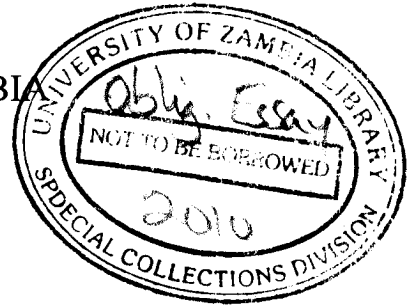


THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW



**DISCIPLINING CHILDREN IN THE HOME: WHERE DOES ONE DRAW THE  
LINE BETWEEN DISCIPLINE AND CRUEL, INHUMAN AND DEGRADING  
TREATMENT? A CRITIQUE ON WHETHER CORPORAL PUNISHMENT IN  
THE HOME SHOULD BE ABOLISHED.**

**BY**

**MHANGO TEMWANINGE**

Being a final year Dissertation submitted to the University of Zambia, School of Law in  
partial fulfillment of the conditions of the award of the degree of Bachelor of Laws  
(LLB)

**UNIVERSITY OF ZAMBIA**

**APRIL 2010**

## **DECLARATION**

I, Temwaninge Mhango, do declare that this work is to the best of my knowledge original and that to the best of my knowledge, no similar piece of work has previously been produced at the University of Zambia for the award of Laws Degree. The works referred to in this work have been cited and duly acknowledged.

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## **ABSTRACT**

In 1992 Zambia was declared a Christian nation. The Bible says “spare the rod spoil the child”. The Bible sanctions corporal punishment in the home. Zambia has no clear legislative law on corporal punishment of children in the home. However it has an obligation at international law to protect children from cruel, inhuman and degrading treatment. Zambia has a dual legal system and under customary law corporal punishment is allowed as children are considered to be the property of the parents. Before criminal corporal punishment and corporal punishment in schools was abolished, there were regulations on its administration. However with regards to corporal punishment in the home, there are no regulations with parents or guardians being allowed to use reasonable discipline. What is reasonable is left to the judgment of the parent or guardian. How then does one know as to the proper action in the discipline of a child as the law is not clear as to the dos and don'ts? This paper seeks to establish whether corporal punishment should be abolished.

The first chapter gives the meaning of the term corporal punishment. It discusses the legal status of corporal punishment in the home in Zambia. In the second chapter, the various treaties and conventions relating to children's rights are discussed as well as the rights of children and the obligation of parents. The third chapter examines the effects of corporal punishment and the available alternatives to corporal punishment. The fourth chapter critically analyses whether corporal punishment should be done away with. The fifth chapter concludes that corporal punishment should not be abolished but that there is need to have appropriate legislation regulating the use of corporal punishment by parents.

## **STATUTES**

The Constitution, Chapter 1 of the laws of Zambia

The Subordinate Court Act, Chapter 28 of the laws of Zambia

The International Covenant on Civil and Political Rights (ICCPR)

The United Nations Convention on the Rights of a Child (UNCRC)

The Convention against Torture (CAT)

African Charter on the Rights and Welfare of the Child (ACRWC)

**CASES**

A v UK (1998) ECHR 85

John Banda v The People HPA/6/1998

R v Hopley (1860) 2F & F 202

**ACRONYMS**

ACRWC.....African Charter on the Rights and Welfare of the Child

CAT.....The Convention against Torture

ICCPR.....The International Covenant on Civil and Political Rights

UNCRC.....The United Nations Convention on the Rights of a Child

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## **CHAPTER 1**

### **1.0 INRODUCTION AND AN OVERVIEW OF CORPORAL PUNISHMENT**

#### **1.1 Introduction**

The concept of human rights rests upon the idea that every human being is born with certain inalienable rights. These rights are inherent and one cannot give them away as these are the things that make one a human being. Hence human rights “are the foundations of human existence and co-existence. They allow mankind to fully develop and use their human qualities, their intelligence, their talents and their conscience and to satisfy their spiritual and other needs. They are based on mankind’s increasing demand for a life in which the inherent dignity and worth of each human being must receive respect and protection.”<sup>1</sup> The idea of human worth and dignity has always existed in all human societies.

Human rights have to be protected by the rule of law. The Zambian Constitution recognizes this and as such strives to provide for and protect human rights through the Bill of Rights. The Constitution is the supreme law of the land in Zambia. Human rights are rights that one has by virtue of being human. This means that rights accrue to everyone whether young or old, regardless of sex, race or religious affiliation.<sup>2</sup> The Bill of Rights for instance protects young persons, it states;

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<sup>1</sup> C Anyanwe, Introduction to Human Rights and International Humanitarian Law, (2004) p. (xi)

<sup>2</sup> See Article 11 of the Constitution, Cap 1 of the Laws of Zambia

“All young persons shall be protected against physical or mental ill-treatment, all forms of neglect, cruelty or exploitation.”<sup>3</sup>

As already mentioned, human rights have to be protected by the rule of law and law was regarded as rooted in religion in the olden days. Religion and morality were treated as inevitably interwoven. This accounts for the moral authority which law commands even today.<sup>4</sup> Zambia is a Christian nation and it was declared as such in 1992 by the former President Frederick Chiluba.<sup>5</sup> In this respect, Biblical teachings are to be obeyed as they are a source of moral law. The Bible in the book of Proverbs contains several verses which command parents to correct and discipline their children to avoid embarrassment as well as to help them not to destroy themselves.<sup>6</sup> The Bible states that,

“Do not hesitate to discipline children. A good spanking will not kill them.”<sup>7</sup>

The Bible thus sanctions corporal punishment which is seen as a necessary tool in the disciplining of children. It further provides that if a parent does not punish or correct their child, then they do not love him or her.<sup>8</sup> Discipline is a form of love.

### **1.1.1 STATEMENT OF THE PROBLEM**

Parents have been entrusted with the duty of raising children. Children are socialised into society through the family. In most instances when a child misbehaves, the question that is most frequently asked is, “Whose child is it?” As such parents have been given the

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<sup>3</sup> Article 24(2) of the Constitution Cap 1 of the Laws of Zambia

<sup>4</sup> C Ayangwe, *An Outline of the Study of Jurisprudence* (2005) p.62

<sup>5</sup> This can be found in the Preamble of the Constitution, Cap 1 of the Laws of Zambia

<sup>6</sup> See Proverbs 19:18, 29:15 and 29:17

<sup>7</sup> Proverbs 23:13

<sup>8</sup> Proverbs 13:24

right to discipline their children. In recent times there have been cases involving parents who inflict harm on their children in the name of disciplining them. Children are human beings with certain inalienable rights which have to be respected, protected and enforced. A question thus arises, how does the parent fulfil his or her duty of disciplining a child and at the same time not infringe on the child's rights which have to be protected. How does society strike a balance between protecting the children's rights and the parents' obligations? Should government regulate corporal punishment in the home or should it be abolished as in the case of criminal corporal punishment or corporal punishment in school.

### **1.1.2 OBJECTIVES OF THE OF THE STUDY**

This research seeks to find means of disciplining a child which do not involve corporal punishment. The research aims at critically analysing whether corporal punishment should be abolished.

- **GENERAL OBJECTIVE**

To establish means of striking a balance between disciplining a child and protecting a child from cruel, inhumane and degrading treatment.

- **SPECIFIC OBJECTIVES**

1. To identify the reasons for the use of corporal punishment in the home as a means of discipline;

2. To establish how one can determine reasonable discipline or use of corporal punishment in the home;
3. To highlight the effects of corporal punishment in the home
4. To critically analyse whether corporal punishment should be abolished;
5. To propose alternative methods of disciplining a child;

## **RESEARCH QUESTIONS**

2. Why do parents or guardians use corporal punishment?
3. Is corporal punishment a necessary tool for discipline?
4. How does one determine what is reasonable discipline?
5. Does corporal punishment achieve the required effects?
6. What are the effects of corporal punishment?
7. Can corporal punishment in the home be regulated?
8. What are parents' and children's views on the use of corporal punishment in the home?
9. What is the rationale for keeping corporal punishment in the home?
10. Should corporal punishment continue to be legal or should it be abolished?
11. What is the implication of the abolishment of corporal punishment in the home?
12. What are the alternatives to the use of corporal punishment in the home?

#### **1.1.4 SIGNIFICANCE OF THE STUDY**

The significance of the study is that it will specifically look at the balancing of a child's right to be protected from cruel, inhumane and degrading treatment against the parents duty to discipline a child, as well as assess whether disciplining a child can be achieved without the involvement of corporal punishment. The study will finally make critical observations on whether corporal punishment should be abolished.

#### **1.1.4 METHODOLOGY**

This research is qualitative. It will involve desk research and field investigations. Therefore, it will include both primary and secondary data. Primary data will be collected through interviews conducted where possible. Relevant published and where necessary, unpublished works shall be consulted. Data will also be collected from reports, text books, statutes, law journals, and any other article which will have a bearing on the study.

### **1.2 AN OVERVIEW OF CORPORAL PUNISHMENT**

#### **1.2.1 Defining Corporal Punishment**

Corporal punishment is not easily defined. It has been defined in many different ways. One definition is that it is the intentional application of physical pain as a method of changing behaviour. Most people understand corporal punishment to mean spanking but it is something far more than that. The definition adopted by the author is that given and recommended by the Committee on the rights of a Child. The Committee on the rights of a Child monitors the implementation of the United Nations Convention on the Rights of a Child. The Committee defines corporal punishment as:

“The Committee defines ‘corporal’ or ‘physical’ punishment 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 – whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, 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 which 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.”<sup>9</sup>

The definition given by the Committee on the Rights of the Child takes into account various activities other than spanking that can amount to corporal or physical punishment. Furthermore, the definition mentions ‘however light’ when talking about the amount of force used meaning that the degree or amount of force used is irrelevant. Thus, whether light or not, any form of treatment causing discomfort or pain qualifies as corporal punishment.

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<sup>9</sup> Para 11 of the General Comment No. 8 of the Committee of the Rights of a Child (2006)



### 1.2.2 Corporal Punishment: A Tool of Discipline

It has been said that corporal punishment is a cruel but necessary tool of discipline. Discipline as a noun can be defined as behaviour and order in accordance with rules and regulations. The word conjures up order, organisation, cooperation, and following rules and policies. The verb to discipline is a controlling, restricting, chastising and punishing type of action. Some of the synonyms for this kind of discipline are:

Correct, direct, keep in line, regulate, restrain, check, curb, contain, arrest, govern, oversee, manage, harness, rein in, leash, muzzle, restrict, constrain, confine, inhibit, chastise, reprimand, reprove, rebuke, criticize, make an example of, punish, restrain, keep in line, make an example of, punish, castigate, penalize.<sup>10</sup>

This kind of discipline is an effort to influence the children as well as an attempt to control the children. Children are coerced or compelled to follow the instructions given by the parents or guardians. Corporal punishment is thus the vehicle used to obtain discipline. Society tolerates and even approves of corporal punishment inflicted by the family on children as part of discipline.

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<sup>10</sup> T. Gordon "The Case Against Disciplining Children at Home or at School." See <http://www.thomasgordon.com/abouttg.asp>

### 1.2.3 The Legal Status of Corporal Punishment in the Home

In Zambia, corporal punishment was abolished in the case of **John Banda v The People**<sup>11</sup>. It had been argued in this case that corporal punishment was barbaric in the modern world as well as being unconstitutional as it violated Article 15 of the Constitution which accorded an individual protection from torture, cruel, inhuman or degrading treatment. Corporal punishment, it was further argued, was an inhuman and degrading legacy of the colonial era. This case led to legislative amendments where this form of punishment was deleted from the statutes in institutions where it had been legalized for example in prisons and in schools. The legislative amendments were aimed at reforming formal institutions but no attempt was made to address corporal punishment of children in the home. Corporal punishment in the home was not looked into as the home is one of the private realms where the law tries not to trespass. In the United Kingdom for instance, Government is of the view that only in exceptional cases should there be compulsory intervention in family life for instance, where it is necessary to safeguard the life of the child from significant harm. The law is silent on this but other sources of law may be referred to determine the legal status of corporal punishment in the home.

Zambia has a dual legal system meaning that customary law exists side by side with English law in so far as the customary law is not repugnant to justice, equity and good conscience. The English law was brought by the white settlers when Zambia, which was then Northern Rhodesia, had been colonised. Customary law had been used by the indigenous people even before colonisation. Zambia upon the attainment of independence inherited a dual legal system.

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<sup>11</sup>HPA/6/1998

The English law system in Zambia is made up of statutory law, common law, and the principles of equity that were in force in Britain prior to 1911. Statutes of later date must have been extended by an Act of parliament.<sup>12</sup> Under common law, corporal punishment is allowed under the defence of reasonable chastisement. Reasonable chastisement is a common law immunity which allows parents to use moderate, reasonable chastisement in the correction of children. The defence can be used but the force should not exceed what is reasonable under the circumstances. "The test of reasonableness leaves room for the subjective opinion of the judge...This makes the law uncertain, as the protection available to a child or indeed if any, depends on the judge or magistrate before whom the matter is."<sup>13</sup> Parents in Zambia can use unlimited force on their children without incurring criminal liability because the law is silent on this issue.<sup>14</sup> The home thus remains a potential breeding ground for violence against children as parents in Zambia are still allowed corporal punishment.

Another source of law in Zambia is customary law. The Subordinate Court Act<sup>15</sup> provides as follows;

"Subject as hereinafter in this section provided, nothing in this Act shall deprive a Subordinate Court of the right to observe and enforce the observance of, or shall deprive any person of the benefit of, any African Customary law, such African Customary law not being repugnant to justice, equity or good conscience, or

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<sup>12</sup> This is provided for under the English Law (Extent of Application) Act, Cap 11 of the laws of Zambia

<sup>13</sup> M. Mukuka, "Law and Corporal Punishment of Children n the Home(2008) p. 35

<sup>14</sup> This is evidenced by the growing number of reports on the various incidents were parents especially mothers hit their children and cause injury even death all in the name of discipline. Muvi TV recently reported an incident were a woman in Lyansha hit her step-child who was 4 years old and damaged his spinal cord. The boy died as a result of this.

<sup>15</sup> Cap 28 of the Laws of Zambia

incompatible, either in terms or by necessary implication, with any written law for the time being in force in Zambia.”<sup>16</sup>

Customary law is practiced in Zambia and under this, children are considered to be the property of the parents. Since children are the property of the parents, the parents are the ones that decide what is good or bad for the child. They decide as to how they would raise and discipline their child since the child's bad behaviour reflects badly on their parental skills. In an African society, once a child misbehaves the most frequently asked question is, “Whose child is he or she?” It has been argued that extending the reach of the criminal law into the family sphere would have a negative impact upon families and hinder parents to nurture their children.<sup>17</sup> However, abusive punishment should be criminalised.

Moreover, if Zambia is a Christian nation and as such draws its laws from the Christian religion and morality, it can be argued that corporal punishment is allowed as religion has allowed and prescribes it.

#### **1.2.4 The Defence of Reasonable Chastisement**

The common law defence of reasonable chastisement dates back to 1860, in the leading case of **R v Hopley**<sup>18</sup> when Chief Justice Cockburn ruled where a teacher had beaten a child to death that, “By the law of England, a parent ... may for the purpose of correcting

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<sup>16</sup> Section 16

<sup>17</sup> F. Jjemba, “Spare the Rod Spoil the Child” An Assessment to Determine the Legal Implications on the Prohibition of Corporal Punishment in Zambian schools (2004) p.35

<sup>18</sup> (1860) 2F & F 202

what is evil in the child, inflict moderate and reasonable corporal punishment".<sup>19</sup> This position was changed in the case of **A v UK**<sup>20</sup> This case involved a nine-year-old boy, who on more than one occasion was beaten with a garden cane by his stepfather. An English crown court jury acquitted the stepfather of assault as he pleaded reasonable chastisement, but in a typically purposive ruling the European Court found the boy had received treatment sufficiently severe to reach the level prohibited by Article 3 of the European Convention of Human Rights. This states that no one shall be subjected to "torture or to inhuman or degrading treatment or punishment". The boy was awarded damages, and at the time the UK Government agreed that the law on reasonable chastisement should be changed.

Since the European Convention on Human Rights was incorporated into UK law under the Human Rights Act 1998, the courts have been under an obligation to take into account factors such as 'the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health' of the child. An Appeal Court Judge giving judgment in the case of **A v UK** held that in addition to these factors, juries should consider the reasons given by the defendant for administering the punishment.

The defence of reasonable chastisement no longer applies in England to cases where a child suffers actual bodily harm. The defence remains available in relation to common

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<sup>19</sup> *R v Hopley* (1860) 12 F & F202 @ 209

<sup>20</sup> (1998) ECHR 85

assault. On current prosecution practice in England, it appears that common assault is normally charged when injuries amount to no more than grazes, minor bruising, reddening of the skin, scratches, superficial cuts, or a black eye. There has been no attempt on the part of the Zambian parliament to remove or modify the defence in relation to recent developments in the international law on the rights of a child. The position remains the same as expressed in **R v Hopley**. The new position in England has not been extended to Zambia by the British Act (Extension) Act.

## **CHAPTER 2**

### **2.0 DISCUSSION ON THE VARIOUS CONVENTIONS AND TREATIES DEALING WITH THE PROTECTION OF CHILDREN FROM CRUEL, INHUMANE AND DEGRADING TREATMENT**

#### **2.1.0 Introduction**

Zambia as a member of the international community has an obligation to ensure that its laws conform to certain standards which are set by the international community. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms. Zambia has signed, ratified and acceded to a number of international human rights instruments some of which are discussed below.

#### **2.1.1 The United Nations Convention on the Rights of a Child (UNCRC)**

This Convention is the most comprehensive international human rights instrument dealing with the protection of children's rights. The Committee on the rights of the Child monitors the implementation of the UNCRC. The two most relevant provisions of the UNCRC are Articles 19 and 37(a). Article 19 contains the obligation to take measures to protect children from all forms of physical or mental violence. It provides:

“ 19(1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent

treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

19(2) Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment, described heretofore, and, as appropriate, for judicial involvement.”

Article 37(a) requires States to ensure that "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment..."

The Committee on the Rights of the Child has consistently stated that legal and social acceptance of physical punishment of children, in the home and in institutions, is not compatible with the Convention. Since 1993, in its recommendations following examination of reports from various States Parties to the Convention, the Committee has recommended prohibition of physical punishment in the family and institutions, and education campaigns to encourage positive, non-violent child-rearing and education.<sup>21</sup> The Committee on the Rights of the Child is the highest international authority for interpretation of the Convention. In ratifying the UNCRC, Zambia is obliged to prohibit

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<sup>21</sup> See <http://www.unhchr.ch/html/menu2/6/crc>



by law corporal punishment and other forms of humiliating or degrading punishment of children in the family.

### **2.1.2 The International Covenant on Civil and Political Rights (ICCPR)**

This is one of the four documents that make up the International Bill of Rights. This treaty guarantees a large number of individual civil and political rights. The ICCPR imposes an absolute and immediate obligation on each state party to respect and ensure the rights guaranteed to all individuals within its territory. Of relevance to this discussion is Article 7 which provides that, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...” This Article imposes an obligation on a state which is non-exceptional, meaning that the state cannot for any reason whatsoever impose this on an individual and in this instance this extends to children. The state in this instance has to look into corporal punishment which is a form of punishment.

### **2.1.3 The Convention against Torture and Other Cruel, Inhuman or degrading treatment or Punishment (CAT)**

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires that state parties outlaw torture in all its forms. “It explicitly provides that no exceptional circumstance whatsoever and no order from a superior may

be invoked as a justification for torture.”<sup>22</sup> Article 2(1) requires that state parties “to take effective legislative, administrative, judicial or other measures to prevent acts of torture.” Furthermore, Article 4(1) requires that state parties “ensure that all acts of torture are offences under its criminal law.” This would also apply to attempts to commit torture.

#### **2.1.4 African Charter on the Rights and Welfare of the Child (ACRWC)**

Article 11(5) requires state parties to ensure that school or parental discipline is administered with respect for the inherent dignity of the child. Punishment of children violate children’s human rights to physical integrity and corporal punishment and other forms of humiliating and degrading human dignity,

## **2.2 STRIKING A BALANCE BETWEEN DISCIPLINING A CHILD AND PROTECTING A CHILD FROM CRUEL, INHUMANE AND DEGRADING TREATMENT**

### **2.2.0 Introduction**

Human rights are fundamental and each and every individual is entitled to the protection of these. The Preamble of the Charter of the United Nations states that "We the peoples of the United Nations (are) determined... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of

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<sup>22</sup> C Anyangwe, Introduction to Human Rights and International Humanitarian Law (2004) p. 39

nations large and small...." The pertinent provisions from this charter make up the International Bill of rights. Children likewise are not exempt from being accorded protection under the Zambian law. Like any other individual, their rights have to be recognised and protected. Parents in relation to their children also enjoy certain rights and society has also entrusted them with certain responsibilities. The question then arises as to how to set a balance between the protection of the children's rights and the rights of the parent.

### **2.2.1 Parent Child Relationship**

A child usually lives with its parents most of its life. Thus the law has entrusted the upbringing of children to the parents. Under civil law, parental rights and duties cease once a child attains the age of majority, that is, eighteen years. Parental rights and duties do not cease under customary law. "The objective of the law is to protect children because of their vulnerability due to lack of maturity or experience in life. They deserve protection till they reach their full potential."<sup>23</sup> The law places parental responsibility in terms of rights, duties and powers.

### **2.2.2 Child Rights**

Child rights in Zambia are dealt with in numerous statutes of which the majority of the Zambia people are not aware of for example the Penal Code<sup>24</sup>, the Employment of Young

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<sup>23</sup> L. Mushota, Family Law in Zambia: Cases and Materials (2005) p.396

<sup>24</sup> Cap 87 of the laws of Zambia

Persons and Children Act<sup>25</sup> and the Education Act.<sup>26</sup> There is no single piece of legislation which deals with the rights of children. Rights of children can be found in various pieces of legislation as well as international treaties and conventions which Zambia has signed, ratified or acceded to. Some of the rights of a child as identified by the UNCRC include the following:

- a) The right to name and nationality,
- b) Freedom of thought, expression and association,
- c) Freedom from torture,
- d) The right to protection from abuse and,
- e) Special protection in the administration of justice.

Under the UNCRC, there are four principles which confer rights in themselves. These are non-discrimination, best interest of the child, the right to life, survival and development and respect for the views of the child.<sup>27</sup> These principles help in the interpretation of the convention.

The Zambian Constitution also can be listed as containing children's rights. The Constitution is the Supreme law of the land in Zambia and as such all other laws must be consistent with the Constitution.<sup>28</sup> The Constitution Contains a Bill of rights which protects the fundamental rights and freedoms of the individual. Of particular interest to this research are Articles 15 and 24. Article 15 provides for the protection from inhumane treatment. It explicitly provides as follows;

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<sup>25</sup> Cap 274 of the laws of Zambia

<sup>26</sup> Cap 134 of the laws of Zambia

<sup>27</sup> C. Anyangwe, Introduction to Human Rights and International Humanitarian law (2004) p. 37

<sup>28</sup> See Article 1(3) of the Constitution, Cap 1 of the laws of Zambia

“A person shall not be subjected to torture, or to inhuman or degrading punishment or other like treatment.”

This Article is one of the few that are absolute in that there are no permissible derogations or drawbacks from this right as can be seen with other rights the enjoyment of which are limited. This right prohibits any form of torture, inhuman or degrading punishment. Children are also supposed to enjoy this right though the extent to which this right is enjoyed is questionable and debatable depending on the way in which one views corporal punishment.

Article 24 of the Constitution provides for the protection of young persons from exploitation. The main point of interest is Article 24(2) which states;

“All young persons shall be protected against physical or mental ill-treatment, all forms of neglect, cruelty or exploitation.”

This Article specifically protects young persons and should corporal punishment be a form of cruel, inhumane and degrading treatment, then it would only be right and proper that the provisions of the constitution should be effected and that corporal punishment in the home should be abolished.

### **2.2.3 Parental Rights**

Parents have been entrusted with the duty of raising children and socializing them into the society. The UNCRC acknowledges the rights of the parent to provide guidance to the

child. Article 5 of the UNCRC provides that the state must respect the rights and responsibilities of parents and extended family to provide guidance for the child which is appropriate to his or her evolving capacities. “The law places parental responsibility on a parent or parents with relation to the rights duties and power necessary for the protection and promotion of the child’s rights.”<sup>29</sup> The duty of parents to their children embraces their maintenance, protection and education. “This is said to rest upon a principle of natural law; but perhaps it may be more reasonably be referred to the implied obligation which parents assume when entering into wedlock, and by bringing children into the world.”<sup>30</sup> Some of the parental rights and duties include:

- a) The right of custody and control of children,
- b) The right to lawfully correct or punish his or her child in a reasonable way.
- c) It is the duty of the parent to maintain and educate his or her children,
- d) It is the duty of the parent to protect the child and provide all the necessities for the child’s life such as food, shelter and clothing.

It is a commonly held belief that children must be disciplined by their parents or guardians. Parents have been given the unique role and responsibility of raising children which is also recognized by the law. “Parental responsibility entails all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and is property.” Parents are for example responsible for feeding, clothing and

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<sup>29</sup> L. Mushota, Family Law in Zambia: Cases and Materials (2005) p.398

<sup>30</sup> G. W. Field, The Legal Relations of Infants, Parent and Child, and Guardian and Ward. (1981) p. 57

housing their children and may be liable to prosecution for failure to provide adequately for their children. In order to fulfill their unique role, the law recognizes that parents have unique powers to control and direct their children's behaviour. These are powers that are no reciprocal and that those without parental responsibility do not share in relation to the child. In this context, the law recognizes that parents may use physical chastisement in relation to the child. This however is on the condition that it should be 'moderate and reasonable'.

#### **2.2.4 Does Corporal Punishment Amount to Cruel, Inhumane and Degrading Treatment?**

Corporal punishment may be humiliating and degrading. Humiliating or degrading punishment takes various forms such as psychological punishment, verbal abuse, ridicule, isolation, or ignoring the child. Punishment of children violate children's human rights to physical integrity and corporal punishment and other forms of humiliating and degrading treatment do not uphold human dignity, as upheld by the UNCRC, the ACRWC, as well as the Zambian Constitution. "It is the obligation of all states around the world to ensure that children's right to a life free from violence, including corporal punishment and other forms of humiliating and degrading punishment, is protected. Children's right to a life free from violence also extends into the private life and home of the child."<sup>31</sup> In addition to infringing on children's basic human rights, there is also a body of evidence from

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<sup>31</sup>G. Clacherty, D. Donaldson and A Clacherty, *Zambian Children's Experience of Corporal and Humiliating Punishment*, Summary Report (2005) p. 2

medical, educational and psychological authorities on the negative effects of corporal punishment and other forms of humiliating and degrading punishment of children.<sup>32</sup>

The low status of children in society, and children's lack of power have prevented a complete prohibition of corporal punishment in many countries, including Zambia. Everyone in society is protected by law from being hit, for instance, assault under the Penal Code. "A husband cannot hit his wife if he does he is a wife batterer. When a big child hits a small child, he is called a bully. What makes it so different when a parent hits a child?"<sup>33</sup> Corporal punishment does not respect the inherent dignity of the child. The Committee on the Rights of the Child which monitors the implementation of the Convention on the Rights of the Child has consistently stated that legal and social acceptance of physical punishment of children, in the home and in institutions, is not compatible with the Convention. There is need to amend the laws in Zambia so as to allow children the same legal protection from violence that adults enjoy today.

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<sup>32</sup> *ibid*

<sup>33</sup> See <http://www.independent.co.uk/opinion/commentators/reasonable-chastisement-is-really-child-abuse-541747.htmlhtml##>, an article by Virginia Ironside



## **CHAPTER 3**

### **3.0 CORPORAL PUNISHMENT AS A MEANS OF DISCIPLINE: IS THIS THE ONLY METHOD TO DISCIPLINE CHILDREN?**

In the previous chapters, corporal punishment was defined and its legality in Zambia was ascertained. Furthermore, various international treaties were discussed in order to show Zambia's international obligations to protect the child from cruel, inhuman and degrading treatment. This chapter discusses the rationale for the use of corporal punishment, the effects of the use of corporal punishment and the possible alternatives that can be used in place of corporal punishment in order to discipline children in the home.

#### **3.1 The Rationale for the Use of Corporal Punishment**

As has been previously mentioned, corporal punishment in the home is legal. Corporal punishment is a form of discipline that has been sanctioned even by the Bible. Corporal punishment has been used since time immemorial but however there has been a move towards its eradication. In as much as there is a global movement towards the total abolishment of corporal punishment, there are some people that for the idea that it should not be abolished as it is the most effective method of disciplining children. Malay carried out several surveys and these surveys found that the use of infrequent "smacking of the legs or bottom" is an effective method of disciplining a child. The article states that a crucial factor in maintaining the effectiveness of corporal punishment is frequency. If

corporal punishment is used too often, it loses its effect. Corporal punishment works well as a last resort.<sup>34</sup>

### **3.2 Does Corporal Punishment Achieve the Desired Effect?**

There is an argument that physical punishment of children does not, as may be claimed, constitute an efficient and effective way of disciplining children in the interests of socialising and educating them; that it contributes to the development of aggressive personalities; and that other methods of control are more effective and humane. “It has been argued that smacking does not work. If it did, life would be simple - people would just be beaten until they behaved. If your boss at work were to hit you, would this make you work better? If he criticised you violently or yelled at you, your first move would be to look for another job or sue for compensation for the stress, rather than try to improve. Not only does smacking not work, but, worse, it's part of the problem of violence, not part of the solution. Research has shown that children from violent families tend to be violent themselves. Hitler's father believed that by endlessly hitting his son, he would teach him to be a good member of society.”<sup>35</sup>

Study has shown that boys of 12 years of age whose parents scored high in restrictiveness and punishment showed strong tendencies toward self-punishment, accident proneness, and suicidal intentions. The more corporal punishment a person has experienced, the more likely he or she is as an adult to: be depressed or suicidal, physically abuse his or

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<sup>34</sup> See <http://www.thomasgordon.com/aboutdtg.asp> in the article “The Case against Disciplining children at Home or in School” by Thomas Gordon

<sup>35</sup> See <http://www.independent.co.uk/opinion/commentators/reasonable-chastisement-is-really-child-abuse-541747.htmlhtml##>

her child or spouse, engage in other violent crime, have a drinking problem, be attracted to masochistic sex, and have difficulty attaining a high-level occupation and high income (Straus, 1994).<sup>36</sup> Mothers of children with low self-esteem were found to have used less reasoning and discussion and more arbitrary, punitive discipline (Coopersmith, 1967).<sup>37</sup> Children of punitive authoritarian parents tend to lack social competence with peers, to withdraw, to not take social initiative, to lack spontaneity (Baldwin, 1948).<sup>38</sup> Children of controlling (authoritarian) parents who valued obedience and respect for authority showed relatively little independence and social responsibility (Baumrind, 1971).<sup>39</sup>

In an article entitled Schoolwide and Classroom Discipline by Kathleen Cotton<sup>40</sup>, researchers Docking, Doyle, and Maurer and Wallerstein made the following conclusions in regard to the effectiveness of corporal punishment in reducing misbehaviour:

- 1) the results **are unpredictable**;
- 2) even when corporal **punishment** is successful in inhibiting inappropriate behaviour, it still doesn't foster appropriate behaviour;
- 3) it can sometimes be "unintentionally reinforcing" since it brings attention from adults and peers;
- 4) it often creates resentment and hostility, which makes good working relationships harder to create in the future; and

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<sup>36</sup> See <http://www.thomasgordon.com/aboutdtg.asp> in the article "The Case against Disciplining children at Home or in School" by Thomas Gordon

<sup>37</sup> *ibid*

<sup>38</sup> *ibid*

<sup>39</sup> *ibid*

<sup>40</sup> See <http://www.nwrel.org/scpd/sirs/5/cu9.html>

5) corporal punishment has also be linked to an increase of undesirable outcomes, such as increased vandalism and dropping out.

### **3.3 The Effects of the Use of Corporal Punishment**

Corporal punishment can have both positive and negative effects. However, most of the effects of corporal punishment can be sad to be negative.

1. Psychologically children tend to identify with their parents and often try to emulate them. Parents who lower themselves to physical violence and aggression in an attempt to control children are setting an example the children may try to follow. This is the hypocrisy of "Do what I say, not what I do," but the actions are often louder than the words.

2. Another major objection to punishment is that it can harm the relationship between the parent and the child. Wishing to avoid punishment, the child will try to avoid its administrator, whether physically or psychologically. The child may withdraw, and the adult may lose the child's confidence. How likely is it that children will share their problems and difficulties, or be honest when asked a question, if they know they may be hurt if they tell the truth? Punitive discipline is hazardous to the mental health of children

3. Aronfreed and Leff (1963) found that more intense punishment can interfere with subtle cognitive discriminations. If children are feeling and thinking they may be punished, will their attentiveness be as clear and perceptive? Even though it may be a

negative motivator, this study shows that punishment can also be a distraction from learning.<sup>41</sup>

4. It perpetuates a cycle of child abuse. It teaches children to hit someone smaller and weaker when angry. Children tend to copy the behaviour of the person inflicting the punishment and most often that is what they themselves will adopt as a means discipline. This means that even when they become parents or guardians they will see nothing wrong with hitting for instance. Moreover, homes that use corporal punishment often have poorer academic achievement.

5. Injuries occur. Bruises are common. Broken bones are not unusual. In Zambia this can be evidenced by the growing number of cases of children abused that are reported in the media. In certain instances, even death has occurred as a result of the violence inflicted upon the child in the name of discipline.

6. Corporal punishment is often not used as a last resort. It is often the first resort for minor misbehaviours. In order for corporal punishment to be effective it has to be administered as a last resort. Optimal disciplinary responses begin with less severe tactics, such as reasoning, but proceed to firmer disciplinary tactics when the initial tactic achieves neither compliance nor an acceptable compromise.<sup>42</sup> Spanking is no more effective as a long-term strategy than other approaches, and reliance on spanking as a discipline approach makes other discipline strategies less effective to use. Time-out and

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<sup>41</sup> See <http://www.thomasgordon.com/aboutdtg.asp>

<sup>42</sup> Robert Larzelere, Boys' Home

positive reinforcement of other behaviours are more difficult to implement and take longer to become effective when spanking has previously been a primary method of discipline.

7. A pattern of corporal punishment may be sustained or increased. Because corporal punishment may provide the parent some relief from anger, the likelihood that the parent will use force or violence on the child in the future is increased.

### **3.4 Alternatives to Corporal Punishment**

To avoid using any form of punishment whatsoever is probably too idealistic and impractical. There are those that are of the view that corporal punishment is not the only means by which children can be disciplined, rather, other methods can be employed to discipline children. "Children need discipline but not hitting."<sup>43</sup> These methods do not involve the use of force or violence but avoid the harmful effects of corporal punishment. By refusing to use physical punishment, perhaps we can refine and develop those other techniques which may prove more beneficial and enduring than the easy and quick brutality. Punishment does not have to be physical; it can be social, emotional, or mental.<sup>44</sup> Alternatives teach children to be self-disciplined rather than cooperative only because of fear.

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<sup>43</sup> D. Walker, Canadian Institute of Child Health

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### **3.4.1 The Possible Alternatives**

There are various methods that have been proposed and have been shown to yield the desired effect which is that children are disciplined. These methods avoid the use of violence or force, that is, there is no hitting, spanking or such action from the parent or guardian. Thomas Gordon, a psychologist, outlined some alternatives in an article entitled “The Case against Disciplining Children at Home or at School”.<sup>45</sup> These are as follows:

#### **1. Reasoning**

Using reasoning to accompany punishment when it is deemed necessary brings up the method of teaching and communicating as an alternative method. This is the ideal method of long-term control of behaviour, because it develops the conscience, cognitive skill, and self-discipline. Research shows that the development of conscience is related to parental warmth and the use of reasoning as a technique of discipline. When the child has developed self-control and one's conscience to the extent that one will no longer do what one knows is wrong even when one knows one won't be punished, then we could say one's character education has been successful. Baumrind (1971) found that nursery school children who rated high in self-control and self-discipline had parents who refrained from punitive messages or punishments and instead made extensive use of reasoning and what she termed "cognitive structuring. This academic-sounding term turns out to be our I-message-telling children the negative effects of their behaviour on others. Baumrind explains that these messages help children internalize the consequences of their behaviour and develop conscience or inner control-what I call self-discipline as opposed to externally administered discipline.

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<sup>45</sup> See <http://www.thomasgordon.com/aboutdtg.asp>

## **2. Distributive Justice**

The method of distributive justice (Piaget, 1948) as opposed to retributive justice is a method of punishment that teaches responsibility. Rather than as retaliation (retributive), punishment can be designed as a corrective method of making the person responsible. In other words, whatever harm children have done should be corrected by them as feasible as possible by devising some action by which they can repay the persons or the situations with some compensation. This ethical principle of distributive justice or compensation is profoundly accepted in the Eastern world as a spiritual law, karma. By facilitating this process, discipline becomes less artificial and more accurate and appropriate to the life experience.

## **3. Extinction**

For changing basic habit patterns, and inability of the child to control one's basic instincts, desire, impulses, and emotions, there are well-known methods of behavioural modification which can be quite effective. First it is important not to reinforce or reward problem behaviour with positive attention or indulgence. The technique of extinction is to ignore the behaviour altogether, hoping that the person will stop behaving that way. This technique would mainly be useful in extinguishing attention-getting behaviour, such as tantrums which usually are repeated as a method children use to control adult's behaviour



#### **4. Counter-conditioning**

Counter-conditioning usually ignores or initially punishes the negative behaviour while reinforcing some other positive behaviour. In this situation immediate and consistent punishment can be mild and brief if the positive reinforcement of the alternative behaviour is at all effective. When combined with teaching and communication, this technique can be effective.

#### **5. Involvement of Children in Rule-setting**

It is a well-established principle that people are more motivated to comply with rules or limits if they have been given the opportunity to participate in determining what they should be. It is advisable that parents should avoid making rules unilaterally. Parents need to be introduced to methods for involving children in the process of determining the policies and rules they will be expected to follow. Among such family policies and rules are those covering bedtime, TV usage, household chores, homework, and any other activity that has the potential for generating problems or conflicts.

#### **6. Helping Children Find Their Own Solutions to Problems**

When children experience some form of deprivation or unmet needs, they often react by behaving in disruptive or non-cooperative ways. Acting-up children are usually troubled children-youngsters carrying around a lot of frustration, disappointment, resentment, or anger. And troubled children also make poor learners. Consequently, it seems obvious that both discipline problems and low achievement could be reduced if parents could be

taught how to be more effective as helping agents or counsellors. Parents need to have more trust in children's ability to solve problems themselves.

## **7. The No-Lose Method of Conflict Resolution**

Although getting children to participate in mutual rule-setting significantly prevents a lot of adult-child conflicts in families, conflicts will always arise for which no rules have been previously established. Parents have to deal constructively with these unexpected situations or else their relationships will suffer. Most parents are either strict or lenient, either tough or easy, either authoritarian or permissive, either their solution in the conflict prevails or the youngster's solution prevails. This is the win-lose method. Parents can however resolve conflicts with an alternative method called the No-Lose Method (or the Win-Win Method), in which both the adult and the child participate in a process of six separate steps:

Step I: defining the conflict in terms of needs

Step II: generating possible solutions

Step III: evaluating the possible solutions

Step IV: reaching an agreement on the best solution

Step V: determining what is required to implement the solution

Step VI: evaluating the effectiveness of the solution

The No-Lose Method of resolving conflicts requires a firm commitment to an entirely different posture from that assumed in the traditional win-lose methods. The parent conveys this message to the child:

We have a conflict-a problem to be solved. I don't want to use power to win at the expense of your losing. But I don't want to give in and let you win at the expense of my losing. So let's put our heads together and search for a solution we can both accept.

These non-power methods add up to a new and far more effective model of parenting and teaching. By giving up using power, parents will foster self-disciplined children. By relating to children democratically and refusing to be dictators or doormats, parents will increase children's compliance with rules through involving them in the process of making the rules. By helping youngsters find their own solutions to problems, parents will foster more independence, more control over their own destiny, and higher self-esteem.

### **3.4.2 The Applicability of the Alternatives in the Zambian Scenario**

In the Zambian scenario, some of the methods of discipline proposed would be workable in that parents or guardians need only avail themselves and be able to spend time with their children in order to work out the various details of their family life such as setting the house rules with the children. Most of the methods require that parents keep open channels of communication with the children.

However, some of the methods may be of little effect looking at the fact that since Zambia is a poor nation. Study has shown that the children on whom corporal punishment is usually inflicted on come from poor families. Fewer families can afford to provide each child with a room of their own, for instance, were a child misbehaves and

isolation would have been the ideal form of discipline, there would be no room to go to. It would thus be difficult to isolate the child in order to give the time to reflect upon their behaviour and attitude.

## **CHAPTER 4**

### **4.0 CRITIQUE ON WHETHER CORPORAL PUNISHMENT SHOULD BE ABOLISHED IN ZAMBIA**

#### **4.1 Introduction**

Having given an overview of the situation on corporal punishment, the essay now endeavours to critically analyse whether there is need to abolish corporal punishment.

#### **4.2 Should Corporal Punishment in the Home be abolished?**

Corporal punishment has been viewed differently by various members of society. There are those that are of the view that it is merely violence against children and as such it should be abolished on the one hand, and those of the view that it is a necessary evil in order to discipline children on the other. Human rights activists are against corporal punishment in the home and would like to see it abolished because it is a morally repugnant, illegitimate and unjust assault upon another human being and especially reprehensible in that it is perpetrated upon those who are least able to defend themselves. The status of children remains low in society and children easily become victims. Children are particularly vulnerable and need rights to protect their integrity and dignity. Rights are important. In Bandman's words, "they enable us to stand with dignity, if necessary to demand what is our due without having to grovel, plead or beg. If we have rights we are entitled to respect and dignity; no amount of benevolence or compassion can be an adequate substitute."<sup>46</sup>

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<sup>46</sup> M. Freeman, *The Moral Status of Children: Essays on the Rights of a Child* (1997) p. 83

Kate Federle argues that having a right means having the power to command respect, to make claims and to have them heard. It is her conclusion that there is a need to reconceptualise the meaning of having and exercising rights. The kind of rights she envisions, are not premised upon capacity but upon power, or more precisely, powerlessness. She sees rights more as inhibitions on the ability of those with power. This she says, creates zones of mutual respect for power that limits the kinds of things that we may do to one another. And this has so she claims a transformative aspect as well, for the empowering affects of rights would reduce the victimisation of children because we would no longer see them as powerless beings.<sup>47</sup>

Children have the right to be protected from cruel, inhuman and degrading treatment. Human rights are of little value if they are not translated into practical reality. In terms of children's rights, the most effective way of protecting these rights is through the domestication of a number of treaties that Zambia has ratified. Zambia has a legal obligation at international law to ensure the practical realisation of rights inscribed in those treaties. The purpose of imposing obligation is to ensure that the rights and freedoms guaranteed in the treaties are translated into practical reality for those whom the said rights are designed to protect.

A large scale survey, conducted by Save the Children in 2005, involving 2,321 children aged 6-18 years from all nine of Zambia's provinces, looked at children's experiences of corporal punishment over a two week period. The findings were also informed by in depth qualitative research with 384 children from four provinces. The research found that

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<sup>47</sup> Ibid, p. 11

24% of children reported experiencing corporal punishment in the home during the period, including being beaten with hands, sticks and belts. Humiliating punishment was reported as being experienced in the home by 43% of children. Corporal punishment was more common in low income than high income environments and more common for younger (6-12 years) than older (13-18 years) children. It was most often inflicted by mothers in the home. Almost three in four children (70%) felt corporal punishment was unacceptable in the home and in school; 79% felt that humiliating punishment was unacceptable.<sup>48</sup> The overwhelming majority of children would like parents to talk to them and explain what they did wrong instead of using corporal punishment and other forms of humiliating and degrading punishment. Children would like adults to talk to them and would prefer non-violent disciplinary measures in the form of staying in one's room, writing punishment or detention. They wish to be treated with respect, to have adults listen to them, and to be given a better understanding of what they have done wrong.

Zero tolerance has been adopted as the central theme with regards to ending violence in the home between adult family members. Why can't the same policy be extended to violence against children in the home? Children's rights are frequently undermined by legal provisions confirming a right of parents and other adults to administer reasonable chastisement. Human rights activists argue that the near universal acceptance of corporal punishment in childrearing necessitates clarity in law that no level of corporal punishment is acceptable.

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<sup>48</sup> Clacherty, G., Donald, D. & Clacherty, A. (2005), *Zambian Children's Experiences of Corporal Punishment*, Pretoria: Save the Children Sweden

The UNCRC Committee traces its objective back to the original International Bill of Human Rights which states that “The dignity of each and every individual is the fundamental guiding principle of international human rights law”<sup>49</sup> The UNCRC builds on these principles. Article 19 of the Convention requires States to protect children “from all forms of physical or mental violence”, the UNCRC Committee states that;

“... There is no ambiguity: ‘all forms of physical or mental violence’ does not leave room for any level of legalized violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and the State must take all appropriate legislative, administrative, social and educational measures to eliminate them.”<sup>50</sup>

The Committee does not find it acceptable that a society which prohibits any form of physical violence between adults would accept that adults subject children to physical violence. It is of the view that there cannot be any educational value in corporal punishment of children that cannot otherwise be achieved. Moreover, in a field where the available statistics show a constant increase in the number of cases of ill-treatment of children reported to the police and prosecutors, it is evidence that additional measures are needed to come to terms with this problem.

“International law focuses primarily upon the relations between states. By contrast, municipal law governs the domestic aspects of government and deals with the issues

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<sup>49</sup> Para 16, see <http://unhchr.ch/html/menu2/6/crc>

<sup>50</sup> Para 18, see <http://unhchr.ch/html/menu2/6/crc>



between individuals, and between individuals and the administrative apparatus.”<sup>51</sup> In as much as Zambia may have an international obligation to observe and protect the rights of children under the UNCRC, for Zambia to be bound, the treaty must have gone through the process of domestication. The binding force of a treaty concerns in principle the state parties to it only and not their subjects. The individual is only a third party beneficiary of undertakings under the treaty. In case of human rights treaties, since they confer rights directly on the subjects of the state parties, necessary steps must be taken by state parties, according to their municipal law, to make the provisions of the treaties binding upon their subjects, institutions, officials and the like.<sup>52</sup> This is done when parliament by an enabling instrument has adopted and adapted it as part of national legislation.

The existence of special defences for violent punishment of children such as reasonable chastisement in an otherwise universally applicable laws on assault, deliberately removes the equal protection under the law which is guaranteed by human rights instruments such as the International Bill of Human Rights. Corporal punishment often reaches the level of cruel, inhuman or degrading punishment and in significant number of cases it is the direct cause of death.<sup>53</sup> Children are particularly vulnerable and need rights to protect their integrity and dignity. The defence of reasonable chastisement undermines the opportunities for extending non-violent discipline. Parents know that, from time to time, children must be disciplined, but they need not always and easily resort to the resource of reasonable chastisement when they should devise other methods of ensuring that children

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<sup>51</sup> C Anyangwe, Introduction to Human Rights and International Humanitarian Law, (2004) p.190

<sup>52</sup> *ibid*

<sup>53</sup> D. Fottrell, Revisiting Children’s Rights 10yrs of the UN Convention on the Rights of the Child (2000) p. 115

do not move into harm's way and, where necessary, find methods of non-violent chastisement.

There are those that are not in favour of abolishing corporal punishment especially parents. A survey of a representative sample of 1,007 adults conducted in July 2004 by the market research agency, BMRB, found that 85 % agreed that 'parents should sometimes be allowed to smack their children'. Only 12 % agreed that, 'smacking of children by their parents should be illegal in all circumstances'. These findings are broadly similar to a survey of 2,000 adults conducted by ONS for the Department of Heath in 1998. In that poll, 88 % registered their agreement that 'it is sometimes necessary to smack naughty children', with only 8 % disagreeing.<sup>54</sup>

It would be more favourable to restrict the scope of the reasonable chastisement defence rather than abolishing it altogether. Those in favour of maintaining corporal punishment argued that a total prohibition of corporal punishment would give rise to unacceptable uncertainty because the question of where to draw the line between "light smacking" that ought not to be criminalized and more heavy-handed smacking which should be criminal would be left to the discretion of the prosecuting authorities. This would lead to unacceptable uncertainty about the scope and definition of the law. By contrast, the partial repeal of the reasonable chastisement defence provides greater legal certainty by clarifying that parents would only be liable to prosecution if they caused their child "harm".

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<sup>54</sup> "A Reasonable Approach to Discipline" See <http://www.parliament.uk>

Legal certainty is clearly required by human rights law. Interferences with liberty must always be "lawful", which means having a legal basis which is sufficiently accessible, precise and foreseeable, such as to enable individuals to foresee the consequences of their action. Similarly, interferences with the right to respect for home and family life must be in accordance with the law. The guiding principle is that individuals must be able to regulate their conduct with a reasonable degree of certainty as to the legal consequences of acting one way rather than another. There is general agreement that the present law is unsatisfactory because it leads to too much uncertainty about what exactly constitutes "reasonable chastisement". The state has to have respect for private and family life, and requires interferences to be justified by a pressing social need. The abolishment of corporal punishment altogether will lead to disproportionate interference with family life.

Reasonable chastisement lies on a spectrum of physical chastisement and it is very much dependent on how individual parents view reasonableness. And what seems reasonable to them might seem quite unreasonable to others. There are far too many instances where the fluid, uncertain, moveable boundary between reasonable and unreasonable has been overstepped. The implication of the abolishment of corporal punishment is that it would lead to the prosecution of parents. If corporal punishment in the home had to be abolished, this would mean the removal of the defence of reasonable chastisement, there are arguments that this would lead to the prosecution of parents. The removal of the defence of reasonable chastisement would render any smack a criminal offence and there could be no guarantee that cases would not be brought to court. This would result in the

criminalisation of good and loving parents. Moreover, a blanket injunction against chastisement by parents is not scientifically possible.

An analysis comparing physical punishment with alternative disciplinary tactics found that:

- a. When used in a controlled way to discipline younger children, smacking was associated with significantly better outcomes for dealing with defiance or antisocial behaviour than most alternative tactics.
- b. Compared with smacking, four common alternative methods of discipline resulted in higher levels of antisocial behaviour, significantly so in the case of grounding, to a lesser extent with the withdrawal of privileges and pocket-money, and non-significantly for sending children to their room.
- c. Whether physical punishment compared favourably or unfavourably with other tactics depended on how it was used. All types of physical correction were associated with lower rates of antisocial behaviour than were alternative disciplinary tactics, with normal parental smacking more effective than alternative disciplinary tactics overall.

Few countries have clear laws on corporal punishment. The imprecise nature of the expression of reasonable chastisement as contained in legal provision paves the way for it to be interpreted in a subjective and arbitrary manner. It is difficult to draw a line

between reasonable and unreasonable force. Certain countries have tried to distinguish between the correction of children and excessive violence such as England. In reality, the dividing line between the two is artificial. It is very easy to pass from one stage to another. It is also a question of principle.

As at May 2008, a comprehensive review of laws relating to children was under way, with a view to bringing them into line with the UN Convention on the Rights of the Child. The draft Constitution states in article 48 that every person has the right “to be free from all forms of violence from either public or private sources” and “not to be subjected to corporal punishment or to be treated in a cruel, inhuman or degrading manner”, but the specific prohibition of corporal punishment of children in article 42 applies only to institutions.<sup>55</sup> The draft Constitution would prohibit corporal punishment in alternative care settings, though it is unclear whether or not the prohibition would apply to foster care, adoption and other family-based care. A Handbook published by the Ministry of Community Development and Social Services Department of Social Welfare states that disciplining children should not include corporal punishment, but as at May 2008 this had not yet been confirmed in law.<sup>56</sup> There is need for clarity and the best that the law makers can do is to adopt the situation in England where corporal punishment is not completely abolished but children’s rights are sufficiently protected. There is room for the parent to discipline the child but not to cause harm to the child.

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<sup>55</sup> See <http://www.endcorp.org/.../African%20commission>

<sup>56</sup> *ibid*

## **CHAPTER 5**

### **5.0 RECOMMENDATIONS AND CONCLUSION**

This Directed Research Essay provides the recommendations and conclusion as set out below.

#### **5.1 Recommendations**

Having looked at the Zambian situation on corporal punishment and Zambia's international obligation to protect children from cruel, inhuman and degrading treatment, the following are the recommendations:

- 1) That given the social, economic and cultural experiences of the Zambian community, a blanket injunction against corporal punishment by parents is not scientifically supportable, thus there should be efforts aimed at reforming the defence of reasonable chastisement. The law should explicitly set out that, in considering whether or not the physical punishment of a child constitutes reasonable chastisement; a court should always have regard to:
  - a. the nature and context of the treatment;
  - b. its duration and frequency;
  - c. its physical and mental effects; and, in some instances,
  - d. the sex, age and state of health of the victim.

- 2) The law should restrict the definition of reasonable chastisement. If possible it should add or elaborate upon the relevant factors which a court must consider in determining whether physical punishment constitutes 'reasonable chastisement'. For example, additional factors might include
- a. the reasons given for the punishment,
  - b. how soon after the event it was given,
  - c. the persons involved,
  - d. the vulnerability of the child.
- 3) That the law should, if possible, state that some forms of punishment could never be deemed 'reasonable'. This might exclude as 'reasonable' any physical punishment administered to the head (so as to ensure that there could be no risk of damage to the brain or sensory organs), or shaking a child, which can cause brain damage. The law might also exclude entirely the use of implements, for example, canes, belts, slippers etc, in the physical punishment of a child, or the physical punishment of very young children such as those under the age of one or two.
- 4) That the law should make clear that physical punishment which constitutes cruel, inhuman and degrading treatment can never be justified as reasonable chastisement. Furthermore, any other form of degrading punishment or treatment of children must be prohibited in legislation and combined with adequate sanctions in penal or civil law.

- 5) That government should engage in public awareness campaigns to promote positive, participatory, non-violent forms of discipline as an alternative to corporal punishment and respect for children's equal right to human dignity and physical integrity at all levels of society. Government should raise awareness about violence against children. It should carry out public education programmes on the negative consequences of corporal punishment. This can be done via the media, and even in schools to enlighten children on their rights. Furthermore, it should support families through parenting programmes.
- 6) That there should be set up a national monitoring system of children's situation. The situation of children should be monitored and any violence reported. The government should set up a child-sensitive mechanism to receive complaints regarding ill-treatment of children and make sure perpetrators are brought to justice. Authorities should be trained on the rights of the child. Children ought to be taught how to protect themselves from abuse and harm and also non-violent ways to manage conflict. People need to break the silence and speak up about violence they experience or witness.



## 5.2 Conclusion

In conclusion, as this essay has shown, corporal punishment in the home cannot be completely prohibited. Corporal punishment is a necessary tool of discipline and research has shown that of all the alternatives forms of discipline, it is the most effective means by which children can easily be corrected. There is however a very thin line between corporal punishment and cruel, inhuman and degrading treatment. Corporal punishment is lawful in the form of the defence of reasonable chastisement. The imprecise nature of the expression of reasonable chastisement as contained in legal provision paves the way for it to be interpreted in a subjective and arbitrary manner. It is difficult to draw a line between what can be termed as reasonable and unreasonable punishment. Certain countries have tried to distinguish between the correction of children and excessive violence but in reality, the dividing line between the two is artificial. It is very easy to pass from one stage to another. The existing law does not have the merit of striking a balance between protecting children from unreasonable punishment on the one hand and protecting families from unnecessary and potentially damaging state intrusion on the other. Zambia would do well to extend the position in England thereby modifying the defence of reasonable chastisement in relation to recent developments in the international law on the rights of a child.

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