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Educator accountability in South Africa: Rethink section 10 of the *South African Schools Act*

Abstract

Twenty years after the abolition of corporal punishment in South Africa, shocking videos of educators administering corporal punishment surfaced during 2017. A much harsher approach to prosecuting offending educators as well as those who do not report corporal punishment is, therefore, justified. Although this is a feasible solution to the issue, it immediately poses a problem, because the *South African Schools Act*, the *Employment of Educators Act* and the *Code of Conduct* for educators do not include a clear definition of what constitutes corporal punishment. Without a clear definition, neither the criminal courts nor the South African Council for Educators can effectively prosecute educators. To strengthen the role of the law in eradicating corporal punishment, several legal sources are investigated in order to guide the debate as to what should be included in a definition of corporal punishment. Furthermore, the need to explicitly abolish other harmful forms of punishment, which cannot be classified as corporal punishment, is investigated. It is concluded that sec. 10 of the *South African Schools Act* should be amended to define the broad ambit of corporal punishment properly and to prohibit other forms of non-physical punishment that cause psychological and emotional harm to learners.

1. Introduction

More than 20 years after the abolition of corporal punishment, such punishment is still used quite extensively in many schools. In 2011, 16.7 per cent of learners reported that they had been exposed to corporal punishment. This percentage steadily decreased and, in 2016, 9.8 per cent of learners were subjected to corporal punishment.[1] This positive trend should, however, be viewed in context. In 2016, roughly 14 million learners attended public schools.[2] Thus, more than 1.3 million learners were still subjected to corporal punishment, despite the unlawfulness of its application. These numbers do not include the number of learners who were traumatised and otherwise affected by witnessing the violence against their peers.

The 2017 General Household Survey[3] does not include a definition of what is regarded as corporal punishment. Participants, therefore, indicated their exposure to it

1 Statistics South Africa 2017:15.
2 Statistics South Africa 2017:14.
3 Statistics South Africa 2017.

with reference to their personal understanding of what constitutes corporal punishment. Considering the ordinary meaning of the term 'corporal punishment', the participants interpreted it most likely to mean some form of physical punishment administered by an educator. Corporal punishment does not include other forms of harmful punishment such as verbal abuse, victimization, harassment, and criminal defamation. These transgressions are also investigated as separate infractions by the South African Council of Educators (SACE) after complaints in this regard were reported.[4]

Research by Maphosa and Shumba[5] indicates that many educators view alternatives to corporal punishment as ineffective and that the abolition of corporal punishment contributes to the high incidence of ill-discipline in schools. However, in September 2017, the Minister of Basic Education, Ms Angie Motshekga, announced that more than 50 per cent of learners are still subjected to corporal punishment. She also indicated that the prevalence of corporal punishment is as high as 71 per cent in KwaZulu-Natal, while it decreased to 34 per cent in Gauteng, and is as low as 20 per cent in the Western Cape.[6]

What is even more alarming than the number of learners exposed to corporal punishment is the gravity of the violence inflicted on some learners. Some were seriously injured or, worse, died at the hands of their educators.[7] Lately, shocking videos have surfaced depicting educators administering corporal punishment in the most brutal way.[8] Several investigations into the use of corporal punishment by educators were and are undertaken by SACE and the police.[9]

The results of a study on the social and economic costs of violence, in general, against children in South Africa further highlights the importance of urgently addressing corporal punishment and other non-physical harmful forms of discipline. According to this study, the reduced earnings attributable to physical violence and emotional violence against children were R25.2 billion and R9.6 billion, respectively, in 2015.[10] Violence influences the number of years lost due to ill-health, disability, or early death. In 2015, the estimated economic value of these loses was R202 billion (5.1 per cent of GDP).[11]

The South African Human Rights Commission, in its Civil and Political Rights Report 2016/2017, also highlights the seriousness of the problem

4 SACE 2015:25-26; 2016:30-33; 2017:21-23.
5 Maphosa & Shumba 2010:391-397.
6 ANA 2017a; Mitchley 2017.
7 ANA 2017b:2; *Citizen* Reporter 2016:8; Hlati 2017:2. Coetzer 2015; *Times Live* 2015; 2016.
8 Monama 2017; *Mojo News* 2016; *ECR Newswatch* 2017.
9 SACE 2015:25-26; 2016:30-33; 2017:21-23; Mogalagadi 2017; Mlambo 2017.
10 Fang *et al.* 2016:29.
11 Fang *et al.* 2016:29.

and the need to address it urgently.[12] The report calls on the Department of Basic Education to

> ... expedite the establishment of a national protocol to enforce the statutory prohibition of corporal punishment in schools, address the shortcomings in the current legislative and policy frameworks, and provide for the prosecution of teachers and educators who continue to administer corporal punishment.[13]

According to the Minister of Basic Education, the Council of Education Ministers approved a protocol to provide uniform standards to deal with teachers who are found guilty of administering corporal punishment.[14] This protocol will include a definition for corporal punishment and will address instances where educators publicly humiliate learners. This protocol will be made available for public comment. In view of such a protocol and the need to rethink sec. 10 of the *South African Schools Act* (hereinafter *Schools Act*),[15] the current legislative and policy framework with regards to the prosecution of educators who continue to use corporal punishment in schools will be investigated.

2. Failure to define corporal punishment and other harmful forms of punishment

It is trite law that corporal punishment was abolished by sec. 10 of the *Schools Act* and that such punishment was held to be unconstitutional in *Christian Education South Africa v Minister of Education* (hereinafter *Christian Education* case).[16] The provisions of the *Schools Act* are very simplistic and provide merely that corporal punishment is prohibited and that, if found guilty of administering corporal punishment, an educator should receive a sentence that could be imposed for assault. This section fails to prohibit any physiologically or emotionally harmful disciplinary measures that might be used against learners.

The SACE is governed by the *South African Council for Educators Act*.[17] This *Act* also fails to define corporal punishment, despite the annual reports of the SACE indicating the number of educators who have been found guilty of corporal punishment and assault in a specific year.[18] Neither the *Employment of Educators Act*[19] nor the *Children's Act*[20] contains a definition of corporal punishment. The Constitutional Court also failed to define corporal punishment in the *Christian Education* case.

12 SAHRC 2017:46.
13 SAHRC 2017:46.
14 ANA 2017a.
15 *South African Schools Act* 84/1996.
16 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).
17 *South African Council for Educators Act* 31/2000.
18 SACE 2015:21; 2016:30; 2017:21.
19 *Employment of Educators Act* 76/1998.
20 *Children's Act* 38/2005.

In terms of the principle of legality, no presiding officer can find an educator guilty of the offence of administering corporal punishment unless the elements of what constitutes corporal punishment are clear.[21] Thus, no educator can currently be found guilty of the crime of administering corporal punishment; hence, prosecutors have to charge educators with assault and not administering corporal punishment.

Many laypeople are of the opinion that there are degrees of severity when it comes to taking corrective measures against children. Corporal punishment is viewed as force applied to the body of a child, which is not severe at all; assault being an instance of severe action taken against a child, and child abuse constituting the most severe and heinous action taken repetitively against a child. However, the soundness of these assumptions needs to be investigated from a legal standpoint.

The most severe cases of corporal punishment are normally the easiest to deal with, because the severity of the actions of the educator clearly overlap with what laypeople would regard as assault. On the other hand, these clear-cut cases are in the minority. More difficult to prosecute and less likely to be reported would be cases where a child was shouted at, or slapped once on the buttocks, or lightly pinched, leaving no visible marks.

The vast majority of prosecutors would refuse to prosecute these types of cases and would regard them as cases where the maxim *de minimis non curat lex* is applicable. Yet, the conduct of the educator in such cases constitutes an infringement of the human dignity and personal security rights of the learner.[22]

The law can only play a positive part in effectively eradicating corporal punishment in schools if the legal provisions are clear, accessible and constitutional. The following issues arise. First, what constitutes corporal punishment, since the term 'corporal punishment' is not defined in legislation? Secondly, what is the link or difference between corporal punishment and assault, if any? Thirdly, is the ambit of common law assault and the provisions regarding child abuse in the *Children's Act* wide enough to address all forms of unconstitutional disciplinary measures used by educators? Fourthly, what should ideally be included in a definition of corporal punishment? Lastly, should sec. 10 of the *Schools Act* not be amended to explicitly include other harmful forms of punishment?

3. Conceptual and theoretical framework

The law is a body of rules and norms aimed at, *inter alia*, facilitating peaceful and orderly coexistence built on legal certainty.[23] This implies that the law should be "predictable, that it [be] applied consistently and that it [have] a fixed and certain content". Further, the law is normally interpreted

21 Snyman 2014:36; Burchell 2005:94.
22 *Constitution of the Republic of South Africa* 1996:sec. 12.
23 Kleyn & Viljoen 2010:2.

and applied by institutions of state. In addition, non-compliance with the rules will result in some form of sanction. To combat the unacceptably high levels of violence and corporal punishment, the law needs to be clear on what is acceptable and unacceptable conduct, in order to ensure peaceful and non-violent co-existence.

A number of approaches can be followed to make, interpret and implement the law. First, a legal positivist approach to law entails that only those legal rules and judicial norms that are written down and are included in legislation and judgments can be regarded as part of the law.[24] Therefore, legal subjects know exactly what their legal competencies, rights and obligations are. One of the disadvantages of this approach is that, if there is no written prescription to deal with an issue, there is no law to regulate the matter. In this approach, judges are bound by the *ius dicere non facere* principle.[25] A clear definition of what constitutes corporal punishment can, therefore, avoid the pitfalls of a legal positivistic approach.

South African law is mostly positivist in nature, but it is also influenced by the natural-law approach, in terms of which the law also has a moral dimension. South African law, therefore, not only is what is promulgated and given positive content, but also comprises a moral dimension and includes concepts such as fairness, reasonableness, rationality, and *bona fides*.[26] In the natural-law approach, an unjust law is no law at all.

Van Zyl[27] indicates that, through the centuries, natural law has been used as a measure to determine and highlight the positive and negative aspects of acts and the law in general. The point of departure has always been that the natural law provides a rational, logical, and systematic set of rules that are applicable to all nations and constitute an invaluable element in all social interaction. However, the dilemma is that, in the absence of a clear definition of corporal punishment and its explicit abolition, the danger exists that one can argue that certain forms of corporal punishment inflicted on children are morally acceptable, reasonable, fair, or even in the best interests of children and, therefore, justifiable.[28]

Variations of the natural-law approach developed over time, ultimately giving rise to the doctrine of human rights and the subsequent human-rights approach to the law.[29] Despite the positivist nature of the South African legal system, human rights play a crucial role in such system, as is evident from the inclusion of the *Bill of Rights* in the *Constitution of the Republic of South Africa*, 1996, and the change from parliamentary sovereignty to constitutional sovereignty. Of particular importance is the rule of law and the principle of legality under the new constitutional dispensation.

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24 Kleyn & Viljoen 2010:10-11.
25 Kleyn & Viljoen 2010:10-11.
26 Kleyn & Viljoen 2010:20; Van Zyl 1983:188-190.
27 Van Zyl 1983:203.
28 See *S v Williams* 1995 (3) SA 632 (CC):par. 13, where the State argued that there is a difference between adult and juvenile whipping.
29 Van Zyl & Van der Vyver 1982:74.

The principle of legality is entrenched in our law and is captured in the Latin maxim *nullum crimen sine lege*. Burchell[30] summarizes the principle of legality as follows:

> In its simplest form the principle of legality proclaims that punishment may only be inflicted for contravention of a designated crime created by a law that was in force before the contravention.

The list of common-law crimes is now considered closed. Therefore, only the legislature can create new crimes through a constitutionally valid legislative process.[31] The principle of legality is also contained in the *Constitution*. Sec. 35(3) provides that the accused's right to a fair trial includes the right to be adequately informed of the detail of a specific charge and that the law cannot be applied retroactively or retrospectively.[32]

For purposes of this research, the focus will be on the *ius certum* principle, which requires crimes to be defined clearly.[33] Vague and imprecise provisions are objectionable, because they do not provide ordinary citizens with sufficient guidance as to what constitutes legal or illegal conduct. Convictions obtained under vague and ambiguous provisions can be set aside.[34] In *S v Lavengwa*,[35] the court found that, although legislative provisions must be clear, it is also difficult to determine what the concept of certainty entails. The court thus ruled that absolute certainty is not a requirement, but that reasonable certainty is necessary. Therefore, the provision concerned must be sufficiently clear so that people of ordinary intelligence can understand it.

However, one should be realistic about the *ius certum* requirement. The drafting of legislative provisions can be challenging and to define the elements of a crime sufficiently does not imply that there will never be a difference of opinion about the content of the provision. It is impossible to formulate a crime in such concrete terms that it will address all instances of application.[36] Therefore, legal definitions are drafted in more general terms, which opens the door for debate. This debate will include arguments as to the general purpose of a provision and which interpretation would best give effect to constitutional imperatives.[37]

It is also important to note that, although the *ignorantia legis neminem excusat* principle is applicable, the law should also be accessible. Access to legal provisions that are applicable to the teaching profession should, in all fairness, be accessible to them. One, therefore, expects the legislator to include a definition of what constitutes corporal punishment in legislation

30 Burchell 2005:94.
31 Burchell 2005:97.
32 *Constitution of the Republic of South Africa*:sec. 35(3)(a), (n) and (l).
33 Snyman 2014:42; Burchell 2005:100.
34 *S v Shapiro* 1987 (2) SA 482 (B):488-489; *Duffey v Munnik and Another* 1957 (4) SA 390 (T):395.
35 *S v Lavengwa* 1996 (2) SASV 453 (W):483-484.
36 Snyman 2014:43.
37 Snyman 2014:42-43; Burchell 2005:100-101.

that is ordinarily used by educators and is easily accessible to them. Risks associated with the proliferation of provisions should be borne in mind, because excessive proliferation can render the law inaccessible.[38]

The rule of law is explicitly included as one of the founding values in sec. 1(c) of the *Constitution*. In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others*,[39] the Constitutional Court held as follows:

> In addition, the rule of law embraces some internal qualities of all public law: that it should be certain; that is ascertainable in advance so as to be predictable and not retrospective in its operation; and that it be applied equally, without unjustifiable differentiation.

Chief Justice Pius Langa emphasized the importance of the *Constitution* and that it should play an active role in the transformation of society.[40] Transformative constitutionalism, therefore, entails the notion that the *Constitution*

> provides a mandate, a framework and to some extent a blueprint for the transformation of our society from its racist and unequal past to a society in which all can live with dignity.[41]

In other words, the *Constitution* provides clear guidance on the direction the legislator, the executive and ordinary citizens should take in any matter to ensure that effect is given to constitutional guarantees. Under a transformative constitution, one can never be satisfied with the *status quo*. Transformative constitutionalism requires a continued, critical analysis of society and the extent of realization of constitutional rights.[42] One can, therefore, never claim that the ultimate realization of human rights is achieved. There will always be something else that can or should be done to give effect to the inherent dignity of human beings. Provisions guiding this endeavour should, however, be clear and have a fixed meaning as far as possible to ensure legal certainty. Furthermore, the provisions should be fair, reasonable and in line with the constitutional imperatives.[43]

4. The legal framework on corporal punishment and other forms of harmful punishment

The existing legislative provisions will be revisited, due to the continued use of corporal punishment and other forms of harmful punishment as well as the need for legal certainty, the best interests of the child, and transformative constitutionalism. This is necessary to determine whether

38 Snyman 2014:41-43; Burchell 2005:101-103.
39 *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).
40 Langa 2006:352.
41 Langa 2006:351.
42 Langa 2006:354.
43 Langa 2006:357.

something else, or something more, can be done to ensure that the dignity of learners and educators is respected, protected, promoted, and fulfilled.

4.1 Legal developments regarding corporal punishment in South Africa

The obvious point of departure in drafting a definition of corporal punishment is the *Constitution*, which provides that everyone has the right to human dignity,[44] the right to equality,[45] and the right to personal security.[46] The latter prescribes that everyone should be free from all forms of violence from either public or private sources, and that no one should be tortured in any way or be treated or punished in a cruel, inhuman or degrading way.

In accordance with these provisions, the Constitutional Court found in 1995 in *S v Williams* that it was unconstitutional to sentence a juvenile offender to corporal punishment (also referred to as juvenile whipping) in terms of sec. 294 of the *Criminal Procedure Act*.[47] The court held that corporal punishment infringes the offender's right to dignity.[48] In the criminal justice context, corporal punishment in the past referred to the infliction of a specific number of strokes on the buttocks of the juvenile while lying on a bench. Thus, it referred to a known and specific type of physical conduct towards the offender.[49] The court, however, directed the state away from the institutionalized use of violence and highlighted the vulnerabilities of children and the need for a child-centred approach in dealing with children in conflict with the law.[50]

The *National Education Policy Act*[51] provides that the Minister of Education may determine national policy for

> control and discipline of students at education institutions: Provided that no person shall administer corporal punishment, or subject a student to psychological or physical abuse at any education institution.[52]

It is evident from this provision that the legislator realised that learners are subjected to corporal punishment and that it should be prohibited at

44 *Constitution of the Republic of South Africa*:sec. 10.
45 *Constitution of the Republic of South Africa*:sec. 9.
46 *Constitution of the Republic of South Africa*:sec. 2.
47 *Criminal Procedure Act* 51/1977.
48 *S v Williams*:paras. 17, 45, 47, 62, 67, 77, 89, 92.
49 *S v Williams*:par. 14.
50 *S v Williams*. See also *The Teddy Bear Clinic for Abused Children and Another v Minister of Constitutional Development and Others* 2014 92) SA 168 (CC); *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 (6) SA 632 (CC):paras. 27-37; *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC):par. 30.
51 *National Education Policy Act* 27/1996.
52 *National Education Policy Act*:sec. 4(n).

all costs. The legislator also distinguished in this *Act* between corporal punishment and other harmful forms of psychological harm or abuse. The need to distinguish and abolish both forms of punishment should, therefore, be included in legislation and policies that flow from this *Act*.

However, in 1997, the *Schools Act* came into operation and prohibited corporal punishment, but the *Act* does not refer to any forms of psychological abuse of learners. The *Act* merely states in sec. 10 that:

> (1) No person may administer corporal punishment at a school to a learner.
>
> (2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.

The provision thus creates an offence and prescribes a sanction for contravention, but it fails to provide any definition of the crime of corporal punishment. What exactly constitutes corporal punishment is thus open to interpretation, and some of the interpretations of this concept will be highlighted below.

The *Employment of Educators Act* came into operation in 1998. This *Act* distinguishes between corporal punishment,[53] assault,[54] and assault with the intent to cause serious bodily harm.[55] Yet, the *Act* also provides no definition of corporal punishment.

The distinctive and explicit use of the two terms "corporal punishment" and "assault" in the aforementioned legislation and in other important official documents such as the annual reports of the SACE suggests that corporal punishment and assault are not exactly the same.[56] One would, therefore, expect that the difference between these concepts should be captured in legislation through a clear definition of what constitutes corporal punishment and how it differs from assault.

The constitutionality of the prohibition of corporal punishment was challenged in 2000 before the Constitutional Court in the *Christian Education* case. The parents in this case contended that the prohibition of the application of corporal punishment constitutes an infringement of parents' right to religion. They claimed that the prohibition of corporal punishment is contrary to Christian beliefs and they referred to specific verses in the Bible to substantiate their claim.[57] However, the Constitutional Court emphasized the need to protect children from maltreatment, abuse

53 *Employment of Educators Act*:sec. 18(5)(f).
54 *Employment of Educators Act*:sec. 18(1)(r).
55 *Employment of Educators Act*:sec. 17(1)(d).
56 SACE 2017:21.
57 *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 CC:par. 4.

and degradation, their right to be protected from violence, their right to inherent dignity, and their right to equality.[58]

Furthermore, parents' religious beliefs pertaining to the use of corporal punishment provides no justification for the infringement of these rights of children.[59] Parents cannot, therefore, authorise a school to inflict corporal punishment on their child.[60] The court also emphasised the importance of reducing the high levels of violence in the broader community and introducing a "coherent and principled system of discipline is integral to such development".[61] It is, therefore, reasonable to expect the legislator to provide proper guidance in this national project, which should promote the best interests of every child.[62]

The court also held that the deliberate and institutionalised infliction of pain to the body of a child has an element of cruelty where the child is treated as "an object and not as a human being". This is indicative of the complete lack of respect for another human being.[63] The court emphasises the risk of abuse and the unacceptable negative impact of corporal punishment on the mental and moral development of the child.[64] Furthermore, the court held that corporal punishment infringes on the dignity of learners and that it can be regarded as cruel or inhuman treatment, in some instances. Therefore, any attempt to put measures in place to ensure the moderation of corporal punishment would be futile. "The fact remains that any type of corporal punishment results in some impairment of dignity and degrading treatment".[65]

The court emphasised that one of the reasons for the prohibition of corporal punishment is that the legislator wanted to ensure a

> radical break with an authoritarian past. As part of its pedagogical mission, the Department sought to introduce new principles of learning in terms of which problems were solved through reason rather than force. In order to put the child at the centre of the school and to protect the learner from physical and emotional abuse, the legislature prescribed a blanket ban on corporal punishment … It [the abolition of corporal punishment] had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children.[66]

The court emphasised that the ban on corporal punishment aims to "promote respect for the dignity and physical and emotional integrity

58 *Christian Education South Africa v Minister of Education*:paras. 8, 12, 15, 21, 26, 42.
59 *Christian Education South Africa v Minister of Education*:paras. 26-52.
60 *Christian Education South Africa v Minister of Education*:par. 5.
61 *Christian Education South Africa v Minister of Education*:paras. 15, 39-40.
62 *Christian Education South Africa v Minister of Education*:paras. 40-41.
63 *Christian Education South Africa v Minister of Education*:par. 44.
64 *Christian Education South Africa v Minister of Education*:paras. 45-46.
65 *Christian Education South Africa v Minister of Education*:par. 46.
66 *Christian Education South Africa v Minister of Education*:par. 50.

of all children".[67] The court thus acknowledges the impact of corporal punishment on the emotional well-being of the child, but it does not explicitly pronounce on other harmful non-physical forms of punishment that will impair the dignity of learners. This is understandable, since the focus of this case was on the abolition of corporal punishment.

At the very least, this judgment paved the way for the legislator to rethink all forms of punishment that might impact on the emotional and psychological well-being of learners. However, the legislator did not follow through on the cues given by the Constitutional court. Consequently, sec. 10 of the *Schools Act* was never refined to include other non-physical harmful forms of punishment.

In 2000, the former National Department of Education published a booklet, *Alternatives to corporal punishment: The learning experience* (hereinafter the booklet), which was distributed to educators after the abolition of corporal punishment. However, this booklet is a mere guide and, by a huge stretch of the imagination, a policy document, and cannot be regarded as an enforceable legal document, in terms of which an educator can be found guilty in a court of law, because only Parliament can create an offence through the prescribed legislative process.[68] According to the Department's definition in the booklet, corporal punishment is:

> [a]ny deliberate act against a child that inflicts pain or physical discomfort to punish or contain him/her. This includes, but is not limited to, spanking, slapping, pinching, paddling or hitting a child with a hand or with an object; denying or restricting a child's use of the toilet; denying meals, drink, heat and shelter; pushing or pulling a child with force; forcing the child to do exercise.[69]

This definition of corporal punishment is in line with the general contention that corporal punishment is something physical done to the child. Although the definition provides more clarity, it focuses only on physical pain or discomfort caused to the child. No reference is made to any form of psychological harm such as sarcasm, name-calling, or belittling to which the child may be exposed.

By contrast, in 2006, the United Nations Committee on the Rights of the Child published *General Comment No. 8* on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment,[70] in which it defined "corporal" or "physical" punishment in paragraph 11 as:

> any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ('smacking', 'slapping', 'spanking') children, with the hand or with an implement – a whip, stick, belt, shoe, wooden

67 *Christian Education South Africa v Minister of Education*:par. 50.
68 Burchell 2005:97.
69 DoE 2000:6.
70 UNCRC 2006.

> spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair, boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child.

The need to cast the net of what constitutes unlawful punishment of a child as wide as possible is evident from this all-encompassing definition. This definition expressly includes non-physical forms of punishment. This is in line with sec. 12 of the *Constitution*, which explicitly refers to "all forms of violence" that would include physical, verbal and emotional violence. The definition provided by the Department of Education in the booklet thus falls short of what is required by the *Constitution* and international standards with regards to non-physical forms of punishment.

In 2010, the *Children's Act* was promulgated, and one of the main focus areas of the *Act* is to protect children.[71] Although earlier drafts of this *Act* included the prohibition of corporal punishment in the home, this prohibition was removed in the final version of the *Act*, due to public resistance.[72] Another golden opportunity was thus missed to define the concept and to eradicate its application from the private sphere and its continued use in schools. This is in sharp contrast to some of the aims of this *Act*, namely to protect children from "maltreatment, neglect, abuse or degradation"[73] and to protect children from "discrimination, exploitation and any other physical, emotional and moral harm or hazards",[74] and "generally, to promote the protection, development and well-being of children."[75]

In an effort to address the continuation of corporal punishment, a few Provincial Education Departments issued circulars to remind educators of the prohibition of corporal punishment. Unlike the *Schools Act*, these circulars provide definitions of corporal punishment and a list of forbidden conduct. However, a circular does not have the same legal force of legislation. The Gauteng Department of Education (GDE) issued their circular in 2014.[76] In this circular, the abovementioned definition of the booklet is repeated, but the following sentence was added: "It is, therefore, not just about caning but also refers to an assault on a person in any manner whatsoever." The circular continues to give a definition of assault and an explanation that corporal punishment is tantamount to assault. The circular states:

71 *Children's Act*:sec. 2(b)(iii).
72 Waterhouse 2007:1.
73 *Children's Act*:sec. 2(b)(iii).
74 *Children's Act*:sec. 2(f).
75 *Children's Act*:sec. 2(i).
76 GDE 2014:par. 4.1.

> The following are examples of forms of corporal punishment (assault) that are punishable:
>
> - Any physical act which may cause discomfort or pain to the learner
> - Using a stick/belt/cane or any object designed to threaten learners
> - Intention to inflict bodily harm
> - Threatening a learner
> - Shaking a learner
> - Any forms of torture
> - Kicking
> - Pinching
> - Pulling of ears
> - Poking at someone with a finger
> - Pulling of ears (*sic*)
> - Any verbal onslaught, use of vulgar language, swearing, name-calling
> - Insulting a learner with racial and/or sexual undertones.
>
> Note that premeditation makes the offence more serious and that self-defence and provocation may only influence the sanction, and not the guilty finding in a case.[77]

The attempt to provide more clarity on what constitutes corporal punishment should be welcomed. However, the legal soundness of classifying the mentioned forms of verbal abuse as assault is discussed below.[78]

In 2016, the Western Cape Education Department (WCED)[79] issued a circular that is almost identical to the GDE circular. The KwaZulu-Natal Department of Education (KZNDE) also issued a similar circular in the same year.[80] The KZNDE circular states:

> Corporal punishment is defined as any deliberate act against a child that inflicts pain or physical discomfort to punish him/her. This includes, but is not limited to, slapping, pinching, hitting or kicking a child with a hand or a leg or any other object, pushing or pulling a child with force.[81]

The KZNDE circular also fails to prohibit any non-physical forms of punishment. In fact, the list of forms of assault is identical to that of the circulars of the GDE and the WCED, except that reference to the last two forms of assault on the GDE and WCED lists are not included.[82] Thus,

77 GDE 2014:par. 5.
78 See par. 4.2 below.
79 WCED Circular 0024/2016.
80 KZNDE Circular 10/2016.
81 KZNDE 2016:par. 3.
82 KZNDE 2016:par. 7.

any non-physical forms of punishment are excluded from the list of prohibited conduct.

At the end of 2017, the Gauteng High Court heard the appeal of a parent in the case of *YG v S* (hereinafter *YG* case).[83] The father in this case had been found guilty in the Magistrates Court of an assault perpetrated on his son. The father argued in the court *a quo* that his conduct was justified and that he had acted within the bounds of the common-law defence of moderate and reasonable chastisement.[84]

Prior to this judgment, parents charged with assault, because they had disciplined their child, could raise the reasonable-chastisement defence. However, the ambiguity regarding what were acceptable and what were unacceptable forms of reasonable chastisement was evident from the common-law requirement that the conduct of the parent should be "moderate" and "reasonable" before the reasonable-chastisement defence could be successfully invoked.[85]

In the past, the reasonableness and moderation of the chastisement had to be determined on a case-by-case basis. Factors such as the age and sex of the child, his/her build and health, the misconduct of the child, the motive of the parent, the severity of the force applied, as well as the number of strokes played a role in this determination.[86] In practice, it meant that, if parents exceeded the bounds of reasonableness and moderation, they were found guilty of assault, but, if they acted within the bounds of reasonableness and moderation, their conduct was not deemed lawful assault, but corporal punishment.[87] Other forms of lawful assault are when force is used against the body of another in self-defence.

In the *YG* case, both the Magistrates Court and the High Court found the father guilty of assault, because he had exceeded the bounds of what constituted reasonable chastisement. The High Court then continued by declaring the common-law defence of reasonable chastisement unconstitutional.[88] Thus, in future, parents will not be allowed to claim that they were applying force reasonably and moderately to the body of their child as part of a disciplinary process.

The High Court did not even attempt to define what constitutes reasonable chastisement; in other words, what constitutes reasonable and moderate assault (corporal punishment). Instead, it held that any conduct by parents that would be regarded as assault, but for the fact that the said child is the child of the offender, should be regarded as assault of the child.[89]

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83 *YG v S* Case number A 263/2016.
84 *YG v S*:par. 4.
85 *YG v S*:par. 33. See also Burchell 2013:195-198.
86 *YG v S*:par. 34; Snyman 2014:138.
87 *YG v S*:par. 35.
88 *YG v S*:par. 61-86.
89 *YG v S*:paras. 36, 69.

The court found that the reasonable-chastisement defence was not in accordance with several of the child's constitutional rights, such as the right to dignity.[90] Children are furthermore entitled to equal protection under the law[91] and should be treated the same as adults or children not related to the parent. The court emphasized that children have the right not to be treated or punished in a cruel, inhuman or degrading way,[92] not even by their own parents, and have the right to be protected from maltreatment, neglect or degradation.[93] Furthermore, the best-interests-of-the-child principle and right should be borne in mind.[94] Therefore, any force used by a parent against the body of the child, even if it appears reasonable and moderate, constitutes assault and cannot be justified as reasonable chastisement or corporal punishment. The net effect of this judgment is, therefore, that what was regarded, in general, as moderate and reasonable corporal punishment should now be classified as assault.

At first, it seems that there is no need to continue with the discussion on what constitutes corporal punishment, because whatever constitutes assault constitutes corporal punishment. Therefore, it appears that the distinction between assault and corporal punishment, as found in the *Schools Act* and the *Employment of Educators' Act*, does not warrant further exploration. Legislative provisions on corporal punishment should thus be interpreted with reference to the elements of assault.

However, the notion of transformative constitutionalism requires a more in-depth investigation than the obvious conclusion already reached and to ensure that proper effect is given to children's right to freedom and security of the person when they are exposed to physical disciplinary measures and any other non-physical forms of punishment imposed by educators.

The prohibition of corporal punishment/assault aims to contribute to a violence-free environment for children and thus to give effect to the constitutional imperatives captured in sec. 12 of the *Constitution*. Apart from physical freedom from violence, the *Constitution* explicitly highlights everyone's right to "psychological integrity",[95] which includes the right to "security in and control over their body".[96]

The question that needs to be answered is whether the definition of assault is wide enough to protect children from all forms of violence, namely physical, psychological and emotional violence, that may be inflicted upon them by educators. Furthermore, does the definition

90 *YG v S*:paras. 36, 71; *Constitution of the Republic of South Africa*:sec. 10.
91 *YG v S*:paras. 36, 75; *Constitution of the Republic of South Africa*:sec. 9(1).
92 *YG v S*:par. 36; *Constitution of the Republic of South Africa*:sec. 12(1)(e).
93 *YG v S*:paras. 36, 43, 48; *Constitution of the Republic of South Africa*:sec. 28(1 (d).
94 *YG v S*:paras. 36, 43, 76; *Constitution of the Republic of South Africa*:sec. 28(2).
95 *Constitution of the Republic of South Africa*:sec. 12(2).
96 *Constitution of the Republic of South Africa*:sec. 12(2)(b).

of assault protect children's "security in and control over their body" adequately? If the definition of assault is not wide enough to ensure that these constitutional imperatives are met, sec. 10 of the *Schools Act* must be amended to explicitly include the prohibition of non-physical forms of harmful disciplinary measures.

The crime of assault will be explored to determine whether the existing legislative provisions protect children adequately.

4.2 Distinguishing corporal punishment from other crimes

General Comment No. 8[97] clearly distinguishes between physical and non-physical punishments. These two types of punishment will now be investigated with reference to existing common-law crimes and the provisions of the *Children's Act*.

4.2.1 Physical forms of punishment

It is evident from the above discussion that corporal punishment and assault are the same. The SACE, for instance, reports assault under the heading "Corporal Punishment, Assault". The elements and ambit of the common-law crimes of assault and assault with the intent to do grievous bodily harm will now be discussed in the context of school discipline.

4.2.1.1 Assault

Snyman[98] indicates that assault consists in:

> any unlawful and intentional act or omission
>
> (a) [w]hich results in another person's bodily integrity being directly or indirectly impaired, or
>
> (b) [w]hich inspires a belief in another person that such impairment of her bodily integrity is immediately to take place.

In terms of the common law, assault was not a self-standing crime, but it was incorporated under a broader infringement called an *iniuria*. A distinction was made between an injury against another person's *dignitas* (dignity) and an infringement of another person's reputation (*fama*). The English law influenced the common law and the crime of assault was ultimately recognized as an independent crime against the bodily integrity (*corpus*) of another. Nowadays, there are three distinct crimes in our law, namely *crimen iniuria* for harm to the dignity of another, the crime of defamation for reputational harm, and the crime of assault for an infringement of the bodily integrity of another. Over time, the concept of assault was further refined, and different forms of assault were recognized, namely common

97 UNCRC 2006.
98 Snyman 2014:447. See also Hoctor 2013:97; Burchell 2013:577.

assault, assault with intent to do grievous bodily harm, assault with intent to commit another offence, indecent assault, and lately sexual assault.[99]

Assault has a very clear physical element and, notwithstanding the *de minimis* rule, the slightest contact with a complainant's body can constitute assault if the required intent can be proven.[100] The severity of the force applied to the body of the victim does not play any role in determining whether or not the conduct constitutes assault.[101] It, therefore, does not matter that the educator gave the child only a soft slap on the buttocks; or held the child's arm against his/her will; or pushed the child to walk in a specific direction; or pinched the child which left a slight mark, or hit the child four times with a sjambok (a long, stiff leather whip) on the buttocks, leaving only minor marks. All of these infringements of the bodily integrity of another constitute assault. However, the severity of the infringement of the bodily integrity of the child can be reflected in the eventual charges brought, namely common assault or assault with the intent to do grievous bodily harm. For instance, if the child was hit with a sjambok all over the body and blood was visible afterwards, the charge can be changed from assault to assault with the intent to cause serious bodily injury.[102] The latter is considered a much more serious offence.

The degree of severity of common assault is normally reflected in the eventual sentence that is handed down. The educator who gave the child a soft slap on the buttocks and the educator who hit a child four times with a ruler on the buttocks will both be found guilty of assault. It is likely that the former will receive a formal warning, whereas the latter will receive a fine or a suspended jail sentence, depending on all the circumstances of the case. However, it is likely that the educator found guilty of assault with the intent to cause grievous bodily harm will be sentenced to a heavy fine or a gaol term, or s/he will be required to perform community service. Therefore, one does not have to prove that the victim sustained injuries in order to secure a guilty verdict, but the injuries will impact on the eventual sentence.[103]

A guilty verdict on a charge of assault requires that force be applied directly or indirectly to the body of the child.[104] Direct application of force entails that the offender uses his/her body to exert force onto the body of the victim. Thus, touching the body of the victim in some way is necessary, for example using an open hand to slap the child across the face, kicking or pushing the child, or removing a cap from the head of the child.[105]

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99 Snyman 2014:447. See also Hoctor 2013:97; *Children's Act*:sec. 1 abuse, sexual abuse; *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32/2007:secs 5-7.

100 Snyman 2014:448; Hoctor 2013:98.

101 S *v M* 1961 (2) SA 60 (0); Burchell 2013:582.

102 *S v Maselani and Another* 2013 (2) SACR 172 (SCA). See par. 4.2.1.2 below.

103 *S v Chabalala* 2014 (1) SACR 458 (GP); *S v Chipape* 2010 (1) SACR 245 (GNP); *S v Maake* 2007 (1) SACR 403 (T).

104 Hoctor 2013:98.

105 *S v Gosain and Damain* 1928 TPD 516.

The way in which the victim is touched must, in some way, be insulting to the victim.[106]

Indirect application of force occurs where the offender uses an instrument to apply force to the body of the victim such as, for instance, using a stick to hit a child or a pair of scissors to cut a child's hair.[107] Other examples of indirect force that constitute assault would include forcing the victim to drink something, whether it is harmful to the victim or not.[108]

In *S v A en 'n Ander*, the court held that a person can also use a third party to commit assault. For instance, when a teacher instructs a learner to hit another learner for breaching school rules, the teacher will still be guilty of assault. Educators can also be guilty of assault if they have a legal duty to protect a child and fail to do so. For example, a parent hits a child at school after an educator has asked the parent to come to school to discuss the learner's behaviour. The educator's failure to protect the learner from the parent can result in a guilty verdict.[109] The educator's *in loco parentis* role must thus always be borne in mind.

The wide ambit of what constitutes assault is also evident from the fact that a mere threat to exert physical force suffices to constitute assault.[110] An act, gesture or words can be sufficient to establish the intended threat; for instance, an educator swinging a cane or angrily approaching a child with a raised fist.[111] In this regard, the court held in *S v Mngomezulu*[112] as follows:

> [F]or an assault to be committed in circumstances where no physical impact takes place there must be a threat of immediate personal violence in circumstances that lead the person threatened reasonably to believe that the other intends and has the power immediately to carry out the threat.

Thus, when an educator threatens a learner with physical violence in order to instil discipline, the threat may result in a guilty verdict on a charge of assault if the attack was imminent. Burchell[113] contends that, if a threat of future harm is made, it can constitute the crime of *crimen iniuria*. He also asserts that, even when the threat is made conditionally, the crime was still committed. Thus, if an educator threatens to hit children if they do not keep quiet immediately, s/he is guilty of assault. The victim's perception of the

106 Burchell 2013:582.
107 Hoctor 2013:97-98; Burchell 2013:582. See *S v Smith* 2003 (2) SACR 135 (SCA), where police officials were found guilty of assault for setting dogs on alleged illegal immigrants.
108 *S v A en 'n Ander* 1993 (1) SACR 600 (A) – victim forced to drink urine; *R v Marx* 1962 (1) SA 747 (N) 853 – victim forced to drink alcohol.
109 *S v B* 1994 (2) SASV 237 (OK).
110 Burchell 2013:578, 583; *S v Miya* 1966 (4) SA 274 (N) 276-277.
111 Hoctor 2013:98; Burchell 2013:583.
112 *S v Mngomezulu* 1972 (2) PH H96 (N).
113 Burchell 2013:584.

educator's ability to carry out the threat will be considered in determining whether the threat constitutes an assault or not.[114]

Snyman[115] argues that, despite the fact that earlier judgments required that the fear should be reasonable, thus far no cases have been reported where the accused was found not guilty by virtue of the fact that the fear experienced by the victim was unreasonable. Snyman,[116] therefore, contends that there is, in fact, no reason to expect the fear of physical violence to be reasonable, because such a requirement would make it impossible to find the accused guilty if the victim is credulous, superstitious or overly fearful.

It is prudent to consider the provisions of the circulars of the GDE and WCED pertaining to the listed forms of assault.[117] First, "Threatening a learner". This description of assault is misleading. The threat must be directed at the learner to cause immediate physical harm. An educator can threaten to phone the learner's parents, to send the learner to the principal, or to sit detention. None of these threats necessarily constitutes any immediate physical harm to the learner. The provision in the circulars are thus too vague and ambiguous to be classified as assault *per se*.

The second questionable form of violence classified as assault on the list is "Any verbal onslaught, use of vulgar language, swearing, name-calling". This description of violence does not meet the requirements of assault by way of a threat. Rather, it is compatible with *crimen injuria* that will be discussed below.[118]

"Insulting a learner with racial and or sexual undertones" is also on the list of forms of assault. The same criticism is applicable to this description of assault. It is neither physical in nature nor does it constitute an immediate threat to the learner. However, it is in line with the elements of the crime *crimen iniuria*. The information in the circulars is, therefore, incorrect and confusing.

The definition of corporal punishment contained in the booklet distributed by the former national Department of Education includes the following actions: "… denying or restricting a child's use of the toilet; denying meals, drink, heat and shelter … forcing the child to do exercise". The definition in *General Comment No. 8* also includes "forcing children to stay in uncomfortable positions".[119] The question that needs to be asked is whether an educator can be found guilty of assault if s/he uses any of these actions to discipline a learner. No case law was found on these specific instances of force applied to the person of another, leading to a guilty verdict on a charge of assault. Strictly speaking, one could argue that

114 Burchell 2013:585.
115 Snyman 2014:451. See also Burchell 2013:585.
116 Snyman 2014:451. See also Burchell 2013:583.
117 GDE 2014:par. 5; WCED 2016:par. 5.4.
118 See par. 4.2.2.1.
119 UNCRC 2006.

these actions do not comply with the requirement that the force must be applied directly or indirectly (with an instrument) to the body of the child.

However, any of the aforementioned actions would result in some form of bodily discomfort for the child and would in all likelihood be unjustifiable. It would be inappropriate to exclude these actions of educators from the reach of an assault charge, considering the wide ambit of what constitutes assault. Consequently, it would be incongruous to focus on the specific form of force that is used instead of on the fact that the bodily integrity of the child has been infringed. This general submission by Snyman[120] is founded on what is at the heart of sec. 12(1) of the *Constitution*, namely respecting and protecting the bodily integrity of a person in the widest possible sense. Sec. 12(2)(b) of the *Constitution* is also of particular importance. It guarantees everyone's "security in and control over" their body. "Security in" refers to bodily protection against intrusions by the state or others. It thus encompasses the right to be left alone and not be molested. "Control over" one's body refers to bodily autonomy or self-determination, and to be allowed to make one's own choices regarding life and the way one wants to live.[121]

One should also bear in mind that there is a power imbalance between educators and learners. To refuse learners permission to, for instance, use the bathroom, or eat or drink, or instruct learners to sit in an uncomfortable position as punishment impacts on learners' ability to control their own bodies and reduces their bodily security, not to mention that it might be difficult to justify such instructions. The humiliation that might, for instance, be experienced by a learner who is refused permission to go to the bathroom is unacceptable.

4.2.1.2 Assault with the intent to cause grievous bodily harm

This form of assault implies that force was actually exerted on the body of the victim and that the victim suffered more than slight bodily injury. Serious physical injury or that the conduct eventually interferes with the health of the victim is a clear indication of assault with the intent to cause grievous bodily harm. The intent to cause "more than the consequences of an ordinary assault" must be proven.[122]

4.2.2 Non-physical forms of punishment

Non-physical forms of punishment that are also cruel or degrading, such as name-calling, belittlement, labelling and ridiculing, cannot be included in the definition of assault. Educators will have to be charged with *crimen injuria* or criminal defamation, because assault has a clear physical element and the abovementioned infractions do not have it and sec. 10 of the *Schools Act* does not prohibit it expressly. Alternatively, redress for

120 Snyman 2014:452.
121 Currie & De Waal 2013:287.
122 Hoctor 2013:98; Burchell 2013:585-586.

child abuse must be sought in terms of the *Children's Act*. The SACE, in its reports, categorises non-physical types of misconduct under the heading: "Verbal Abuse, Victimization, Harassment, Defamation".[123]

4.2.2.1 Crimen iniuria and criminal defamation

Dignity is not only a basic value of the *Constitution*, but also an enforceable right that should be respected and protected as far as possible.[124] According to Burchell,[125] *crimen iniuria* consists of "unlawfully and intentionally impairing the dignity or privacy of another person." In this instance, the individual autonomy or self-esteem (*dignitas*) of the victim is impaired through offensive, disrespectful, insulting, contemptuous and/or degrading treatment either publicly or privately. Thus, if the educator belittles or labels a learner privately or in front of the whole class, s/he will be guilty of *crimen iniuria*. Defamation entails the unlawful and intentional publication of defamatory matter referring to another person.[126]

It should be clear from these descriptions of *crimen iniuria* and defamation that the circulars of the GDE[127] and WCED[128] incorrectly classified "Any verbal onslaught, use of vulgar language, swearing, name-calling" and "Insulting a learner with racial and/or sexual undertones" as assault, while it, in fact, constitutes *crimen iniuria* and possibly criminal defamation. One should, however, commend the departments for high lighting the unlawfulness of these actions.

4.2.3 Child abuse in terms of the Children's Act

The *Children's Act* does not include a definition of corporal punishment, but it defines child abuse as follows:

> any form of harm or ill-treatment deliberately inflicted on a child, and includes –
>
> (a) assaulting a child or inflicting any other form of deliberate injury to a child;
>
> (b) sexually abusing a child or allowing a child to be sexually abused;
>
> (c) bullying by another child;
>
> (d) a labour practice that exploits a child; or
>
> (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.

123 SACE 2017:21.
124 *S v Makwanyane* 1995 (3) SA 391 (CC):paras. 144, 313, 328.
125 Burchell 2013:628, 632.
126 Burchell 2013:627.
127 GDE 2016:par. 5.
128 WCED 2016:par. 5.4.

In line with the international position on corporal punishment and other cruel or degrading forms of punishment, this definition of abuse has a physical and psychological dimension. It does not create a standard of severity to be met or indicate that the action should be repetitive in nature. It merely states that "any form of harm or ill-treatment deliberately inflicted on a child" constitutes abuse. Intent to cause harm is a clear requirement. The attempt to widen the definition of abuse is further evident from the explicit reference to assault and, more importantly for this discussion, to "inflicting any other form of deliberate injury to a child".

For purposes of the present discussion, it can be inferred that the intention of the educator to cause harm, pain or discomfort to the learner is important and not whether the infraction was indeed severe. Again, the question arises as to whether there is a difference, and, if so, what the difference between corporal punishment and child abuse is. If a teacher hits or labels a child, the intention is surely to cause harm, pain (physical and/or emotional), or at least discomfort, albeit with the aim of ensuring that the child sits still and listens or does not hurt another child.

Of particular importance is the explicit reference to psychological or emotional harm. The extent and severity of the psychological harm are not described and mere exposure to such harm constitutes child abuse. It is clear, therefore, that the legislator intended to protect not only children who are the direct objects of the harmful conduct (either physical or verbal) of an educator, but also those children who are mere spectators to the harmful conduct and might be harmed psychologically or emotionally by the exposure to any form of violence.

4.3 Civil claims

Apart from criminal charges, victims of corporal punishment or other forms of harmful non-physical disciplinary measures can also institute civil claims (delictual claims) against educators to claim damages from them. Currently, tax payers foot the bill for these transgressions by educators, since the Provincial Departments of Education are held accountable for the actions of their employees through the application of the vicarious liability principle.

In *Shange v MEC for Education, KwaZulu-Natal*,[129] a former learner sued the Department for R3.9 million, due to an injury to his eye when his educator used corporal punishment against a fellow learner.[130] In the KZNDE[131] circular, the Department warns educators that they will be held

129 *Shange v MEC for Education, KwaZulu-Natal* 2012 (2) SA 519 (KZD). The department claimed that the claim prescribed, but the High court held that the claim did not prescribe. The decision was upheld in the Supreme Court of Appeal in *MEC for Education, KwaZulu-Natal v Shange* 2012 (5) SA 313 (SCA).

130 Padayachee 2013.

131 KZNDE 2016:par. 7.3.

personally liable for any delictual damages that might result from the educators' application of corporal punishment.

5. The aims of a definition of corporal punishment

The exploration of the existing legal framework reveals that educators who infringe the physical, emotional and psychological integrity of a child can be held accountable in a criminal court or by the SACE through charging them with one or more common-law crimes, namely assault, *crimen iniuria*, and criminal defamation. They can also be charged with child abuse in terms of the *Children's Act*. Moreover, civil claims can be instituted against them.

It would thus be fair to conclude that there are sufficient criminal-law and civil-law remedies available to hold educators accountable for these infringements – even in the absence of a definition of corporal punishment and thus in the absence of an explicit crime of corporal punishment.

Yet, the state has a duty not only to ensure that those who infringe the rights of others are held accountable after the fact, but also, more importantly, to respect, protect, promote, and fulfil the rights in the *Bill of Rights*.[132] To "respect rights" means that the state has an obligation not to violate rights or to limit rights unlawfully. In this context, this would mean that the state, organs of state (*e.g.*, the school governing body), and employees of the state (educators) should not infringe the rights of learners through disciplinary measures that would constitute assault, *crimen iniuria*, criminal defamation, or child abuse.[133]

To "protect rights", on the other hand, requires the state to prevent the violation of rights; hence, measures such as legislative provisions must be put in place to prevent the infringement of rights through disciplinary measures. To "promote and fulfil rights" means that the state must take active steps to make it possible to exercise rights and to prevent the infringement of rights.[134] This implies that the state must implement measures that, while ensuring the maintenance of discipline, seek to promote and fulfil rights.

In the absence of an explicit, all-encompassing definition of corporal punishment and the explicit prohibition of other harmful forms of non-physical disciplinary measures, the state is at risk of inadequately protecting, promoting and fulfilling learners' personal security rights. The lack of a definition of corporal punishment and reference to other harmful forms of non-physical disciplinary measures open the door for educators to give their own interpretation to technical and often very emotive concepts. This subjective interpretation may or may not be in line with the legal position explained earlier.

132 *Constitution of the Republic of South Africa*:sec. 7(2).
133 Rautenbach & Malherbe 2004:300.
134 Rautenbach & Malherbe 2004:300.

Furthermore, the absence of a clear definition of what constitutes corporal punishment and other non-physical harmful disciplinary measures in legislation that is normally used by educators, exposes educators unduly to punitive sanctions. Of equal importance is the fact that learners are at risk of being exposed to conduct that may infringe on constitutional rights, a situation that can be avoided through the inclusion of an elaborate definition of corporal punishment and other non-physical harmful disciplinary measures in the *Schools Act* and the *Employment of Educators Act*. The absence of all-encompassing definitions may also result in learners tolerating unacceptable conduct on the part of educators, because they (the learners) do not know that such conduct actually constitutes a violation of their rights and is either a common-law crime or child abuse in terms of the *Children's Act*.

6. Conclusion

The law can only be applied properly if it is clear, fair and in line with constitutional imperatives. An evaluation of the legislation on the prohibition of corporal punishment reveals that, despite the absence of a definition of corporal punishment, there are several other possibilities available to hold educators accountable for infringements of the dignity and personal security rights of learners. In all likelihood, the proposed Protocol approved by the Council of Ministers[135] will play an important role in addressing the scourge of corporal punishment and other non-physical forms of punishments that are prevalent in many schools.

However, circulars and protocols are not enforceable law in the real sense of what constitutes legal sources. It is, therefore, important to formulate a proper definition of corporal punishment and other non-physical harmful disciplinary measures and to include it in the *Schools Act* and in the *Employment of Educators Act* to ensure that effect is given to the principles of legality and transformative constitutionalism. That will also avoid a proliferation of charges and will ensure legal certainty.

A proper definition of corporal punishment and other non-physical harmful disciplinary measures is essential not only to ensure the successful prosecution of offending educators, but also to prevent infringements of learners' personal security rights, especially in the form of non-physical infringements. Admittedly, it would be difficult to draft definitions that incorporate all possible inappropriate conduct.

No definition of corporal punishment and other non-physical harmful disciplinary measures can sufficiently address the continuum of severity of conduct from a slap on the buttocks to conduct that constitutes assault with the intent to do grievous bodily harm, as well as all forms of conduct that can cause emotional harm. The definitions of corporal punishment and other non-physical harmful disciplinary measures should, therefore, include explicit examples of unlawful conduct that cause both

135 ANA 2017a.

physiological and emotional harm. The definition should also focus on the impact and consequences of the prohibited conduct on the learner and school community and on the need to respect, protect, and promote human rights.

The definition contained in *General Comment No. 8* provides a good example of an all-encompassing definition and should be used as the point of departure to amend sec. 10 of the *Schools Act* to prohibit physical and harmful non-physical disciplinary measures. The amendment should also include an obligation that Provincial Departments of Education should recover all damages paid by the State for any delictual claims due to the use of corporal punishment or any other non-physical harmful disciplinary measures used against a learner. The same arguments apply for similar amendments to the *Employment of Educators Act*.

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