



Response

23rd September, 2019

The Unconstitutionality of Corporal Punishment

The Constitutional Court, in unanimous ruling on 18th September, upheld an earlier ruling by the Gauteng High Court to do away with the common-law defence of reasonable chastisement when spanking a child.¹ The Court found that “the vulnerability of children, their rights to dignity and to have the paramouncy of their best interests upheld, as well as the availability of less restrictive means to achieve discipline, render moderate and reasonable chastisement unconstitutional.”²

This means that parents no longer have a defence if they are accused of assault for smacking their children at home.³ But the court also ruled that the common law chastisement defence itself was unconstitutional because it violated the child’s right to equal protection of the law, dignity, freedom from all forms of violence and degradation, bodily and psychological integrity, and the child’s right not to be discriminated against on the basis of age. The judgement is in line with UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. South Africa is a signatory of both. The judgement emphasized the availability of less restrictive means to achieve discipline which is in the best interests of the child.

In 2017 the High Court struck down the defence of reasonable chastisement, saying that physical discipline violates children's rights. Freedom of Religion South Africa (FOR SA) appealed against this ruling, arguing that while the organization does not promote abuse, parents should have the right to raise their children according to their religious beliefs. They argued that the judgment would effectively make criminals of many people of faith who believe that the scriptures permit or require them to physically correct their children where necessary, but always out of love.⁴

The Constitutional Court prohibited corporal punishment in detention in 1995, and in schools in 2000, so until now the home has been the only place where corporal punishment could take place. In the face of our present crisis of violence and child vulnerability we need to use every opportunity to provide both meaningful protection for our children and empower parents. Dr Paula Pinheiro emphasizes that “children’s rights to life, survival, development, dignity and physical integrity do not stop at the door of the family home, nor do the states’ obligations to ensure these rights for children.”⁵

Needless to say, the Constitutional Court judgement has received a mixed response, with many saying that the court has no right to interfere in matters of private morality and/or religious conviction. The

polarization of positions on the discipline of children is unfortunate and unhelpful. The common good of all our children is a priority that religious communities share. As one expert in the field puts it:

“The voice and influence of religious leaders is particularly important to deconstruct arguments that justify or condone the use of violence, including corporal punishment, on the basis of culture, tradition or faith. With strong resolve and example, religious leaders are uniquely placed to spearhead their communities’ contribution towards building a world free from violence against children and a society based upon the values of tolerance, respect, compassion, fairness and solidarity.”⁶

In the face of our present crisis of violence and child vulnerability we need to use every opportunity to provide both meaningful protection for our children and empowerment for parents.

Later on the same day as the Court judgement, President Cyril Ramaphosa convened a joint sitting of both Houses of Parliament to discuss the issue of Gender Based Violence. Perhaps that, more than anything, tells us that the way children have been socialized has failed and that a culture of violence has been allowed to flourish. Archbishop Desmond Tutu wrote as far back as 2006 that

“progress towards abolishing corporal punishment is being made, but millions of the world’s children still suffer from humiliating acts of violence and these violations of their rights as human beings can have serious lifelong effects. Violence begets violence and we shall reap a whirlwind.”⁷

The violence and despair of the past few weeks have shocked the nation and there have been calls for effective interventions. There is also a growing consensus that we should be looking at what kind of society we are ‘growing’, and this brings us back to how we bring up our children. As Nelson Mandela said at the launch of his Children’s Fund,

“the vision of a new society that guides us should already be manifest in the steps we take to address the wrong done to our youth and to prepare for their future. Our actions and policies, and the institutions we create, should be eloquent with care, respect and love.”⁸

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¹The ruling follows a 2017 High Court judgement which effectively made all forms of physical correction of children by their parents – no matter how light or well-intended – unlawful

² Judgement handed down by the Constitutional Court of South Africa, 18th September 2019

³While the judgment does not create a new offence – as hitting a child has always been assault under the country’s criminal law – it was previously possible for a parent who smacked a child to raise a special common-law defence of reasonable chastisement, and thus to plead not guilty.

⁴ <https://www.sowetanlive.co.za/news/south-africa/2019-09-18-god-vs-the-law-ban-on-spanking-will-tear-families-apart-warns-lobby-group/>

⁵ Dr. Paulo Pinheiro headed the UN Study of Violence Against Children, October 2006

⁶ Marta Santos Pais, Special Representative of the United Nations Secretary General on Violence against Children

⁷ See Church Network on Non-Violence

⁸ http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS250&