome, but expressed dissatisfaction with the quality – the shallowness in particular – of the justification offered in support of it. I submitted that the High Court had overlooked arguments that it could – and should – have enlisted, in addition to the arguments it did enlist, in arriving at the conclusion that even mild or moderate parental corporal punishment violates the rights of children. I concluded my assessment by expressing the hope that the decision would be appealed, the likelihood of a reversal being (in my view) sufficiently low as to be outweighed by the desirability of a more comprehensive and compelling justification for the criminalization of parents' physical chastisement of their children (Patrick Lenta 'The "Reasonable Corporal Punishment" Defence Struck Down: *YG v S*' (2018) 135 *SALJ* 205).

The High Court's decision *has* since been appealed, the Constitutional Court affirming the incompatibility of the common law 'reasonable corporal punishment' defence with the Constitution of the Republic of South Africa ('the Constitution') in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* [2019] ZACC 34. The outcome of the appeal is gratifying given that all parental corporal punishment is both morally impermissible and in violation children's constitutional rights, regardless of the degree of force employed or whether the pain registered by its recipients be mild or severe, or whether the chastisement be religiously or culturally motivated, or whether it be administered in a loving environment, or whether it be turned to only as a final disciplinary resort (for detailed arguments in support of these propositions, see Patrick Lenta *Corporal Punishment: A Philosophical Assessment* (2018)). My satisfaction at the High Court's decision having been appealed and at the Constitutional Court's having unanimously reached the correct result, as I see it, is, however, overshadowed by disappointment at the latter's having provided a justification in support of its ruling that is even narrower and shallower than the

High Court's, so that it fails more conspicuously than the High Court to discharge satisfactorily the state's duty credibly to justify restrictions placed on parents' freedom to raise their children as they see fit (a freedom which, on the liberal outlook, is far-reaching).

In what follows, I argue that the narrow grounds on which the Constitutional Court's decision is based, and the shallowness of the arguments it advances in support of it, appear to be a consequence of its adherence to judicial minimalism, at once a doctrine and a decision-making strategy thanks to which philosophical and theoretical input is eschewed in favour of judicial determinations based on narrow and shallow grounds. I begin by briefly setting out what judicial minimalism entails and outlining the rationales advanced in support of it. I then provide evidence of the conformity of the Constitutional Court's judgment to the precepts of judicial minimalism. My purpose is not to assail judicial minimalism – I forbear pronouncing on its merits – but to argue that in the judgment I bring under scrutiny embrace of it results in a regrettable justificatory deficit. I submit in addition that the Court's efforts to affirm the respectability, and even cogency, of the arguments brought forward by parental corporal punishment's defenders serve, at best, to take the shine off the gains secured by the ruling itself; at worst, actually to undermine them.

JUDICIAL MINIMALISM AND ITS MANIFESTATIONS IN THE JUDGMENT

What Judicial Minimalism is and the Court's Embrace of it

The Court's allegiance to judicial minimalism is expressed in paragraph 30 of the judgment, in which the Chief Justice, on behalf of a unanimous Court, endorses the avoidance of 'prolixity' and espouses the view that '[w]here one or more key constitutional rights or principles could help to properly dispose of an issue, very little purpose is hardly ever served

by the long-windedness that takes the form of trolling down all the rights, principles or issues implicated or raised in order to arrive at the same conclusion' (para 30). These sentiments could easily have been inspired by an apophthegm of another Chief Justice and supporter of judicial minimalism, United States Supreme Court Chief Justice John Roberts: 'If it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more' (quoted in Cass Sunstein 'Beyond judicial minimalism' (2007) 43 *Tulsa Law Review* 825 at 827). Judicial minimalism, whose best-known academic proponent is Cass Sunstein, counsels in favour of judges' ruling on intractable and divisive issues as shallowly and narrowly as possible (Cass Sunstein *Legal Reasoning and Political Conflict* (1996); Cass Sunstein *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999)). That is to say, it recommends that judges eschew theoretical depth and cover only as much ground – engage with only as many issues – as is necessary to resolve the dispute they are adjudicating. Judges' silence on issues which it is not crucial for them to address is seen as a constructive option from the vantage-point of judicial minimalism, for it subserves the desideratum of reducing the scope for disagreement both among presiding judges and the public at large and, beyond that, holds out the hope of attracting citizens' support for rationales and outcomes that may be contentious and/or unpopular.

Judicial minimalism discerns positive value not only in judges' silence but also in judgments founded on 'incompletely theorized arguments' as the latter are well-adapted to garnering broad-based public support. Among other benefits extolled by advocates of judicial minimalism is one mentioned by Mogoeng CJ, namely, that it reduces the decision-making burden placed on judges, who often are required to arrive at their determinations in circumstances of 'scarcity of judicial resources and time' (para 30). Relatedly, judicial minimalists submit that minimizing complex and contentious theoretical reasoning and circumventing issues which it is not strictly necessary for judges to take into account, reduces

the scope for judicial error, as judges are not, after all, trained philosophers (Cass Sunstein 'From theory to practice' (1997) 29 *Arizona State Law Journal* 389 at 391-2). Abstention by judges from contentious reasoning is also held to reduce the scope for giving offence to individuals or interest groups by leaving their basic convictions unchallenged (Sunstein (1996) op cit at 4). In the perspective of judicial minimalism, this is not only inherently good as it bespeaks judges' respect for others' convictions, which may well be at odds with their own, but is also prudent as it is likely to deflect hostility from, or even win support for, possibly unpopular judicial rulings. It is evident from the character of the benefits ascribed to judicial minimalism that it is justified above all on pragmatic grounds.

Narrowness

An aspect of the judgment that undoubtedly is in tune with judicial minimalism is its narrowness. It reposes primarily on the right of everyone not to be subjected to 'violence from either public or private sources' and, secondarily and cursorily, on the right of all to 'have their dignity respected and protected'; also on the provision falling under the heading of 'Children' to the effect that '[a] child's best interests are of paramount importance in every matter concerning the child' (ss 12(1)(c), 10 and 28(2) of the Constitution respectively). The Chief Justice confines his analysis to these rights even though, as he acknowledges, the right to equality (s 9) and section 28 as a whole (including the right of children to protection against maltreatment, neglect, abuse or degradation (s 28 (1)(d)) also have a bearing on the case and 'could be relied upon to determine the validity of reasonable and moderate chastisement' (para 36).

The Court says almost nothing about religious parents' right to freedom of religion (s 15) despite its recognition that 'parents' right to freedom of religion is also implicated' in the

controversy (para 16). One might have expected the Court to include a discussion of how the clash between religious parents' right to raise their children in accordance with the tenets of their faith, an aspect of the right to freedom of religion, and the children's rights engaged by the dispute over the constitutional status of the 'reasonable corporal punishment' defence is to be resolved. Mogoeng CJ's rationalization of the Court's pretermission of a substantial discussion of the right to freedom of religion is that Freedom of Religion South Africa (FORSA), the applicant in this appeal, 'fundamentally seeks to protect the pre-existing common law defence of chastisement available to all parents irrespective of their religious persuasions, cultural practices or non-belief in a deity' – that is, its claim is libertarian in character, rather than taking the form of a demand that only religious parents should be entitled to physically punish their children (in accordance with their perceived religious duty to do so, say). But as a reason for abjuring discussion of the right to freedom of religion other than to say that it 'does not expressly provide for parental entitlement to administer moderate and reasonable chastisement to the child nor does any provision of the Constitution acknowledge the existence of a cultural right to the same effect' (para 63), it is unconvincing given that FORSA is a religious organization that, as Mogoeng CJ acknowledges, relies in part on Old Testament verses enjoining corporal punishment in support of its claim that parents are entitled 'to administer reasonable and moderate chastisement on their children as an integral part of their exercise of the right to freedom of religion' (para 34) and given that the criminalization of all parental corporal punishment infringes (or limits) many religious parents' right to religious liberty.

For judicial minimalists like Sunstein, of course, narrowness particularly recommends itself in the context of potentially divisive court rulings: in such settings, as noted above, it can serve to both minimize dissension and maximize support. Nor is there room to doubt the divisiveness of the Constitutional Court's judgment in *Freedom of Religion South Africa v*

Minister of Justice and Constitutional Development: many if not most South Africans, after all – and not just religiously-inclined ones – do not view mild corporal punishment visited as a last resort upon persistently disobedient or otherwise refractory children as a violation of their rights, and they favour its being legally permitted. So the unpopularity and contentiousness of the Court's ruling that *all* corporal punishment violates children's rights would have been easily foreseeable. Consequently, the temptation to settle the dispute on the narrowest possible legal and constitutional grounds would have been signally difficult to resist. It is no surprise, therefore, that in the present case, at any rate, the Court was won over to the doctrine of judicial minimalism.

From the minimalist standpoint, not only is narrowing the grounds of judicial decisions desirable as a way to reduce the scope for disagreement among the citizenry at large, it is also more likely to facilitate unanimous judgments since judges who have diverse views and convictions are more likely to concur in a single judgement if it is narrow, there being less with which to disagree. As Mogoeng CJ's American counterpart, Chief Justice Roberts, puts it, 'the broader the agreement among the justices, the more likely is a decision … on the narrowest possible grounds' (quoted in Sunstein (2008) op cit at 827). And the more the judges agree, the less are citizens likely to dissent; this is a point that surely would not have been lost on the Constitutional Court in the case under discussion: if in handing down their controversial ruling, the justices could contrive to speak with one voice, their unanimity, while probably unlikely to win citizens' approval, might yet suffice to limit their disapproval.

Shallowness

Another aspect of the justification offered for the ruling that is consonant with minimalism is its shallowness; it eschews as far as possible contentious theoretical argument. Consider, for

example, how little the Court has to say in support of its view that even moderate corporal punishment violates children's right to dignity:

> 'There is a sense of shame, a sense that something has been subtracted from one's human whole, and a feeling of being less dignified than before, that comes with the administration of chastisement to whatever degree. I say this alive to the reality that being held accountable for actual wrongdoing generally has the same effect. Being found guilty of misconduct or crime and the consequential sanction like imprisonment, however well-deserved, has a direct impact on one's dignity. It is all a matter of degree.' (para 47)

From this it follows, in the Chief Justice's opinion, that 'moderate chastisement does impair the dignity of a child' (para 48). And since, in his view, alternative, non-physical kinds of punishment (or discipline) are available to parents that are effective as a 'means to achieve discipline', the infringement (or limitation) of the right to dignity cannot be justified: any and all corporal punishment violates it (paras 68-71).

Let us assess the force of these statements as an argument, starting with the first sentence of paragraph 47. (Important to notice at the outset, however, is that when Mogoeng CJ says that shame, indignity and injury to a child's sense of self-worth inevitably accompany 'the administration of *chastisement* to whatever degree', he is making a claim not about punishment in general but about *physical* punishment (or physical chastisement) only. The Chief Justice erroneously uses 'chastisement' throughout the judgment as a synonym for corporal punishment. It is no such thing. While the connotation of physical punishment is not absent from the term, it also encompasses disciplinary techniques involving no exercise of physical force on children's bodies and no infliction of physical pain – stern verbal rebuke,

for example.) Is the Chief Justice right in holding that children on whom corporal punishment is visited inevitably feel shame, a diminution of self (or self-worth) or indignity? The answer is no, for many children on whom it is administered feel none of these things. Does it then follow that mild corporal punishment does not, after all, violate children's right to dignity? Again the answer has to be no, since what is in play here are feelings, subjective reactions, that is; and such reactions are far from trustworthy. Accordingly, a child's *feeling* (or not feeling) diminished, degraded or shamed is no reliable indicator of whether she actually has been (or has not been) unacceptably diminished, degraded or shamed. As Antony Duff observes, 'some of the worst kinds of degradation precisely involve reducing their victims to a condition in which they no longer feel degraded because they have come to think such treatment fitting for them' (R A Duff 'Punishment, dignity and degradation' (2005) 25 *Oxford Journal of Legal Studies* 141 at 150-151).

Although Mogoeng CJ provides no substantial theoretical argument in support of his view that all corporal punishment violates children's right to dignity, such arguments are certainly available. It is arguable, for example, that inasmuch as moderate corporal punishment violates children's right to security of the person (assuming, for now, that it does – I shall say more about this in a moment), it also violates their dignity since the message conveyed by such treatment is that the punished child lacks sufficient worth to be treated with respect (Jeffrie Murphy 'Forgiveness and resentment' in Jeffrie Murphy and Jean Hampton *Forgiveness and Mercy* (1988) 14 at 25). It is also arguable that because it unfairly discriminates against children on the grounds of their age, unexcused assaults on adults being legally prohibited on the basis of their serious moral wrongfulness, all corporal punishment violates the ideal of respect for the equal dignity of all. In the words of Canadian Supreme Court Justice Ian Binnie, corporal punishment 'effectively designate[s] children as second class citizens' in a way that is 'destructive of dignity from any perspective including the

child's' (see Justice Binnie, dissenting in part, in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 S.C.R. 76, para 107). But the development of arguments along one or more of these lines is discouraged by judicial minimalism's anxiousness to avoid potentially controversial theoretical rationales.

The Chief Justice's point in the sentences that comprise the remainder of paragraph 47 seems to be that while all conviction and punishment may degrade inasmuch as they are intended to express reprobation and condemnation, which have the potential to make the punished wrongdoer experience shame and indignity, some kinds of punishment, as Fitzmaurice J observed in his separate judgment in *Tyrer v United Kingdom* ((1978) 2 EHRR 1, para 6), 'entail a degree a degree of degradation recognizably greater than that inherently bound up with any normal punishment that takes the form of coercion or deprivation of liberty'. If that is indeed Mogoeng CJ's point, it constitutes a cogent rejoinder to a lurking *reductio ad absurdum* that he ought to have pounced upon but in fact passes over in silence: namely, the proposition that if punishments are condemnable because they subject their recipients to shame or indignity, then *all* punishment should be considered illegitimate since any punishment whatsoever may cause the person subjected to it to experience shame or indignity. Yet the fact of the matter is that we do not consider *all* punishments to be illegitimate and condemnable. What Mogoeng CJ, however, does not supply is precisely the element that is most needed, to wit, an argument in favour of viewing moderate corporal punishment as involving a degree of degradation that crosses the line dividing the level of indignity or shame accompanying all punishments from that which characterizes punishments that degrade their recipients to an unacceptable degree, such that they (but not other punishments) may be deemed to violate the right to dignity.

I turn now to consider what Mogoeng CJ says in support of his view that all parental corporal punishment violates the right 'to be free of all violence from either public or private

sources' that is subsumed under the right to freedom and security of the person (section 12(1)(c) of the Constitution). In support of his interpretation of this right, he offers at least the outline of a sound argument, which runs roughly as follows: (1) violence should be defined as conduct consisting in the exercise of physical force that is 'intended to hurt, damage or kill someone or something'; nor need the physical force exercised be more than minimal for the conduct in question to qualify as violence (paras 38 and 39); (2) all corporal punishment employs physical force for the purpose, and with the intention, of inflicting physical pain or hurt (paras 39-41) – and this regardless of whether the aim behind its administration be to benefit children overall or on balance; (3) in the absence of the 'reasonable corporal punishment' defence, the infliction of moderate corporal punishment upon children would be legally classified as assault, which incontestably qualifies as violence under the definition set out in (1) above (paras 35, 41-43); (4) it follows from (1)-(3) above that all corporal punishment counts as violence; (5) therefore, all parental corporal punishment infringes (or limits) the right of children to live free of violence; (6) since it infringes this right, corporal punishment would be justified only if it benefits child recipients on balance – only if it is in their best interests overall – which would be the case only if it were indispensable for achieving the legitimate aims of child discipline; (7) there is 'a paucity of clear or satisfactory empirical evidence that supports chastisement as a beneficial means of instilling discipline' and some evidence that it has potentially harmful effects (para 64); (8) there is thus insufficient evidence to show that corporal punishment benefits children on balance and that it is in their best interests overall; (9) corporal punishment is not indispensable for effectuating the disciplining of children since effective non-violent disciplinary alternatives to it are available to parents (para 69); (10) it follows from (5)-(9) that the 'reasonable corporal punishment' defence's infringement (or limitation) of children's right to be free from

violence cannot be justified and that all parental corporal punishment must be deemed to violate this right.

While the train of argument adumbrated above is sound in broad outline, more by way of supporting argumentation is needed to prosecute it convincingly. I have not space enough here to consider more than one of its steps, so I shall restrict myself to the first. The definition of violence Mogoeng CJ favours, which, he says, is sourced from the *Oxford English Dictionary* (*OED*), does not appear among the senses given by the *Oxford English Dictionary Online* (*OED Online*), which records the present-day senses of the word. (For whatever reason, the Chief Justice cites a 1936 edition of the *OED* as the source of the definition he favours.) Now a significant difference between the *OED Online* definitions of violence and the one befriended by the Chief Justice is that none of the former make mention of an *intention* on the part of the person exercising physical force to 'hurt, damage or kill someone or something'. A likely reason for the *OED Online*'s excluding such an intention as an element of the definition emerges when we consider the case of a shooter who fires a machine gun into a crowd of people not because he intends to hurt, injure or kill anyone but simply to determine, out of curiosity, whether he can empty a magazine into the crowd without hitting anyone. Under Mogoeng CJ's definition of violence, the shooter will not have engaged in violence even if, in the event, he injures or kills people in the crowd, since although he acts extremely recklessly, he lacks the intention to hurt, injure or kill anyone in the crowd. This consequence is counter-intuitive. Mogoeng CJ suggests, moreover, in the final sentence of paragraph 38, that violence is 'about the … exertion of some force *or threat thereof*' (para 38, emphasis added). But this contradicts his initial definition of violence, which makes no mention of the *threat* of force, only its actual exercise. Finally, let us consider Mogoeng CJ's uncircumscribed interpretation of what constitutes violence, as expressed in the proposition that the application of physical force with the intention to cause

pain or hurt must needs count as violence '*however minimal*' may be the degree of force employed (para 39, emphasis added). This proposition will be disputed by those who define violence with reference to the degree of force employed, arguing that for an act to be violent the amount of force used must cross a certain threshold of intensity (see, for example, Carl Wellman *An Approach to Rights* (1997) 201). Under this view it follows that one or two spanks with the flat of the hand on children's buttocks may not count as violence. By way of rejoinder, it may be pointed out that a husband who smacks his wife's buttocks for disciplinary purposes with physical force sufficient to cause pain would be guilty of an act of domestic violence. On this analogy, should not corporal punishment, even in the form of just one or two spanks with the flat of the hand on children's buttocks, equally count as an instance of violence – perhaps even as domestic violence (see Susan J Brison and Daniel Manne 'Domestic Violence' in *The International Encyclopedia of Ethics* (2013) 1454 at 1454)? This argument is there to be made, but the Chief Justice omits to make it, presumably because his commitment to the principle and practice of judicial minimalism (at any rate in the case under discussion) induces him to forbear its use or perhaps blinds him to its availability.

My animadversions with regard to Mogoeng CJ's definition of violence are not intended to call into question his classification of even moderate corporal punishment as violent ((4) above). I agree with him that smacking or hitting that causes even slight physical pain qualifies as violence. My point is simply that the argument he enlists to support his conclusion that moderate corporal punishment is inconsistent with children's right to protection against violence requires significantly more by way of theoretical back-up to make it convincing. It may well be that the Chief Justice's theoretical abstinence saves time and resources, decreases the likelihood of error, increases the likelihood of agreement among the judges, and gives defenders of parental corporal punishment less to disagree with, but these

gains come at a price, and the price incurred is that the justificatory base on which the Court's ruling rests is neither as broad nor as substantial as it ought to be (or deserves to be); as a result, the judgment falls short of being the legal and moral landmark it could, and should, be.

UNWARRANTED CONCESSIONS TO CORPORAL PUNISHMENT'S DEFENDERS

As we have noted, judicial minimalism's supporters contend that a judge's embrace of it has the advantage of showing respect for convictions and/or theoretical commitments that stand opposed to his own. That Mogoeng CJ is at pains in his judgment to demonstrate respect for the standpoint of corporal punishment's defenders is incontestable. Indeed, he goes further; he is not averse to flattering them and exhibiting a conciliatory understanding of their point of view: a whole section of the judgment is incorporated solely for the purpose of sympathizing with them and acknowledging the merit of their outlook (paras 51-54). He characterises the arguments brought forward by FORSA in support of the retention of the 'reasonable corporal punishment' defence as 'understandable' (para 53), an epithet calculated rather to procure defenders' forbearance (if not their favour) than actually to mean what it says. He asserts, furthermore, that 'there are indeed sound and wisdom-laden, faith-based and cultural considerations behind the application of the rod' (para 44). (There are, in fact, no 'sound and wisdom-laden' considerations supporting the use of corporal punishment, for its benefits (such as they are) have not been shown to outweigh its costs, there is strong evidence that even moderate parental spanking poses a risk of psychological harm to children, and all corporal punishment violates children's rights to dignity and security of the person, as well as to equality. (For detailed arguments in support of each of these propositions, see Patrick Lenta *Corporal Punishment: A Philosophical Assessment* (2018)). And if the Chief Justice means to affirm the soundness of the Old Testament's mandating of corporal punishment in

Proverbs 13: 24, which he twice cites, that would be to overstep the line of separation between Church and State, a divide on which liberals insist. In any case, the view he espouses in his ruling, that corporal punishment indisputably violates children's rights while being by no means necessary to the attainment of worthy disciplinary objectives, effectively rebuts the claim that to spare the rod really is to spoil the child.

The judgment handed down by the Court contains a number of concessions to the standpoint of corporal punishment's defenders, the net effect of which is to exaggerate the force of the case against the criminalization of all parental corporal punishment. Their only conceivable purpose is to signal the Court's sympathetic understanding of, and respect for, the defenders' position, and thereby to mitigate foreseeable animus in the wake of the ruling. By way of example, let us consider how the Chief Justice handles a key objection raised by opponents of criminalization. Their argument is that if mild parental corporal punishment is criminalized, the only defence to the charge of criminal assault available to parents who administer it will be the *de minimis (non curat lex)* rule. But instead of rebutting the opponents' objection – and grounds for a rebuttal there certainly are (as I shall demonstrate presently) – the Chief Justice goes more than halfway towards sympathizing with it by holding that the *de minimis* rule 'has shortcomings in terms of its inability to prevent the abolition of the [reasonable corporal punishment] defence from possibly imposing a strain on the family structure by allowing parents to be prosecuted for even the mildest of well-intentioned infractions', and to be 'imprisoned' if convicted (para 52).

Yet the objection that the Chief Justice prefers to leave unrefuted can, and should, be disposed of. We do not consider it to be a sound objection to the criminalization of domestic violence that it would leave a well-intentioned husband who, believing that it is 'for her own good', administers physical force on the body of his wife, without the consent of the latter, to teach her a lesson, with only the *de minimis* rule to fall back on. Furthermore, criminalizing

moderate corporal punishment does not entail the criminalization of every minor exercise of physical force applied by parents to the bodies of their children. Force that does not involve smacking, hitting or beating children for disciplinary purposes could be made legally permissible for a range of other purposes through the enactment of a legislative provision along the lines of New Zealand's *Crimes (Substituted section 59) Amendment Act 2007*, which, while disallowing moderate corporal punishment, allows parents to use reasonable physical force on children for purposes such as 'preventing or minimising harm to the child or another person' and 'performing the normal daily tasks that are incidental to good care and parenting' (ss 59(1)(a) and (d)).

Furthermore, the Chief Justice's concern that the criminalization of moderate parental corporal punishment could place 'a strain on the family structure' by exposing parents who inflict it to prosecution and imprisonment (para 52) is groundless. For one thing, the complaint that state intrusion into the family following criminalization could be detrimental to its integrity could equally be used as an argument against state intervention to prevent husbands from inflicting physical chastisement on their wives with a view to correcting perceived misbehaviour. Yet few nowadays take this objection seriously. For another, the intimacy and affection subsisting between parents and children need not suffer under a dispensation in which all parental corporal punishment is criminalized, for there is no reason to suppose that children will suddenly be emboldened to stand on their rights and point accusing fingers at their parents. There is, accordingly, little reason to fear frequent intrusion by the state into family affairs; and in any case the opportunities for such intrusion could be minimized by the exercise of police and prosecutorial discretion (provision for which is made in section 59(4) of New Zealand's *Crimes (Substituted section 59) Amendment Act 2007*). Finally, the punishment imposed on parents who are prosecuted for engaging in corporal punishment and convicted of assaulting their children need not be a sanction, such as

imprisonment, that has the potential to fracture the family unit. Parents could instead be fined or, preferably, be required to take part in specialized programmes focussing on violence against family members, with a view to bringing home to them the harmful effects of violence against children, persuading them of its illegitimacy, and educating them about available disciplinary alternatives.

With reference to the criminalization of mild parental corporal punishment, Mogoeng CJ writes that it is 'debatable whether the use of that method of discipline invariably produces negative consequences' (para 53). This kind of concessionary pussyfooting in favour of opponents of the criminalization of mild parental corporal punishment is, at best, superfluous, at worst, a straw man gambit. For few, if any, opponents of parental corporal punishment – and the more so of *mild* parental corporal punishment – submit that it is a method of discipline that *invariably* produces negative consequences. They are far from insisting that *every* child subjected to it will be harmed psychologically or will manifest the aggressive and delinquent kinds of behaviours that the vast majority of studies which research its effects associate with it. Their claim is rather that the use of corporal punishment *increases the probability* of psychological harm and anti-social behaviour.

The Chief Justice argues further that studies associating corporal punishment with psychological harm to children are 'open to criticism in that very little effort seems to have been made to distinguish between moderate and excessive or abusive application of force to the body of a child' (para 64). Now while it *used to be true* that the findings of studies associating corporal punishment with psychological harm laid themselves open to allegations of unreliability as a result of confounding moderate corporal punishment, such as parental spanking, with more severe and potentially abusive applications of physical force, a new set of meta-analyses from which harsh and potentially abusive outcomes were removed has demonstrated that even parental spanking is associated with 'low moral internalization,

aggression, anti-social behaviour, externalizing behaviour problems, internalizing behaviour problems, mental health problems' and other detrimental consequences (Elizabeth T Gershoff and Andrew Grogan-Kaylor 'Spanking and child outcomes: old controversies and new meta-analyses' (2016) 65 *Family Relations* 453 at 457). As for the risk of psychological harm posed to children by *mild* corporal punishment, the evidence, while not entirely conclusive, is yet sufficiently strong that it ought to be accorded significant weight in any assessment of the legal status of this practice (see Elizabeth T Gershoff, Cindy L Miller-Perrin, Yo Jackson, Gail S Goodman, George W Holden and Alan E Kadin 'The Strength of the Causal Evidence Against Physical Punishment of Children and Its Implications for Parents, Psychologists, and Policymakers' (2018) 73 *American Psychologist* 626).

The Chief Justice says that it would be 'an over-generalisation to brand the very possibility of retaining reasonable and moderate chastisement on religious or cultural grounds as an inescapable recipe for widespread excessive application of violence or child abuse' (para 54). This concessive declaration, apart from the tangled prose in which it is couched (a vice infecting not a few of the Chief Justice's submissions) and the pussyfooting stance it betrays, offers grounds for disquiet, inasmuch as the legal authorization of moderate corporal punishment, in combination with its endorsement by certain religious groups, nourishes precisely those conditions that conduce to the flourishing of the practice. If we suppose that retention of the 'reasonable corporal punishment' defence would result in more widespread resort to corporal punishment than if it was done away with (as seems plausible enough on the assumption that criminalizing moderate corporal punishment would have the effect over time of reducing its incidence to some degree, whether through deterrence or, as seems more likely, through fostering a change in parents' attitudes), that would indeed open the door to an increase in the 'excessive application of violence', on the assumption that the Chief Justice's equation of all corporal punishment with violence is sound (which I believe it is). As for

whether retention of the defence would inevitably result in a higher incidence of child abuse than if it were rescinded, corporal punishment is closely associated with a risk of parental child abuse (Elizabeth T Gershoff 'More harm than good: A summary of the scientific research on the intended and unintended effects of corporal punishment on children' (2010) 73 *Law and Contemporary Problems* 31 at 51-52). That 'reasonable' corporal punishment may escalate – often insensibly – into abuse is hardly surprising, considering that the line separating the former from the latter is but vaguely demarcated, so that for parents to cross it inadvertently is a relatively easy matter. And even if it be true that the association between corporal punishment and physical abuse does not of itself constitute conclusive evidence of a causal relationship between parental spanking, say, and actual abuse, the potential for moderate corporal punishment to morph into abuse should carry weight in any assessment of the legal standing of the former.

Taking pains to show respect for, and a sympathetic understanding of, the applicant's position, Mogoeng CJ declares:

> 'Properly managed reasonable and moderate chastisement could arguably yield positive results and accommodate the love-inspired consequence management contended for by Freedom of Religion. And that would explain why so many other civilisations and comparable democracies have kept this defence alive and relatively few have abolished it.' (para 54)

Now while corporal punishment *may* bring certain benefits, these are far outweighed by its costs, some of which the Chief Justice alludes to, including its placing children at risk of psychological harm and its potential to escalate into physical abuse (para 56); but there are others of which he makes no mention at all. For example, corporal punishment is less able to

make children realize the nature and implications of their offences than are certain non-corporal alternatives (such as requiring a child who has vandalized some property to repair the effects of that vandalism, a sanction which also affords her the opportunity to make apologetic reparation to her parents, family or community for the wrong committed, thereby potentially 'strengthening the child's sense of self as good and constructive rather than bad and anti-social' (Martha Nussbaum *Hiding From Humanity: Disgust, Shame and the Law* (2004) 246)). Further, because corporal punishment is typically of a shorter duration than non-physical punishments, it offers the child less time for reflection on the wrong committed, and to that extent shrinks the space for moral stock-taking and repentance. Additionally, the very prospect of corporal punishment not infrequently induces in children sensations of dread and intense anxiety which, besides being bad in themselves, are liable to magnify the intensity of the physical pain experienced during the actual administration of the chastisement. Finally, corporal punishment teaches children the lesson that it is morally acceptable to inflict violence to correct behaviour of which one disapproves – decidedly the wrong lesson, and one which, if strongly enough internalised by the child, could well result later on in violent conduct on the social level. (A fuller discussion of the benefits and costs of corporal punishment is provided in Patrick Lenta *Corporal Punishment: A Philosophical Assessment* (2018) chapter 2.)

Mogoeng CJ's claim that the 'arguably … positive results' corporal punishment produces could account for why the 'reasonable corporal punishment' defence has been for so long retained in many countries is entirely speculative. Dabbling in a bit of speculation myself, I would argue that the defence's retention is more likely due to its endorsement over the centuries by politically powerful religious groups who interpret the tenets of their faith as encouraging or even requiring the use of corporal punishment; another reason could be the

residual influence of the long-lived conception of children as chattel, that is, their parents' property.

Finally, Mogoeng CJ gives unwarranted credence to corporal punishment's defenders' prediction that its criminalization will result in court rolls being clogged up by a 'proliferation of assault cases against parents'. He regards such an eventuality as a 'reasonable possibility' (para 74). But there is little likelihood of his being proved right. To begin with, as we have already noted, there is no reason to believe that the advent of criminalization will suddenly embolden significant numbers of children to hale their parents into court to face charges of assault. Second, we should have regard to the experience of countries which have decided that the better route to follow in addressing the issue of parental corporal punishment is to adopt a policy of prosecutorial restraint in combination with a reliance on the attitude-altering effects of legal prohibition. Two such countries are Sweden and New Zealand. In both, criminal prosecutions of parents for assaulting their children have been relatively few.

CONCLUSION

As we have noted, judicial minimalism's supporters see it as offering appreciable benefits. Whether these will prove their (alleged) worth in the present case only time will tell. It may turn out that some defenders of parental corporal punishment who previously believed that it should remain lawful will be sufficiently impressed by the unanimity of the judgment, sufficiently placated by the Court's silence on a number of contentious issues and sufficiently flattered by its solicitude towards their concerns to be brought to accept its reasoning and ruling. It may also be that the narrowness and shallowness of the judgment has served to reduce the number of errors that would otherwise have materialized (although this scarcely seems possible given the proliferation of confusions and misrepresentations already present

in the judgment as it stands). But even if, despite legitimate doubts, the benefits touted by judicial minimalists were actually to supervene in the present case, the gains achieved would still be outweighed by the price they exact, the manifestation of which is the justificatory shortfall ensuing inescapably from the narrowness and shallowness of the Constitutional Court's judgment.

The confusions and silences that blemish the Constitutional Court's judgment and, more generally, its failure to justify its ruling credibly, are intrinsically deplorable inasmuch as restrictions upon parental liberty demand (and deserve) to be persuasively justified under the principles of liberal democracy. But these shortcomings are also instrumentally detrimental, for in the absence of a persuasive justification the Court's effectively criminalizing mild parental corporal punishment, deemed by many citizens to be a morally irreproachable, convenient and efficacious means of disciplining stubbornly recalcitrant children, has the potential to breed resentment among those who oppose the outcome. And from this reaction may flow further ill effects: the respect due to the highest Court may be eroded; its legitimacy may be called in question. On a more practical, day-to-day level, the temptation to flout the ruling may be irresistible. Criminal proscription of conduct that is powerfully motivated, that mostly takes place in private *and* that is widely viewed is unjustifiably criminalized are apt to be ignored, potentially undermining respect for the law.

A further consideration is that the Court, in deciding the dispute on narrow grounds and in providing shallow justifications for its decision, has effectively passed up the opportunity of communicating to citizens the full extent of the wrongfulness of parental corporal punishment, even as it has passed up the opportunity of shining a light on the many sound arguments that may be appealed to in favour of its renunciation. More is the pity as the educational dimension is of critical importance in this context, given that parental corporal punishment appears to be most effectively curbed when its criminalization is accompanied by

educational initiatives and attitude-altering strategies (Kai-D Bussman, Claudia Erthal and Andreas Schroth 'Effects of banning corporal punishment in Europe: A five nation comparison' in Joan E Durrant and Anne B Smith (eds) *Global Pathways to Abolishing Physical Punishment: Realizing Children's Rights* (2011) 299). While Mogoeng CJ admittedly does recognize the 'educational value' (para 30) of a broader, more substantial justificatory base than the one he provides in his judgment, he appears not to grasp the extent of the damage wrought by its absence to the cogency and authority of both the judgment and the ruling founded upon it.