An analysis of the South African common law defence
of moderate and reasonable child chastisement

By
Noluthando Maqhosa
(200218824)

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Faculty of Law, University of Fort Hare South Africa

Supervisor: Prof. Nasila Selasini Rembe
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ABSTRACT

The study sought to analyse the South African common law defence of moderate and reasonable child chastisement. Regarded by those with religious and cultural beliefs as a way of instilling child discipline, child chastisement has been a centre of contestation in recent years. Constitutionally, children have rights to care, dignity and protection. Thus, child chastisement infringes upon these rights. However, regardless of its intentions, child chastisement has an effect of inflicting pain onto its victims thereby infringing on their rights to human dignity, equality and protection. It can also lead to unintended consequences such as injury or death to its victims. Subjecting children to this cruel, inhuman and degrading action affects the development of children and sometimes haunts them at a later stage in life. In addition, child chastisement lacks the measure of determining whether it is moderate or severe, thereby making it prone to abuse or misuse.

The study used a qualitative research paradigm, where data was collected from existing documents and analysed towards understanding child chastisement and finding sustainable ways of improving child welfare in the home or in society. The study also analysed the legal framework on child welfare and chastisement globally, regionally and locally. Instruments such as the UNCRC, ACRWC and the UDHR have a clear stance abolishing child chastisement. The study established that, despite the existence of global instruments promoting child care and protection, the common law defence of corporal punishment in the home and society remains a loophole that needs closing and enactment of laws that outlaws it completely.

Keywords: Corporal Punishment, Discipline, Moderate and Reasonable Chastisement
DECLARATION

I, Noluthando Maqhosha, hereby declare that this mini-dissertation submitted to the University of Fort Hare for the degree of Master of Philosophy in Human Rights has not been previously submitted for any degree at any other University. I declare that this is my own work in design and execution and that all material and sources contained herein has been fully acknowledged or referenced or indicted by quotation marks in the text.

Signature of Candidate

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Date: ......................................

Signature of Supervisor

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Date ......................................
DEDICATION

I dedicate this study in memory of my late father,

Sithembile Melrose Maqhosa (1951-2007), I know you are proud of me today.
ACKNOWLEDGEMENTS

Firstly I would like to thank God the Almighty for the strength that He has given me throughout the period of writing this dissertation, without which I could not have succeeded.

Secondly, I would like to thank my Supervisor Prof. Nasila Selasini Rembe for his incisive and insightful comments on the drafts and final production of this work, and gratitude is due for his patience as well.

Thirdly, I would like to thank my husband Sizwe Tsutsu for his unwavering support and love during this period. I could have not done it without him. Many thanks to the Walter Sisulu University staff (Management, Governance and Law) for their words of encouragement and the opportunity they have given me, especially my former head of department Phumelele Dlodhlo and Fundiswa Saffa.

I thank all my friends, especially, Sandiso Mahlala who has supported me and offered guidance when I needed it.

Finally, I owe my career to my parents Sithembile and Nomsa Maqhosha, who instilled in me the value of education at a very young age. To my sisters Asanda and Indira who have believed in me since the inception of this work, I also extend my deepest gratitude.

Liyinene elithi: Lowo wawuqalayo ngaphakathi kwenu umsebenzi olungileyo wowufeza, ide ibe yiloo mini ka Yesu Kristu.
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<td>ACDP</td>
<td>African Christian Democratic Party</td>
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<td>JGC</td>
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<td>RSA</td>
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CHAPTER ONE
INTRODUCTION AND BACKGROUND OF THE STUDY

1.1. INTRODUCTION

In the 21st century, child rearing and discipline has become the pinnacle of most contemporary debates in modern society. In the same vein South African families believe in the use of moderate and reasonable chastisement onto children in a bid to instil and maintain child discipline. For the purpose of this study, moderate and reasonable chastisement is used to refer to what the mainstream society terms corporal punishment. In this regard therefore, there are raging debates on the use of such moderate and reasonable chastisement (Freeman, 2010:251).

Tracing back over the years, the defence of moderate and reasonable chastisement was first raised in the case of *Rex v Janke & Janke* (1938) *TPD* 13. In this case the courts allowed parents to responsibly inflict moderate and reasonable chastisement on their children. However, such discretion and power is tantamount to being abused and neglected by guardians or any other person under whose custody a child is placed. Principally, the practice of child chastisement involves the punishing of children by their parents or guardians as a way of instilling and maintaining discipline.

In spite of the implications of the court ruling highlighted above, the practice of child chastisement is contentious especially given the existence of various statutes and protocols prohibiting it locally, regionally as well as globally (Gallinetti, 2006:211). According to Bower (2002:2) states are obligated to enact enabling legislation as well
as repeal statutes that promote or create breeding conditions against all forms of violence against children. Above all, these statutes and conventions seek to defend and protect children against unjustifiable and inhuman disciplinary measures. It should also be noted that moderate and reasonable chastisement lacks the characteristics of being measurable; hence it is prone to getting into abusive levels.

The common law defence of moderate and reasonable child chastisement has witnessed clashes between those supporting corporal punishment and the South African Human Rights Commission (SAHRC). The defence of corporal punishment has been supported by parents, especially those whose religious beliefs are centred on the 'spare the rod, spoil the child' notion. Such religious beliefs have influenced Christian organisations like the Cape Town based Joshua Generation Church (JGC) to develop manuals and teachings that promote the practice of parents to 'lovingly chastising' their children. This 'loving chastisement' is said to be rooted in the teachings of the Bible on how children should be raised.

In light of the presence of such teachings and guidelines on the rearing of children by parents and Christian families, the SAHRC (2016:2) ruled against the JGC’s promotion of corporal punishment and called for its prohibition in the home. This ruling was issued following a complaint brought against the JGC on its promotion and cultivation of a culture of child chastisement. As a Chapter 10 institution established by the South African Constitution (1996), the SAHRC is in addition obligated by the government to meet its human rights commitments by initiating law reform to prohibit corporal punishment in the home SAHRC (2016:2).
In its judgement, it found that corporal punishment, including ‘moderate chastisement’, can never be justified, even if it is based on religious teachings. Promoting corporal punishment violates a child’s right to have his or her best interest considered.

In spite of the SAHRC’s ruling in relation to the JGC and other Christian teachings promoting corporal punishment in the home, stakeholders in society have opposed the ruling as interference by the state in the activities of non-political organisations. One such stakeholder is the African Christian Democratic Party (ACDP) which issued a statement on the 27th of January 2016 to disagree with the SAHRC’s findings. The ACDP state that child chastisement should not be equated to abuse or violence; hence religious organisations should be allowed to teach, preach and use moderate and reasonable child chastisement in raising children.

The ACDP further regards the ruling as an infringement on the freedom of religion and belief which is constitutionally protected; hence the state has no discretion to determine what the church teaches their congregants (Gatewaynews, 2016:1). On the 27th of January 2016, the Baptist Union of South Africa (BUSA), rejected the SAHRC’s ruling and findings since the holy scripture is clear on how Christians should discipline their children, including chastising them. The banning of child chastisement by loving Christian families committed to the best interest of the child is regarded as outrageous by the BUSA (gatewaynews, 2016:1).

Any state legislation forbidding child chastisement would thus be a direct rejection of biblical teachings, and as Christians, obedience should be to God and not to men. Biblical teachings take precedence in everything especially on corporal punishment.
On the contrary, there are other stakeholders who vehemently oppose any form of child chastisement and are in support of the stance taken by the SAHRC in the ruling on the practice and teachings of the JGC on child chastisement. These include, *inter alia*, Sonke Gender Justice, Africa Child Policy Forum (ACPF), the African Experts Committee on the Rights and Welfare of the Child; Child Helpline International, Plan International, Save the Children; and United Nations International Children’s Emergency Fund (UNICEF) (SAHRC, 2016:2).

The above stakeholders have co-operatively launched the Action on Violence against Children campaign. The campaign premised on the fact that South Africa is a country with one of the highest levels of interpersonal violence, including violence against children, and this should be eradicated through state interventions which include laws and policies outlawing it.

Such an abolishment would secure the welfare of children in society. The banning of corporal punishment in the home and within the society is also consistent with regional and international conventions that are discussed in chapter two of this study. Hence, the growing concern raised by states, charities, non-governmental organisations and the United Nations (UN) agencies such as the UNICEF is proof that South Africa needs a robust law that banishes moderate and reasonable child chastisement due to its effect on the welfare and development of children.

There exists a myriad of legislations and conventions outlawing the use of any forms of chastisement done to children. Some of these include: the United Nations Convention on the Rights of the Child (UNCRC) (1989); the African Charter on the
Rights and Welfare of the Child (ACRWC) (1990); and the Constitution of the Republic of South Africa (1996). They all recognise that the child’s best interest and his/her right to respect and dignity, physical integrity and equal protection under the law are paramount.

As a member state of international bodies such as the United Nations (UN), the Republic of South Africa has a duty to respect, promote, and protect the inalienable rights of the child both progressively and consistently. Safeguarding the rights of the child in South Africa is of paramount importance since investing in the welfare and future of children is part and parcel of the future of South Africa. This is particularly so because South Africa has a relatively young population according to the 2011 national population census conducted by Statistics South Africa (2011:3).

Moderate and reasonable chastisement as argued in the preceding section has the risk of being abused by guardians and/or parents. Such abuse of chastisement will have a huge bearing on the dignity of the child. According to a study by Waterhouse and Luddy (2009:3), “children are physically, socially and emotionally vulnerable than adults and receive less protection from violence”. The study notes that the majority of parents who use corporal punishment as an indication of love for their children strongly believe that their actions are in the best interest of their children.

However, as alluded to in the opening section of this chapter, there are instances when their fundamental human rights are violated by the continued tolerance of this common law defence, as it allows parents to use physical violence as a form of child discipline.
Apart from the Constitution (1996), the Children’s Act (No. 38 of 2005) further protects the interest and dignity of children by prohibiting corporal punishment as a sentence for children convicted of crimes, in all forms of detention such as correctional service centres, and as a method of controlling the behaviour of children in alternate care. These alternative care centres may include, *inter alia*, foster care, temporary safe care and child youth centres. Similarly, the South African Schools Act (No. 84 of 1996) also outlaws the mooting of corporal punishment in the public and private educational institutions by educators. In developed nations such as the United States of America (USA), rampant child abuse caused by moderate and reasonable chastisement, which becomes excessive and abusive, is a common occurrence, with over three million children subjected to neglect or abuse annually (Du Preez, Naudé & Pretorius, 2004:25).

In the local context, the exponential rise in foster care children in South Africa can be credited to abusive parents or guardians, indicating an escalating problem of child abuse and neglect, with most of this credited to faultily administrated moderate chastisement. Revisiting the common law defence of moderate and reasonable child chastisement in South African society, or precisely in the family setup, would be a step in the right direction towards the alleviation and subsequent eradication of its abuse. Such a robust intervention would significantly aid in the promotion of children’s rights stemming-out child abuse, ill-treatment and minimising the South African foster culture.
1.2. STATEMENT OF THE PROBLEM

The study is premised on the conflict between the law and practice of moderate and reasonable chastisement despite many statutory provisions in various South African legislation and policies outlawing its use on children. Using corporal punishment in the home is an infringement of the rights of children as stipulated in the Bill of Rights and section 28 of the Constitution of South Africa (1996). Child chastisement infringes children’s constitutional rights; *inter alia*, the right to protection. Firstly, the equality clause in Section 9 of the Constitution (1996) stipulates that everyone is equal before the law and has the right to equal protection and benefit of the law. This implicitly requires the State to ensure that the rights of children to dignity and other rights are equally enjoyed and protected. Secondly, Constitution of South Africa, (1996:12) affords everyone freedom and security, which include the right to be free from all forms of violence from either public or private sources, and not to be tortured in any way or to be treated or punished in a cruel, inhuman or degrading way.

Thirdly, Section 10 of the Constitution (1996) accords everyone the right to inherent human dignity and to have such dignity respected and protected. Thus, reasonable and moderate caning of children has an adverse effect on their dignity, which is inherent and constitutionally entrenched.

Another vital section of the Constitution is section 28 that is exclusively dedicated to children and their prospects of reaching their full potential and graduating into adulthood. Section 28 sets out a range of rights in addition to the protection that children receive from the provisions of the Constitution (Currie & Dewaal, 2005:600).
The purpose of Section 28 of the Constitution (1996) is to protect children from situations where they are particularly vulnerable, and in this respect, the rights contained within Section 28 enhance the protection contained within the rest of the Constitution (1996). The study regards the use of moderate and reasonable child chastisement as a precedent for the infringement of all the rights of children. This implies that the abuse of moderate chastisement results in an infringement of children’s right to human dignity and protection. This implication was raised in two cases, which are, State v Henry Williams and five others (1995) and Christian Education South Africa v Minister of Education (2000). In both cases, corporal punishment was regarded as degrading and inhuman, and thus should not be used on children. Nonetheless, one has to bear in mind that child chastisement which gets out of reasonable proportion is used under the guise of moderate child disciplining. More often than not, it is good intentions gone badly.

Apart from the local prohibition of actions that can infringe the rights of children, the problem that the study seeks to resolve has a global connotation. Such international perspectives on children’s rights centre on international instruments that obligate member states that signed and ratified them to eradicate excessive punishments that can be degrading to children.

One of such key conventions is the UNCRC (1989) which obliges all states to take appropriate legislative and policy measures to protect children against unjust and irrational child chastisement.
In particular, Article 19 of the UNCRC (1989) states that all state parties should 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. In this regard, child’s rights are a global concern hence they need to be fulfilled and protected.

It is apparent that international conventions such as the UNCRC have a bearing on the enactment of state-specific legislation to give effect to their provisions. International conventions serve as a yardstick and benchmark for the promotion of human rights. This implies that South Africa should take reasonable legislative and other measures to promote the rights of children in line with the UNCRC. However, the legislative and policy framework in South Africa is not explicit when it comes to the use of moderate and reasonable child chastisement.

Such a position is substantiated by the existence of a common law defence of the practice of corporal punishment at home. This common law defence has become a loophole through which the rights of children to human dignity in South Africa are infringed upon leading to child abuse.

In the case of *State v Henry Williams and Five Others* (1995) the court stated that, the deliberate infliction of physical pain on a person offends society's notions of decency and is a direct invasion of every person’s right to human dignity (Morrel, 2001:293).
Although South Africa has abolished the use of corporal punishment as a judicial sentence or as a form of discipline in schools, its use in the family by parents has not been abolished. Gallineti (2010:211) writes, despite the global movement to ban child chastisement at home, the use of such acts of punishment and disciplining in South Africa still remains. The continued existence of moderate and reasonable child chastisement can be attributed to the fact that parents have a common law right to chastise their children through corporal punishment (Gallineti, 2006:211).

The absence of legislation that criminalises corporal punishment in homes has left South Africa lagging behind in terms of advancing children’s rights in contrast to other parts of the world. In some states, using corporal punishment at home has been abolished and criminalised. These countries include *inter alia*, Austria, Cyprus, Denmark, Latvia, Norway, Germany, New Zealand, Spain and Sweden, (Global Initiative to End Corporal Punishment of Children, 2007:23). Germany, England, Austria, Italy and Israel are regarded as the pioneers towards the abolishment of corporal punishment at home as early as 1979 (Gallineti, 2006:211).

The problem of the use of moderate and reasonable child chastisement in South Africa is widespread, and there is need for interventions to be done to outlaw such inhuman treatment of children. Statistics on the prevalence of corporal punishment at home do shed a bleak future for children’s rights in South African society both at present and in the foreseeable future.
The Human Sciences Research Council (2005:11) in a nation-wide opinion poll found out that a total of 120 020 children had their rights violated in homes through corporal punishment. There is also a gender bias in the use of child chastisement in the home, with boys being subjected to corporal punishment to a larger extent than girls (HSRC, 2005:11).

According to Proudlock (2014:169), corporal punishment in homes is used under the guise of discipline and more than 1 in 4 children have been physically chastised daily or weekly in South Africa. Such a ratio is alarmingly high since it shows that a quarter of children are being subjected to some form of corporal punishment. Therefore, this study seeks to analyse the shortcomings of the South African law with regards to reasonable and moderate child chastisement.

The facts discussed in this section paint a grim picture of the reality of child abuse that results from the use of moderate and reasonable chastisement as a disciplinary measure in South Africa. Therefore, the purpose of the study is to analyse the impact of the common law defence of moderate and reasonable chastisement on the rights of children.

Further the study seeks to bridge the disjuncture between this common law defence of moderate and reasonable chastisement and the 21st century standards of democracy, equity and equal protection in the presence of legislation that protect children’s welfare and rights. To another extent, the study seeks to analyse the
shortcomings of the South African law with regards to reasonable and moderate child chastisement by their parents or guardians.

1.3. RESEARCH QUESTIONS

The central question of the study concerns the infringement of the rights of children by the defence and practice of moderate and reasonable chastisement by the parents or guardians. In this regard, the research questions are:

- What is the current reality in terms of the use of or abuse of moderate and reasonable child chastisement in South Africa?
- Are there measures that have been put in place to restrain parents against moderate and reasonable child chastisement?
- What are the legislative challenges with regard to moderate and reasonable child chastisement in South Africa?
- How can the challenges with reference to moderate and reasonable child chastisement in South Africa be resolved to give effect to the promotion and protection of the dignity and rights of children?

1.4. OBJECTIVES OF THE STUDY

The overarching objective of the study is to analyse the South African common law defence on reasonable and moderate child chastisement. In this regard therefore, the study seeks to gather ample data to sufficiently attain the research objectives which are to:
- establish the status quo in terms of the use or abuse of moderate and reasonable child chastisement in South Africa;
- ascertain the existence of any measures put in place to restrain parents or guardians from using irrational child chastisement;
- determine the legislative challenges with regards to the use of moderate and reasonable child chastisement in South Africa; and
- explore ways through which challenges linked to the use or abuse of moderate and reasonable child chastisement can be minimised in South Africa.

1.5. RATIONALE OF THE STUDY

The rationale of this study is to ascertain the shortcomings in the South African law on children’s rights in relation to the use or abuse of moderate and reasonable child chastisement. This is motivated by the increase in child abuse cases as well as the ever-growing demand for foster care in South Africa. Therefore, the findings of the study will help to address these shortcomings. Globally, the use of any form of child chastisement has been abolished, but South Africa still uses it at home based on the common law defence for parents and/or guardians to use corporal punishment reasonably and moderately. However, this has created a loophole which exposes children to the risk of abuse and inhuman treatment.

The study is also motivated by the need to advocate and explore other child rearing practices which are devoid of physical, verbal or any other punishment for South African parents. It also seeks to focus on the disjuncture between the global movement banning child chastisement and its continued existence in South African families. Overall, the analysis seeks to find sustainable ways of completely abolishing this
degrading practice which not only infringes on the rights of children to dignity and protection from harm but also affects the intellectual development of children into responsible adults.

1.6. DELIMITATION OF THE STUDY

The research is limited to child chastisement and the legal provisions of reasonable and moderate child chastisement in South Africa. Emphasis is given to the use or abuse of moderate chastisement and its effects on the rights, dignity and welfare of children in South Africa. Hence the study focuses on the use of moderate and reasonable child chastisement as well as its intended and unintended consequences.

1.7. PRELIMINARY LITERATURE REVIEW

Child chastisement is an inherent problem in South Africa and the world at large (Dawes & Mushwana, 2007:283). According to Ritcher and Dawes (2008:79), various legal measures have been established by governments to deal with child chastisement, but the problem still persists.

Numerous studies on child chastisement have been conducted in different parts of the world and many of the researchers’ emphasise is on abusers such as parents, educators and guardians (Ritcher & Dawes, 2008:84). However, one should bear in mind that the identified abusers of children are the ones entrusted with the care and protection of children in societies.
This study seeks to analyse the South African common law defence of the reasonable and moderate child chastisement and its bearing on the rights of children. The aim of this section is to provide a preliminary literature review to ascertain where other studies on child chastisement have established, key findings of those studies, and establish gaps that exist from the literature. The study also seeks to bring new insights through an empirical gathering of evidence for both policy makers and citizens alike.

According to Krug, Dahlberg, Mercy, Zwi, and Lozano (2002:64), thousands of children die every year and the majority of these deaths are due to injuries and physical impairments as a result of corporal punishment. Studies that have been conducted globally reveal that children experience severe physical violence under the guise of discipline (Krug et al, 2002:64). This is highlighted by studies conducted in Indonesia, Mongolia, Vietnam, China, Cambodia, the Philippines and the Republic of Korea where children testified that the dominant form of punishment was physical punishment in which they were beaten with hands and some objects such as chains, whips and belts (Kleyhans, 2011:25). Other forms of punishment that induce extreme and excruciating pain in children include, inter alia, pulling of hair, electrocution, submerging of the head in water, twisting joints, scratching and punching of children’s stomachs by adults and pinching (Krug et al, 2002:5).

A study conducted in New Zealand by Willow and Hyder in 1998 included 80 children in the age range of 7-14 years about their opinions on corporal punishment. The children who participated in this study had no known history of being abused, victimised or neglected by adults who were supposed to care and protect them. The children reported the severity of the punishment which included forms of physical
punishments such as being beaten with belts and tennis rackets, being assaulted on the face and head or forced to eat inedible things such as petroleum jelly and soap.

In a national survey undertaken in 2005 by the Human Sciences Research Council (HSRC), it was found that the most common age of children who are smacked is 3 years of age; the most common age of those are beaten with some or other object being 4 years (HSRC, 2005). The data from the HSRC survey showed that 57% of parents with children under 18 years of age used corporal punishment, and 33% used severe corporal punishment in the form of beatings (HSRC, 2005).

In the same vein, a 2002 study on child chastisement by guardians and the child behaviours and experiences in South Africa linked child abuse to subsequent behaviours (Gershoff, 2002:54). The study was in the form of a meta-analysis, which involved 88 studies and sought to examine the associations between physical punishment and the subsequent behaviours and experiences. The meta-analysis revealed some important relationships between physical punishment and behaviours or experiences that were undesirable (Gershoff, 2002:54).

The results of the study showed that the subsequent undesirable behaviours included abusing others at a later stage in life when the child becomes an adult; aggressive and violent behaviour when an adult; delinquent behaviour in childhood, and mental health problems when an adult. In light of the above arguments, child chastisement can affect the intellectual and psychological development of the child and later haunt him/her in life.
Although corporal punishment has been regarded by some as a form of disciplining children, some scholars regard it as a form of child abuse. Durrant (2008:55) argued that the difference between abuse and corporal punishment is quite meaningless. Further, it can be argued that no distinction can be drawn between tolerable and intolerable forms of violence that wedged against children (Durrant, 2008:55). However, there are some scholars who have drawn a distinction between abuse and punishment to ascertain the connections between socially acceptable or unacceptable dimensions of violence against children (Durrant, 2008:55). In contrast, the outcome of the meta-analysis undertaken by Gershoff (2002:317) established that physical punishment was considerably related to physical abuse.

There are various variables which act upon the gravity and bearing of corporal punishment. For an example, the emotional nature of the punisher also increases the risk of corporal punishment. The degree of anger of the person administering the corporal punishment has a tendency of increasing the level of force used beyond what was intended; and their intent may be retaliatory as well as punitive. Thus, moderate and reasonable chastisement becomes immeasurable to an extent that nobody ascertains how much force may be regarded as moderate or minimal this makes it tantamount to abuse or misuse.

Based on this preliminary literature survey, the study deduces the relative bearing of corporal punishment on its victims. The following subsequent deductions can thus be made. All physical punishment, be it ‘mild’ or ‘light’, carries an inherent risk of escalation; its effectiveness in controlling children’s behaviour decreases over time, encouraging the punisher to increase the intensity of the punishment. The risk of
escalation of physical punishment is increased by the fact that adults who inflict physical punishment are often angry. This makes the use of such moderate and reasonable force vulnerable to emotional influences thereby harming the recipient of such chastisement (Strauss & Douglas, 2008:18). It is from these deductions that the study seeks to analyse the relative bearing of the use of moderate and reasonable chastisement in South African families. The section that follows covers the theoretical framework upon which the study is premised.

1.8. THEORETICAL FRAMEWORK OF THE STUDY

The theory that guides this study is the theory of unintended consequences advanced by Merton (1936). The theory was thereafter developed by contemporary scholars from various disciplines such as social science and the political economy who studied and criticised indirect, unintended effects of social policy (Hill, 2003; Andersen & Serritzlew, 2007; Holzer & Millo, 2005; Glinavos, 2008) and new legislation (Glinavos, 2008; Iyengar, 2008; Rose, Clear & Ryder, 2001).

The theory advances that several explanations for how the outcomes of any action, policy, or programme, can deviate from the intended purpose. In the context of moderate and reasonable child chastisement, the parents or guardians can end up punishing their children irrationally or against the law yet initially the punishment was intended to discipline the children.

According to Holzer and Millo (2005:236), Merton regarded ignorance as the first and most obvious limitation to a correct anticipation of the consequences of action. Therefore, the theory of unintended consequences is viable for this study in that when parents or guardians use physical punishment as a way of disciplining children, they
end up subverting children rights, creating delinquency and/or deviant behaviour. One should note that all these outcomes could have been unintended in the first place. A robust argument would be that actions meant to instil discipline through corporal punishment are unintentional from the beginning but emotions and lack of a measurable benchmark on the extent of moderate chastisement lead to further harm, distress and inhuman treatment of the child.

Moreover, it is not assumed that social action involves clear cut, explicit purpose (Merton, 1936:899). It may well be that awareness of the purpose is unusual, and that the aim of action is more often than not nebulous and hazy (Merton, 1936:900). It must not be inferred that purposive action implies rationality of human action (that person uses objectively most adequate means for the attainment of the end). Another important factor of unintended consequence of conduct, which is perhaps as pervasive as ignorance is error.

Holzer and Millo (2005:237) further view Merton’s theory of unintended consequences as intruding itself in any phase of purposive action. Error may also be involved in instances where the actor attends to only one or some of the pertinent aspects of the situation, which influence the outcome of the situation (Holzer & Millo, 2005:237). In this regard, the theory of unintended consequences perfectly fits and informs the study towards sufficiently answering the research questions highlighted in the preceding section of this chapter.
1.9. LIMITATIONS OF THE STUDY

Limitations are concerned with the factors which influence the decisions and findings of any empirical study (Lutabingwa & Nethonzhe, 2006:700). Limitations related to the study are discussed hereunder. Firstly, the time taken to carry out the study was limited, since it was conducted over a period of ten months. Secondly, the study is limited since only the documentary study method was used. Nonetheless, these limitations have no significant bearing to the extent of negatively influencing the research findings. The study ensured that the findings are as objective and as valid as possible through the employment of thorough scrutiny of the documents surveyed, elimination of biased records, and the use of global arguments on the issue of moderate and reasonable child chastisement.

1.10. OUTLINE OF THE STUDY

The dissertation comprises of five sequential chapters covering the respective areas of focus as outlined hereafter:

Chapter One provides the introduction and background of the study. It serves as the snapshot that grounds the study in the area under study in analysing moderate and reasonable child chastisement of children in South African society. As the opening chapter, it further covers the problem statement, research questions as well as the objectives, preliminary literature review, limitations and the delimitation of the study.

Chapter Two discusses the statutory and regulatory framework guiding the use of child chastisement globally, regionally and locally. The chapter also provides the provisions for children’s rights to equity, dignity and equal protection. It compares and
contrasts the global, regional and local statutes in order to identify any possible shortcomings in a bid to advocate for an equal enjoyment of children’s rights in South Africa.

**Chapter Three** focuses on the research design and methodology. This includes the research paradigm, the data gathering and data analysis methods. The purpose of this chapter is to provide the roadmap of the study by way of giving the finer details on the methods used to gather empirical evidence to achieve the objectives of the study.

**Chapter Four** details the data analysis and draws inferences based on the collected data. The analysis of data is executed through a qualitative analysis method. The study analyses the attitudes, feelings and actions in relation to the use of moderate and reasonable chastisement on children in South Africa.

**Chapter Five** presents the conclusions and the recommendations of the study. It is this final chapter that proves that the objectives of the study have been achieved. The chapter closes by recommending implementable strategies on how to solve the research problem and closes by making some concluding remarks on the topic of moderate and reasonable child chastisement in South Africa.
CHAPTER TWO

STATUTORY FRAMEWORK ON CHILD CHASTISEMENT IN SOUTH AFRICA

2.1. INTRODUCTION

Child discipline is a crucial part of child rearing in modern society. Administering child discipline through moderate and reasonable chastisement has however been proven to bring more harm than good to its recipients, the children. Despite these adverse or unintended consequences of corporal punishment, South African society still utilises it to discipline its children. Hence the study advocates for the cessation of this degrading chastisement through an in-depth analysis of the South African situation on the subject matter. The opening chapter provided a synopsis of the study and wrapped up by providing the limitations alongside the structural outline of the dissertation.

The aim of the current chapter is to look at the legislative and policy framework guiding the use of moderate and reasonable chastisement of children in South Africa. Further, the chapter focuses on the statutes and policies that prohibit the use of corporal punishment in South African society. It also looks at the gaps between legal provisions and the common law defence of moderate and reasonable chastisement of children. Overall, the chapter details arguments against corporal punishment from a legal viewpoint and inconsistencies which may exist between global, regional and local laws. The discussion covers legislation and protocols from a global, regional as well as local perspective.

2.2. SOUTH AFRICAN LEGISLATION ON THE RIGHTS OF CHILDREN

Child chastisement takes different forms. For Cornock (2008:30) it may be a verbal request not to do something, having a privilege withheld, being physically struck by a
parent/guardian by hand or tool. However, some forms of child chastisement could constitute criminal offences in relation to the law. If a child becomes afraid of a physical attack because the parent was shouting at him/her, this could then constitute an assault (Cornock, 2008:30). However, scholars have argued that under common law, moderate and reasonable chastisement is a defence that can exist for parents or guardians who may be facing legal prosecution for actions that they may have taken against their children, which at times may have unintended consequences (Keating, 2006:394).

Generally, acts of moderate and reasonable chastisement are regarded under common law as a means of disciplining a child. However, in some cases children have been left with serious injuries, neglected or even left dead from actions aimed at punishing them. A saddening scenario is when a child dies as a result of injuries and neglect at the hands of those who are entrusted with his/her care (Keating, 2006:394). Therefore, unintended consequences such as those that result in death, disfigurement or impairment as a result of corporal punishment constitute gross abuse of the rights of children by their parents or guardians.

Under common law, the argument is that chastisement is acceptable as long as it is done in a manner regarded as reasonable before the law (Bower, 2014:112). However, children are often spanked or verbally abused as a form of moderate and reasonable chastisement (Barbarin & Ritcher, 2013:65).

Bezuidenhout and Jourbert (2008:8), trace the constitutional development of child chastisement in South Africa as far back as 1869. During this period, forms of chastisement such as corporal punishment were acceptable even as a form of judicial
sentencing. For an example, the courts of the Cape Colony could impose sentences of corporal punishment on children or juvenile offenders who were below the age of 15 years (Bezuidenhout & Jourbert, 2008:8). From there on, under numerous legislation such as the Criminal Procedure Act (No. 56 of 1955) and the Criminal Procedure Act (No. 51 of 1977), corporal punishment was acceptable before the law as a form of punishment for a convicted crime but often with regulated limitations (Midgely, 1982:388).

The Criminal Procedure Act (No. 51 of 1977), for an example, permitted the use of corporal punishment on juvenile offenders but on condition that they were only whipped over their clothing. After decades of the use of corporal punishment, the dawn of a new era in the history of South Africa in 1994 changed the admissibility of corporal punishment in South Africa.

On the same vein, it is noteworthy to consider the stance of South African legislation relating to child chastisement. South African Legislation regulating children’s rights include the Children’s Act (No. 38 of 2005); Child Justice Act (No. 75 of 2008); and the Criminal Procedure Act (No. 71 of 1997) amongst others. For Bower (2014:109) these pieces of legislation help in the clarification of the legal position on child chastisement in South Africa both at home and within the external environment.

This examines what is permitted and prohibited in terms of moderate and reasonable child chastisement. In a bid to achieve this objective, the chapter evaluates arguments for and against this practice in order to consider whether any form of moderate and reasonable chastisement of a child is acceptable and if so, which persons are legally
permitted to administer such punishment and in what proportions. The study also notes the challenges in defining what ‘moderate and reasonable’ chastisement implies and how such a determinant factor can be quantified. The legislative challenges with regards to child chastisement in South Africa are also discussed.


The Republic of South Africa prides itself in having one of the most advanced constitutions in the world, mainly due to its extensive Bill of Rights. More so, the Bill of Rights has an equally extensive coverage of the rights of children in South Africa (Cook, 2013:6). The Constitution takes precedence in all situations since it is the supreme law of the land (RSA, 1996:2). To begin with, the Constitution (1996) in its Bill of Rights (Chapter II) lays out the rights of the child within the democratic state in a bid to promote the care and protection of children. Firstly, the Constitution affirms the values on which South Africa is one, sovereign, democratic state founded on human dignity, equality and the advancement of human rights (RSA 1996:1)

Important to note is that the Bill of Rights applies to all law and binds all organs of the state which include the judiciary, the executive and the legislature in promoting the full and equal enjoyment of rights by all citizens, including children.

Section 9 (1) of the Constitution specifically states that everyone is equal before the law and has the right to equal protection and benefit of the law. What this entails is that children in South Africa, just like adults, have a claim to such a right. In any case, their right to equality must be upheld and they must enjoy all rights and freedoms enshrined in the Constitution. In doing so, neither the state nor anybody should discriminate against a child.
Furthermore, the right of children as human beings to dignity is affirmed in the Bill of Rights (Chapter 10 of the Constitution of South Africa). Human dignity relates to the position of being worthy to be treated with respect and the child’s human dignity must be protected in line with the Bill of Rights (Metz, 2011:551).

The Bill of Rights declares that children have the right to be protected from maltreatment, neglect, abuse or degradation and that their best interests should take precedence in any matter concerning them (Metz, 2011:551). The implications of this are that the child must not be subjected to acts that are harmful such as corporal punishment, degrading statements or cruel and inhuman punishment whether it is considered moderate or reasonable chastisement. Above all, the Constitution prioritises the health, safety and well-being of the child as being pivotal to the promotion of care and protection of children from inhuman and degrading action such as corporal punishment.

2.2.2. Abolishment of Corporal Punishment Act (No. 33 of 1997)

This Act is a ground-breaking statute as far as the promotion of children’s rights to care and protection is concerned, due to its banning of corporal punishment to children. The adoption of the Act was a step towards the right direction since it helps criminalise child abuse through the cane whether administered domestically or by the judiciary. Thus, any South African law that allowed the use of corporal punishment as a method of instilling child discipline or correctional programmes to juvenile offenders was abolished through the Abolishment of Corporal Punishment Act (No. 33 of 1997) (Pete, 1998:430). Within the context of moderate and reasonable child chastisement,
such a development has a significant influence as corporal punishment by the child’s parents, guardians or correctional officers is often regarded as reasonable chastisement.

At common law, parents have the right and discretion to inflict moderate and reasonable physical punishment upon their children and in cases of assault. For instance, the prosecution has the burden to prove beyond reasonable doubt that the chastisement was excessive and constituted some kind of unlawful punishment (Parsons, 2007:308). The provisions laid-out in the Abolishment of Corporal Punishment Act (No. 33 of 1997), repealed provisions in other states such as the Black Administrations Act (No. 38 of 1927) and Criminal Procedure Act (No. 51 of 1977) which authorised the use of both judicial and domestic corporal punishment.

Implicitly therefore, the provisions of the Abolishment of Corporal Punishment Act (No. 33 of 1997) mean that no court of law could impose corporal punishment as a sentence for offences committed by juveniles or any other persons regardless the nature of a such crime.

Thus courts have to utilise custodial sentences to rehabilitate rather than punish offenders through caning (Souverein, Ward, Visser & Burton, and 2015:18).

The enactment of the Abolishment of Corporal Punishment Act (No. 33 of 1997) came as a result of growing pressure both regionally and globally for eliminating child abuse. Hence the cause of such legal interventions is mainly due to the fact of South Africa being a signatory to various international protocols on children’s rights. It has to fulfil

However, it is interesting to note that in the constitutional developments of corporal punishment, legislation often refers to corporal punishment by formal courts. Surprisingly however, there is no clear prohibition of corporal punishment by parents or guardians. In this sense, one may argue that moderate and reasonable child chastisement is legal within the home. However, corporal punishment is perceived to be unconstitutional on the basis that it is cruel, inhuman and degrading (Pete, 1998:430).

In this regard therefore, with reference to such case law, moderate and reasonable child chastisement in the form of corporal punishment is not acceptable in any scenario before the law because it is unconstitutional.

2.2.3. Children’s Act (No. 38 of 2005)

Like the Constitution of the Republic of South Africa (1996), the Children’s Act (No. 38 of 2005) makes provision for the protection of the rights of children. Furthermore, the Children’s Act (No. 38 of 2005) promote proper care of children including having their dignity respected to enable them to grow unhindered and reach their maximum potential in their lives (Ritcher & Dawes, 2008:80). In terms of the Children’s Act (No.
38 of 2005), children must be protected from any form of harm whether physical or emotional.

As Parsons (2007:308) puts it, oftentimes moderate and reasonable chastisement results in harm. Sometimes extreme cases of abuse happen when a child is beaten to death by whoever uses corporal punishment with the intention of only chastising him or her as a form of instilling discipline. Notably, the Children’s Act (No. 38 of 2005) was enacted to prohibit such acts of barbarism and child abuse. In the 21st century society, the best interests of the child should be given top priority (Parsons, 2007:308).

The Children’s Act (No. 38 of 2005) clearly lays out and defines the forms of harm and ill-treatment which a child must be protected from, both by the law and by those staying with him/her (Ritcher & Dawes, 2008:84).

The Act stipulates that assaulting a child or inflicting any form of deliberate injury to the child is outlawed and criminalised. Emphasis is made on these forms of abuse highlighted in the Children’s Act and this includes abuse of a sexual nature (Heaton, 2012:36). In fact, the child’s wellbeing is to be promoted and children should be safeguarded from maltreatment, degradation, discrimination, exploitation or moral harm. Such abuses can result from the abuse of moderate and reasonable chastisement which suffers from the absence of benchmarks that limit severity.

Above all, the Children’s Act promotes child safety and welfare through prohibiting abusive acts such as bullying by other children, labour practices that exploit children as well as any form of behaviour that may harm the child psychologically or
emotionally. Therefore, the act of moderate and reasonable chastisement is one such behaviour as it includes forms of punishment such as physically striking a child, which have an adverse effect on the child’s wellbeing and psychological state.

2.2.4. Child Justice Act (No. 75 of 2008)

In South Africa, the tolerance towards the utilisation of moderate and reasonable child chastisement under common law has often times been mistaken for a loophole for child abuse in society (Ritcher & Dawes, 2008:91). During the era when the Criminal Procedure Act (No. 51 of 1977) was still being enforced in South Africa, corporal punishment was even permitted as a form of sentencing juvenile offenders by courts of law (Midgely, 1982:388). Hence it is noteworthy to understand the current stance on child chastisement in South African legislation relating to children in conflict with the law.

The Child Justice Act (No. 75 of 2008) is one such law which outlaws the use of moderate and reasonable chastisement on children. This legislation makes no provision for child chastisement. In fact, it emphasises the protection of children whose rights are inclusive of protection from maltreatment, neglect, abuse or degradation. The Child Justice Act further prohibits subjecting a child to practices that could endanger their well-being, education, physical and mental health or spiritual, moral and social development. Such prohibitions go hand-in-hand with the values of human dignity and equality which are underpinned in the Constitution of (1996).

The Child Justice Act focuses on establishing a justice system for children based on the values of restorative justice. In the same vein, in terms of sentencing child
offenders, the interests of the child are seriously considered; instead of corporal punishment the child may be placed in correctional programmes. According to Maruna (2011:106) such programmes deal with a child outside the formal criminal justice system. Correctional interventions therefore encourage the rehabilitation of children in a normal societal setting where they are protected from harm and abusive acts (Maruna, 2011:108). In turn, rehabilitated children will mature ordinarily with their dignity, self-worthy, equality and care. These attributes should not be taken from them in the name of child discipline.

In cases where the child faces a criminal trial, the sentence that the child may be subjected to may include community-based sentences, which is a type of sentence that would allow the child to stay in the community.

The child may also be subjected to restorative justice which may be in the form of family conferences and fines (Ritcher & Dawes, 2008:85). The child is not to be subjected to any manner or behaviour that is degrading or unconstitutional, such as corporal punishment or verbal abuse.

In South Africa where the Child Justice Act is operational and enforced, having moderate and reasonable child chastisement simply due to the common law defence of those utilising it constitutes an infringement of the rights of children.

2.2.5. Criminal Procedure Act (No. 51 of 1977)

The use of corporal punishment, be it by the judiciary, schools or at home, can be credited to the Criminal Procedure Act (No. 51 of 1977). The Act provides that juveniles
found guilty of certain types of crime could be punished by means of corporal punishment administered through a number of strokes of the cane determined by the court (Midgely, 1982:337). However, as this Act was amended on matters relating to children, it began to make a lot of reference to the Child Justice Act (No. 38 of 2008) which places emphasis on upholding and consistently, safeguarding the physical and emotional well-being of children.

Such a stance is opposed to corporal punishment or any forms of severe, moderate or reasonable child chastisement. An interesting implication of the Criminal Procedure Act is that of classifying children under the age of 18 years as minors, hence the need for society to care and protect them from harm such as that which is inflicted by the use of corporal punishment.

As children are minors, they are protected by law, which limits their capacity to participate in legal interaction (Heaton, 2012:38). Thus the relationship between a minor and the guardian should be one of harmony, trust and comfort throughout.

It is noteworthy that the Criminal Procedure Act has since been amended to repeal the clause which legalised the utilisation of corporal punishment. The original Act gave the Penal Officers right to administer corporal punishment as a sentence to a juvenile offender convicted of crime, depending on the nature of the crime committed. However, in the amended Act, corporal punishment was abolished completely from the South African criminal justice system through the Criminal Procedure Amendment Act (No. 8 of 2013). In fact, police officers in interaction with children should take due regard to the children’s personal rights relating to privacy, dignity and bodily integrity.
Thus, officers of the law should always safeguard the rights of children to be protected from any form of harm, be it physical, emotional or psychological.

Whilst the Criminal Procedure Act (No. 51 of 1977) has since been amended to repeal the degrading clause related to children’s rights not to be abused or harmed, the Act is of significance to the study. This is due to its ability to locate the origins of legalised corporal punishment and the gradual interventions by policy makers to outlaw and criminalise the use of inhumane forms of punishment such as child chastisement in South Africa.

2.3. SYNOPSIS OF LOCAL STATUTES ON THE RIGHTS OF CHILDREN

Quite clearly, the legislation on children’s rights in South Africa prohibits the use of excessive forms of child chastisement such as corporal punishment. However, its stance on moderate child chastisement is quite unclear. Generally, child chastisement is a complex ideology as there is no clear indication of what constitutes moderate or severe child chastisement (Cornock, 2008:30).

Statutes that advocate for moderate and reasonable child chastisement in South Africa mainly emerged during the pre-1994 era, before South Africa was a democratic nation. However, after 1996 some forms of chastisement that had been previously permitted, such as corporal punishment, were abolished. The enactment of the Constitution (1996) marked the dawn of a new era of equality, human rights and dignity both for the young and the old. As such, some scholars argue that the common law argument of reasonable chastisement has become an outdated one in terms of contemporary 21st century legislation (Keating, 2006:394).
To further understand the legislation relating to child chastisement in South Africa; it is of critical importance to make reference to international legal instruments relating to the subject of child chastisement. Such instruments will assist in the understanding of the debate on the usefulness or otherwise of child chastisement in the modern day society.

2.4. INTERNATIONAL INSTRUMENTS ON THE RIGHTS OF CHILDREN

The issue of human rights is omnipresent around the world. As a result, governments are compelled to take serious measures to ensure that human rights are observed. Human rights are categorised into various classes such as political, social and economic. In this section, key international legal instruments on human rights and the mechanisms for their implementation are presented. For the purpose of this study, there are instances where global statutory instruments refer to ‘human rights’ and this is treated to also encompass the rights of children.

Efforts to establish the rights of the child at an international level can be traced back to as far as 1924 when the 5th Assembly of the League of Nations adopted the Declaration on the Rights of the Child (1924), popularly known as the Geneva Declaration. Generally, the Geneva Declaration sets-out 5 principles that aim at fulfilling the rights of the children.

The first principle provides for the material and spiritual requirements of children. The second principle provides for the caring of children in terms of feeding them when hungry and nursing when they are sick; the third principle espouses an element of what has come to be commonly known as the ‘children first’ principle or bana pele.
The Geneva Declaration (1924) declares that ‘the child must be the first to receive relief in times of distress’. The fourth principle declare that a child must be protected from being exploited while the fifth principle called on states to instil in children a spirit of service towards fellow human beings.

Therefore, the Geneva Declaration (1924) set precedence in placing an obligation on society to nourish, care and protect children so that they can realise their full potential. Thus moderate and reasonable child chastisement would be a stumbling block to such peace and tranquil effort of rearing and raising children.

The following are some of the international instruments on human rights that succeeded the Geneva Declaration (1924), the United Nations Convention on the Rights of the Child (UNCRC; the Africa Charter on the Rights and Welfare of the Child (ACRWC); International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).


South Africa signed the UNCRC (1989) and ratified it in 1995. The UNCRC was incorporated into the Children’s Act (No. 38 of 2005). As children’s rights need proper safeguarding and promotion, the endorsement of the UNCRC has advanced the requirement that any court, forum or tribunal should be guided by the UNCRC in interpreting the Bill of Rights in the context of children’s rights.

Article 3 of the UNCRC requires all state parties to ensure that the children’s rights are realised, their dignity respected and that they are not subjected to inhumane treatment.
of any kind. Such a dignified way of child rearing can only be attained by ensuring appropriate care and protection of the child in the school, in the home and in the society.

Furthermore, Article 4 obligates all UN member states to take appropriate legislative and other measures to ensure that children are not subjected to any kind of chastisement. Such measures should also strive to stem-out child abuse and the use of corporal punishment as a form of disciplining children in society.

The UNCRC was adopted in order to promote child welfare as evident in its preamble. The convention stresses that children should be treated with respect and should be raised within the spirit of peace, tolerance, dignity, solidarity, freedom and equality. In addition, the needs of children which include appropriate legal protection and parental care before and after birth should be safeguarded.

Article 19 of UNCRC provides for all the rights of the child and places due responsibility on individual states to enact statutory intervention aimed at the care and protection of children as well as the alleviation of the infringement of the rights of children by any individual or authority, including parents or guardians.

The UNCRC (1989) does not merely advocate for the safeguarding of the rights of children, but it also promotes the creation of tranquil conditions in society for the development of children until they have reached adulthood. In this regard, Article 19(1) states that:
“State 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 while in the care of parent(s), legal guardian(s) or any other person who has the care of the child”.

Article 19(2) further expounds on such protective measures by stating that they should include effective procedures for the establishment of social programmes, thus providing the necessary support for the child as well as ways for detecting, referring, investigating and preventing the abuse of children by their parents, guardians or authorities under whose custody the child will be staying.

Furthermore, Article 37(a) outlaws the use of corporal punishment, be it as a way of disciplining a child or for the judicial sentencing of juvenile offenders. The Convention declared chastisement as cruel, inhuman, degrading and humiliating. Using moderate and reasonable child chastisement therefore constitutes a gross infringement on children’s rights. Hence in the local context, South Africa should make more legislative interventions to give effect to the total elimination of child chastisement whether such punishment is perceived as moderate or reasonable, since it is inhuman and prone to being abused.

The stance taken by the UN and its member states towards child welfare and dignity was strengthened by the outcomes of the deliberations of the Committee on the Rights of the Child. Since the adoption of the UNCRC in 1989, the UN Committee on the
Rights of the Child held sessions and made successive general comments to emphasise on critical importance of promoting the rights of children internationally.

During the period 2000 to 2001, the Committee held general discussions centred upon violence against children. Following the discussions; General Comment No. 08 of 2006 on the Right of the Child to Protection from Corporal Punishment and Other Cruel, Inhuman or Degrading forms of Punishment was adopted.

This General Comment was made within the context of the right of the child to protection from corporal punishment and other cruel, inhuman or degrading forms of punishment in order to elaborate on Articles 19 and 37 of the UNCRC, as highlighted in the preceding section.

The Committee highlighted that the General Comment was based on child chastisement by parents or guardians as well as corporal punishment and other cruel, inhuman or degrading forms of punishment, which was unanimously regarded by the Committee as a very commonly accepted and practiced forms of violence against children (UN Committee, 2007).

In the same vein, the Committee also issued General Comments that obligated State Parties to seriously consider and enact measures that would speedily eliminate and prohibit all forms of corporal punishment of children through the institution of legislative and other awareness-raising and educational measures (UN Committee, 2007). The Committee also emphasised that the protection of children’s dignity, equal protection
of the law and integrity are essential ingredients of child welfare in societies (UN Committee, 2007).

Therefore, such a goal can only be achieved through the elimination of the use of moderate and reasonable chastisement and through legislative prohibition of all forms of corporal punishment of children.

Interestingly, it is worthwhile to note that eradication of moderate and reasonable chastisement in South Africa would lead to compliance to the UNCRC, its subsequent General Comments and global child welfare standards.


Africa has also embraced the child welfare and rights movement by enacting a regionally binding charter the ACRWC (1990). In general terms, the ACRWC was enacted to give effect to the wider objectives of its global predecessor, the UNCRC.

However, most scholars have regarded the ACRWC as being broader in the promotion and protection of the rights and welfare of children than its predecessor. One such a scholar, Mezmur (2008:551) argues that:

“There are very few areas where the UNCRC (1989) offers better standards children’s rights than the ACRWC (1990) since the ACRWC (1990) offers a greater progressive provision that are tailored to address African realities”
In principle, the ACRWC re-affirms its adherence to the UNCRC, which confirms the complementary character of the two conventions. The preamble to the ACRWC acknowledges the unique situation faced by African children on the continent. It recognises that the child occupies a unique and privileged position in the African society and in order to attain the full development of his or her personality, he or she should be raised and reared in a family environment and in an atmosphere of “happiness, love and understanding”.

Furthermore, the ACRWC further recognises that:

The child, due to the needs of his or her physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security.

Hence, ACRWC mandates states to provide children with all the needs and necessities that are required for the growth and development of children. According to Kaime (2009:31), ACRWC together with other global instruments protecting and promoting human rights particularly the rights of children plays a critical role in child welfare, care and protection. In the same vein, ACRWC forms an integral part of a continuing conversation about how member states of the African Union (AU) can best embrace the self-worth and dignity of human beings.
Defendants of moderate and reasonable child chastisement always support their stance of instilling discipline among children, although some forms of the corporal punishment can easily reach abusive proportions. In this regard, Article 11(5) of the ACRWC requires the children who are subjected to school or parental discipline must be treated with dignity, humanity and respect in the different environments of society. In solidarity with this provision, Article 16 obliges State Parties to protect children against any form of torture and child abuse. Article 16(1) further mandates states to make specific legislative, administrative, social and educational measures to protect the child from all forms of torture. Such forms of ill-treatment of children usually happen in the home, school and other environments where children are under the care and custody of elderly persons.

The stance of ACRWC towards child welfare, care and protection has been quite instrumental in supporting the core argument of the study, which condemns all forms of child abuse and violence brought about in the name of moderate and reasonable child chastisement.

South Africa, as a member state of both the UN and the AU, has the obligation to implement legislative and related measures towards the elimination of degrading and inhuman child treatment in the form of corporal punishment whether at school, at home or within any other environment in the society.

Furthermore, attaining a child abuse-free society does not only lie with the state and legal interventions, but requires a multi-sector approach where communities, faith-based organisations, non-governmental organisations and public service entities collectively co-operate towards establishing and maintaining such as tranquil society.
However, that will be possible after some societal, religious and traditional defences advanced for corporal punishment have been neutralised through awareness campaigns and an equal commitment from all the members of modern day society.

### 2.4.3. The Universal Declaration of Human Rights (1948)

Donnelly (2013:28) mentions that the Universal Declaration of Human Rights (UDHR) (1948) was adopted by the UN General Assembly in December 1948, and recognises that inherent dignity, equality and enjoyment of human rights as being the foundation upon which freedom, justice and peace are premised. Of particular interest to the study is Article 5 of the UDHR (1948) which states that, “no one shall be subject to torture or cruel, inhuman or degrading treatment or punishment”.

It is noteworthy that when the UDHR prohibits inhuman treatment, it encompasses all children and hence subjecting any child to corporal punishment is degrading and a gross violation of the UDHR.

Moreover, the Special Rapporteur of the Commission on Human Rights submitted a report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the General Assembly, where special mention was made of corporal punishment of children as a mode of delivering and instilling child discipline.

According to Mendez (2015:5), the findings in the Report of the Special Rapporteur serve as a stepping stone into the eradication of child abuse and inhuman treatment. Such findings, read together with the contents of General Comment No.8 (2006), on Rights of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment, show the disjuncture between the reality in terms of
the practice of corporal punishment based on religious belief and the legal standing of global statutes such as the UDHR (1948). Member states of the UN, such as South Africa, need to enact robust and unambiguous legislation outlawing the slightest of corporal punishment which is still being used under the guise of moderate and reasonable child chastisement.

2.4.4. **International Covenant on Civil and Political Rights (1966)**

One of the key pieces of international legislation in the sphere of human and civil rights is the International Covenant on Civil and Political Rights (ICCPR) adopted in 1966. Article 7 of the ICCPR provides that, “no one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment”.

Therefore moderate and reasonable child chastisement is an infringement of this covenant, because it is cruel and inhuman. The ICCPR does not only advocate for the abolishing of inhuman treatment, but has an equity clause.

Hence, Article 26 states that, “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law”. In this regard therefore, the law should equally protect children against degrading or inhuman treatment in the same manner it does for adults.

Article 24(1) of the ICCPR is specifically tailored to children. It declares that:

> Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required
by his status as a minor, on the part of his family, society and the State.


This covenant builds a global foundation for social security rights and entitlement. Article 2 of the ICESCR provides that all signatories to the Covenant undertake to ensure equal rights of men and women to the enjoyment of all economic, social and cultural rights (Felner, 2009:405).

This also encompasses equal rights for children. Moderate and reasonable child chastisement used to be rampant in South African schools. Whilst commenting on the issue of discipline in schools, the Committee on the Implementation of Social, Economic and Cultural Rights stated that:

Corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the UDHR and states should take measures to ensure that discipline which is inconsistent with the ICESCR (1996) do not occur in any public or private educational institution within its jurisdiction.
An encouraging fact in the history of children’s rights in South Africa is the outlawing of corporal punishment in schools in spite of the continued use of it in families. Children in families are still exposed to this act of child discipline locally. Hence corporal punishment is not permissible and should be totally abolished due to its dehumanising nature on the recipients, usually children.

2.5. CONCLUSION

International, regional instruments and local legislation have been put in place in a bid to stem-out child abuse and create a conducive environment for raising children into adulthood.

From the UDHR (1948), the ICCPR (1966), the ICESCR (1966) the UNCRC (1989), the ACRWC (1990), to the Children’s Act (No. 38 of 2005), consistent and sustainable efforts have always been advocated for an elimination of child abuse. This is done in the name of moderate and reasonable child chastisement. These instruments or legislation covered in this section highlight the inconsistencies which one finds between global stand-points on the issue of child chastisement and the South African legal system. The latter has a loophole that permits the use of moderate and reasonable chastisement on children.

Further, the chapter identified the grey areas which have caused a persistent problem of corporal punishment that remains the Achilles heel of contemporary society. Such grey areas lie in the common law defence of child chastisement which authorise parents or guardians to use such punishment to discipline their children. Adding
complications to this problem are societal, religious and cultural beliefs which have failed to separate moderate child chastisement and child discipline. The religious support to child chastisement was raised in the case of *Christian Education South Africa v Minister of Education (2000)* where the applicant opposed the prohibition of corporal punishment since it was related to Christian beliefs of disciplining children. This is further supported by the SAHRC ruling in the case of *Joshua Generation Church*, which taught and promoted child chastisement by its congregants. Nonetheless, Africa has had one of the strongest child emancipating instruments, the ACRWC which bans corporal punishment.

In a nutshell, South Africa needs to enact a robust legislation that outlaws moderate and reasonable child chastisement. Such an enactment requires the engagement of all relevant stakeholders in order to ensure that African children are treated with dignity, respect and humane care similar to children from any other part of the world.
CHAPTER THREE
RESEARCH DESIGN AND METHODOLOGY

3.1. INTRODUCTION
The study focuses on the analysis of the common law defence of moderate and reasonable child chastisement in South Africa. The preceding chapter observed that international instruments have taken a vivid stance to abolish the subjecting of children to any form of degrading action or punishment. However, locally there still exists a common law defence which parents and guardians capitalise on to inflict punishment on their children. Hence this loophole needs legal intervention.

In order for the study to gather ample evidence to achieve the research objectives outlined in chapter one, a well-defined blueprint is presented and discussed within the context of the research design and methodology. The chapter discusses the preferred methods as well as its justification for the applicability to the study which centres on an analysis of the common law defence of moderate and reasonable child chastisement within the context of South Africa.

3.2. RESEARCH PARADIGM

Research paradigm is the underlying assumption and intellectual structure upon which research and development in a field of inquiry is based. In other words, it can be best described as a whole system of thinking (Neuman, 2006:94).
Furthermore, a paradigm includes various accepted theories, approaches, frame of references traditions and body of methodologies and researches that could be seen as a framework for understanding (Creswell, 2007:19; Babbie, 2010:33; Rubin & Babbie, 2010:15). In this way, a research paradigm entails a set of beliefs that normally guides action, particularly in terms of disciplined inquiry in a wider sense thereby making concepts on how a particular phenomenon should be studied and understood.

The study adopts an interpretivistic research paradigm, which seeks to understand human capacity through sympathetic introspection and reflection based on detailed narrative gathered through direct observation, in-depth, interviewing and case studies (Creswell, 2007:18). In the context of the study therefore, the gathered and analysed data centres around the behaviours, perceptions and attitudes of South African society in the wake of the use or abuse of moderate and reasonable child chastisement as a form punishment.

Reeves and Hedberg (2003:32) states that, “the interpretive paradigm stresses the need to put analysis in context”. Interpretivism has been applied in the analysis of case studies where the researcher adopts an insider’s perspective to understanding human feelings, attitudes, behaviours and perceptions. In addition, in order to improve on the quality of findings, interpretivism can be triangulated together with positivism, a paradigm that divorces or detaches the researcher from the subject area to promote the making of objective conclusions.
According to Morris (2006:3) the positivist paradigm enables the researcher undertakes to gather data from a distant, neutral, non-interactive and detached position.

In the context of the study, the interpretivistic and positivistic approach enable the study to develop insights into the common law defence of moderate and reasonable child chastisement. These insights are informed by the facts and from the gathered data which help in the establishment of the current reality on child chastisement, identifying gaps in the policy or implementation of child welfare policies and findings sustainable ways of improving children’s rights to care, equality and protection. Interpretivism and positivism are compatible with the qualitative research design and case studies as a form of qualitative research design.

A case study is a type of qualitative research design in which the investigator explores a real life, contemporary bounded system (a case) or multiple bounded systems (cases) through the employment of detailed data collection methods incorporating multiple sources of information (Creswell, 2013:97).

Therefore, the focus of qualitative case studies is on the perceptions of the ‘actors in a situation’ (Lester, 2006:2). It should be mentioned that the case(s) being studied may refer to a single process, activity, event, programme, individual or multiple individuals. Thus the study analyses the case of South Africa, where all societal constituents and role-players interact and divergently perceive towards the use of moderate and reasonable chastisement.
3.3. QUALITATIVE RESEARCH DESIGN

Research design according to Kumar (2005:74); refers to the procedural steps taken by the researcher to answer research questions. In this regard, the design provides the overall structure of the procedures that the researcher follows, the data that the Researcher gathers, and the data analysis techniques which the researcher employs.

In this study, the researcher adopts a qualitative research design. In general terms, research design details the blue-print or road-map that any study follows from the designing of a research topic till the attainment of all the study aims. For the purpose of this study, a qualitative research design is adopted.

Maree (2007:49) postulates that qualitative study is concerned with the understanding of the processes of social and cultural contexts which underlie various behavioural patterns and is mostly concerned with exploring the ‘why’ questions of an empirical study.

Furthermore, Babbie and Mouton (2008:28) argue that qualitative research falls under the interpretive paradigm which is also known as the phenomenological approach and its main aim is to understand people. There exists a solid link between qualitative research designs; case study and interpretivism as a study paradigm because of the ability of these methods to aid researchers get an objective understanding of human behaviour, feelings, attitudes and perceptions towards certain phenomena, in this instance moderate and reasonable child chastisement.

Qualitative researchers study objects in their natural settings and attempt to make sense of, or interpret phenomena, in terms of the meaning people bring to them
Therefore, a qualitative research method was found useful for the study due to its emphasis on the vitality of the social context for understanding the reality in the social world. In the context of the study, a triangulation of case study within a qualitative research design and interpretivism aided the researcher to explore the underpinning factors associated with South African common law defence of reasonable and moderate child chastisement.

In a nutshell, the study utilises the case study qualitative research design within the context of both the positivism and interpretivism research paradigm. It should be mentioned that such a mix of research designs best suits the context of the study, which is more concerned about behaviours and perceptions of society towards moderate and reasonable child chastisement. In this regard, the researcher preferred to use a qualitative method. In support of this, Silverman (2005:89) argued that:

Methods used by qualitative researchers exemplify a common belief that they can provide a ‘deeper’ understanding of social phenomena than would be obtained from purely qualitative data.

Empirical studies centre around the gathering of data in order to validly and reliably achieve the research objectives. Hence the methods used to gather data in the study are presented in the section that follows below.

3.4. DATA COLLECTION TECHNIQUES

David and Sutton (2004:87) stated that data is what the researcher actually receives from the respondents, be it in social or physical sciences. Secondary documentary analysis also takes the shape of analysing the findings of other researchers on the
same topic and in most cases; there is abundant information available on the topic under study which might lessen the burden on researchers in conducting a study from scratch, thereby enabling cost effectiveness and comparative analysis (Auriacombe, 2005:384). The study analysed data from secondary existing documents on the phenomena under study, that is, the use or abuse of moderate and reasonable child chastisement in South African families and society at large. It is critical to mention that the study phenomena is also informed by the escalating nature of child abuse that begins as discipline and the susceptibility of corporal punishment to unintended consequences.

According to Bailey (cited in Des Vos et al 2005:85), official documents or non-personal documents imply those that are compiled and maintained on a continuous basis by large organisations like government institutions and public entities. Such types of documents are more formal and well-structured as compared to personal documents. Specifically, secondary documents take the form of agendas for meetings, inter-office memos, statistical reports, annual reports and process records (De Vos et al., 2005:84).

As a desktop research, the study gathered secondary data from official documents such as, inter alia, the Constitution (1996) and international conventions of child rights and case law. In order to eliminate subject biases, the study emphasises that the researcher evaluates the relevance, authenticity and reliability of the documents (De Vos et al., 2005).
Justifiably, verification of the authenticity of documents centres on the existence of biased writings where some authors write the documents for the sake of prestige and money. Similar to any data collection methods, the use of documentary analysis as a data gathering technique has various merits and demerits attached to it as discussed hereafter.

3.4.1. Merits of document survey

In any scientific study, every data collection has its own strengths and weaknesses. In this study, document study has its own merits. These are discussed as follows:

Firstly, literature surveys have relatively low costs tied to data collection (Bailey, 2008:294). Secondly, existing documents are a good source of background information on any topic or phenomena under study.

Thirdly documentary surveys are unobtrusive data gathering methods implying that there is not much tension and contact with human subjects who might subjectively influence the outcome of a study (Webb & Auriacombe, 2006:599). Fourthly, document surveys provide a behind-the-scenes look at a programme that may not be directly observable and it may also bring up issues not noted by other means. Fifthly, a document study allows research on subjects to which the researcher does not have physical access (Bailey, 2008:294). Whilst arguing along the lines of historical and cultural research, Bowen (2009:29) argues, that documentary study is the sole realistic approach in modern research.
Furthermore, the rationale behind using secondary sources rests on the fact that public records are freely available together with the dependability of information in government documents which entails the quality and relevance of the data (Bailey, 2008:294).

Additionally, documents are also fairly cheap and easily accessible. Marlow (2005:182) however, brings out the notion that not all documents serve the research purpose which make them vulnerable to bias or criticism from other scholars in the event that they are used alone in the research.

3.4.2. Demerits of document survey

Document analysis also has several weaknesses such as the incompleteness of statistical records. Historical documents are often incomplete which signifies several loopholes (Bailey, 2008:294).

It is arguable that since documents were not fully intended for research purposes, there are some factors which can influence the objectivity and the reliability of those documents. For an example, annual reports of municipalities are designed in a way that instils public confidence. However, they may portray a false image or misrepresent the actual situation on the ground, hence they are unreliable.

The notion of false information is validated by Bowen (2009:31:32) who adds that documents are sometimes insufficient since they are produced to fit a certain purpose for a specified time frame. Thus certain documents might not fit perfectly to a given
study agenda. Nonetheless, the demerits discussed in this section are not significant to distort the findings of the study.

3.5. DATA ANALYSIS TECHNIQUES

Data analysis refers to a practice of reducing large volumes of collected data in order to make sense of it. According to Patton (1987), data analysis involves the inferences of conclusions and themes drawn from raw data. The study used a thematic content analysis to analyse documents with regard to the common law defence of moderate and reasonable child chastisement.

The qualitative content analysis approach involves analysis and proof reading transcripts, looking for correspondences and dissimilarities that allow the researcher to design and come-up with various themes and categories (Neuman, 2006:322).

Chelimksy's (1989:16) content analysis is a set of procedures for collecting and organising information in a standardised format that allows analysts to make inferences about the characteristics and meaning of written and other recorded material. In the same vein, complex formats can be created for analysing trends or detecting subtle differences in the intensity of statements.

For Jose and Lee (2007:34), content analysis is a technique for making inferences by objectively and systematically identifying specified characteristics of messages. Accordingly, Denzin and Lincoln (2000:28) stated that content analysis allows for ample description in the analysis of data which is categorised through thematic
organisation. A thematic organisation involves the categorisation of data into themes which can be uniformly analysed and described.

Myer (2009:172) points-out that content analysis results in an organised technique for quantifying the contents of a qualitative or interpretive text, and does so in a modest, vibrant and effortlessly repeatable design. After analysis the content of various interrelated but separate themes based on the holistic analysis of the South African common law defence for moderate and reasonable child chastisement, numerous explanations are conducted through an explanatory process of data analysis. An exploratory process is carried out in order to gain insight into a situation, phenomenon, community or individual involved in the case study. Explanations systematically describe a situation, problem, phenomenon and the living conditions of the community as well as describing attitudes towards moderate and reasonable child chastisement.

3.5.1. Advantages of content analysis

According to Merriam (1988:118) the content of numerous documents can help the researcher to uncover the meaning, discover insights and understand the insights relevant to the research problem. Thus literature survey can provide useful information to use in research though it is prone to errors in interpretation (Merriam, 1988:118).

Content analysis is unobtrusive meaning that a researcher can get objective and reliable data from documents based on the phenomena under study rather than interviewing individuals who my subjectively distort data by being biased. Existing documents may give a complete record, whereas a participant may consciously or unconsciously fail to give vital information. This helps prevents bias from corrupting data.
On the same note, the researcher can find answers to the question needed instead of searching through irrelevant or inappropriate information (Babbie, 2001:15). Therefore content analysis saves time and resources while giving the researcher access to quality data that has objective content. In the case of the study, content analysis accords the researcher access to documents on child chastisement, which interviewees might fail to recall to the minor details in face-to-face interviews.

3.5.2. Disadvantages of content analysis

Despite the above mentioned merits for document survey, the study is but conscious of the weaknesses of literature study as well as content analysis. According to Babbie (2001:16), content analysis suffers from several demerits, both theoretical and procedural. Above all, content analysis can be extremely time consuming and is prone to increased error, especially when relational analysis is used to attain a higher level of interpretation. Moreover, content analysis is often devoid of a theoretical base or attempts to liberally draw meaningful inferences about the relationships in a study. Content analysis tends too often to simply consist of word counts which lacks quantitative expression of reality (Babbie, 2001:16).

Overall, content analysis often disregards the context that produced the text, as well as the state of things after the text is produced and can be difficult to automate or computerise. In the wake of the analysis on the use and abuse of moderate and reasonable child chastisement, the study regards content analysis as the best approach to analyse data since it is qualitatively linked to an insider’s perceptive to
understanding human behaviour, emotions, perceptions, feelings and attitudes towards the phenomena under study.

3.6. VALIDITY AND RELIABILITY
Babbie (2010:153) defined validity as the extent a research instrument measures what it is supposed to measure. On the contrary, Ritchie and Lewis (2010:270) state that reliability relates to the reliability of research findings in different studies, using similar methods and obtaining similar results. In this study, the researcher utilises her own discretion to ensure that the analysis of data is as valid and reliable as possible. Such assurance is ensured through the careful scrutinising of the authenticity of documents which are analyses, the constant and consistent analysis of literature within the confines of the research topic, problem stated, research questions as well as the research objectives.

Nonetheless, it should be stated that the research design and methodologies used in the study have their own pitfalls, but this will not adversely affect the outcome of the study, since the researcher works within the boarder of moderate and reasonable child chastisement in South Africa.

3.7. ETHICAL CONSIDERATIONS APPLICABLE TO THE STUDY
Ethics refers to the systematic thinking about morals and values as well as making moral decisions about what is wrong or right during the data collection in process (Boiling & Dempsey, 1981:74). On the same note, scholars such as De Vos et al. (2005:57) conceptualise ethics as simply being a set of morals and values suggested by individuals or groups like a governing body. They are subsequently broadly
recognised and offer rules and behavioural patterns towards respondents or research matters, employees, promoters, other researchers, assistants and students.

There are various categories of ethics namely ethics of reporting and intellectual property ethics. The study observes the ethics of data collection through ensuring that there is no fraudulent obtaining of data from documents; all documents used were legitimately sourced.

Furthermore intellectual property revolves around the need to acknowledge the writing of other scholars and avoiding plagiarism which encompasses a number of actions where credit is misappropriated, including, *inter alia*, verbatim lifting of passages without attribution, rephrases of ideas from the original in the purported author’s style, naive uncredited paraphrasing from another scholar’s work or partial acknowledgement of ideas or language of an original author (Armstrong, 1993:479). The study was guided by the University of Fort Hare policy on intellectual property rights. In this regard, therefore, the study made sure that proper referencing and citations are used to acknowledge the ideas and work of other scholars. For the purposes of this study honesty in reporting and analysing the research findings from the documents was also observed. In documentary study, Welman *et al* (2005:32) argued that the falsification of research findings and reports must be avoided. In this regard, the information acquired from the documentary sources was used both for academic and policy making purposes. Observance of the discussed ethical principles was undertaken in a bid to ensure that the findings of the study are as valid, authentic and reliable as possible.
3.8. CONCLUSION

An analysis of the common law defence of child chastisement in South Africa is undertaken through the research blueprint discussed in this chapter. The chapter is of great significance to the study since it lays-out the roadmap followed towards the sufficient answering of the research questions. The chapter covered the research paradigm, design, data collection and analysis methods as well as the ethical principles which have been duly observed in the study.

The study adopts a case study qualitative research designs under the interpretivistic and positivist paradigm. Data gathering is done though secondary documentary survey, whereas the analysis is done qualitatively through content analysis.

It is important to mention that the findings of the study are valid and reliable due to the careful and thorough scrutiny of documents consulted on the issue of the use and/or abuse of moderate and reasonable child chastisement in South African families and society at large. The next chapter details the analysis of data based on the assessment of the common law defence of child chastisement in South Africa.
4.1. INTRODUCTION

Loopholes exist in the use of moderate and reasonable child chastisement in South Africa as evident in the arguments in the study so far. The use of degrading and dehumanising action against children is deemed to be a gross infringement of their rights. After the analysis of legislation and regulations guiding the use of moderate and reasonable child chastisement from international, regional as well as a local perspective, the current chapter covers the practice of corporal punishment in modern South African society.

It also discusses the major findings, interpretations, analyses and discussions in the context of the phenomenon under investigation, which is the use of moderate and reasonable chastisement in South African Society. Such an analysis originates from the disjuncture between widespread global condemnation of moderate and reasonable child chastisement and the local justification whereby common law provision are manipulated towards the use of corporal punishment on children by their parents, guardians or other persons under whose custody they are placed.

From the onset of the study, the key issues under investigation are the use of moderate and reasonable child chastisement as a way of disciplining children in South Africa, the infringement of children’s rights when they become the victims of corporal punishment, the legal standing of local laws on the issue and the wider aspect of the unintended consequences.
The latter damages the development of children by inflicting on them gross physical, emotional or psychological harm. In a bid to gather concrete evidence on the key issues, the analysis of the study puts the South African common law defence of child chastisement under the microscope by contrasting case law, statutes and provision of global and regional bodies such as the UN and AU.

Critical to the analysis is the theoretical framework propounded by Robert Merton (1936) where actions such as corporal as punishment have a tendency of inflicting unintended consequences onto its victims, sometimes resulting in the unfortunate loss of life. Merton’s theory advances several explanations on how the outcomes of any action, policy and programmes can deviate from the intended purpose. In the context of child chastisement, the parents or guardians can end up punishing their children irrationally or abusively yet initially the punishment may have been meant to discipline the children.

Further to this, the theory of unintended consequences addresses how parents or guardians use physical punishment as a way of disciplining children consequently ending-up subverting children rights and creating delinquency and deviant child behaviour. Thus, the stance of the study is that any moderate or reasonable corporal punishment should be abolished in totally since it dehumanises its victims.
4.2. QUALITATIVE DATA ANALYSIS

The aim of this chapter is to provide an analysis of the common law defence of moderate and reasonable child chastisement in South African society, identifying and interpreting the possible children’s rights infringed by the use of moderate and reasonable chastisement, and subsequently analysis of these rights in light of the limitation clause contained within Section 36 of the Constitution (1996). As mentioned in chapter three, the study used qualitative data analysis in the form of content analysis of existing documents through what other scholars term literature survey.

4.2.1. Analysis of children's rights affected by chastisement

The rights of children in South Africa in the context of moderate and reasonable child chastisement are contained in comprehensive sections of the Constitution, viz, Sections 9 (right to equality); 10 (right to human dignity); 11 (right to life); 12 (right to freedom and security of the person); 27 (right to access healthcare and social security); and 28 (specific rights of children such as care, protection and nutrition). Having such an advanced Bill of Rights which vividly lays-out the rights of children in society has been commended and authenticated by the UN Committee on the Rights of the Child in General Comment No. 08 of 1996. Therefore, it is clear why the constitution emphasis on children’s rights to care, dignity and protection. Therefore, degrading actions such as corporal punishment, whether moderately or reasonably used, constitute and infringement of the rights of children in South Africa.

The need to guard against the violation of the rights of children locally has also been rubber-stamped by global human rights instruments such as the UNCRC (1989); which calls for the respect of the child in the form of the child’s equal protection, respect
for the child’s human dignity; and integrity under local law. When the Committee on the Rights of the Child raised the elimination of corporal punishment within UN member states, there were objections on its use in some societies. The objections came from some governments who justified this form of degrading child punishment as a way of instilling discipline on children, on the pretext that it will be used reasonably and moderately. States which defended moderate and reasonable child chastisement argue that in common law, the argument is that chastisement is acceptable as long as it is done in manner that is regarded as reasonable before the law (Keating, 2005:23).

Further to this, the Committee on the Rights of the Child (1996) vehemently rejected the explanation, emphasising the interpretation that the ‘best interests’ of the child must be consistent with the whole Convention, including the obligation to care for children as well as protecting them from all forms of violence.

Thus the phrase, ‘best interest’ of the child cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child’s human dignity and right to physical integrity.

Therefore, the stance of the Constitution should thus positively affect the welfare of children through good child rearing practices which do not affect their dignity and self-esteem. It is evident that there is a growing movement against corporal punishment which specifically emphasises the infringement of rights of children especially when their human dignity is at stake. Implicitly, the need for respecting the dignity of others emphasises that all people, particularly children, should be cared and protected against degrading actions in
society. The assurance and safeguarding of the dignity of children means the avoidance of cruel, inhuman or degrading punishment chastisement of children, as highlighted within General Comment No. 08. Legally, the Constitution requires international law to be taken into account when interpreting the rights contained within the Bill of Rights. As such the vivid global condemnation of corporal punishment should be locally taken into account since it is indeed a gross violation of children’s inalienable right to human dignity.

The exploitation of the loopholes of the common law defence of moderate and reasonable chastisement must be construed as infringing children’s inherent right to human dignity hence the need to enact concrete and explicit legislation outlawing moderate and reasonable child chastisement. Furthermore, Heaton (2012) posited that the Constitution in its Founding Provisions (Chapter 1) affirms the values onto which South Africa as a democratic and sovereign state is founded; which include, inter alia, human dignity, equality and the advancement of human rights including those of children in a democratic state. Therefore, practices that infringe upon the rights of children should be regarded as a threat to the democracy which South Africa embraced on the 27th of April 1994.

In the following section, the study analyses the specific rights of children which are violated in the administering of moderate and reasonable child chastisement.

4.2.1.1. Freedom and security of the person

According to Section 12 (1) of the Constitution:
Everyone has the right to freedom and security of person, which includes the rights to be free from all forms of violence from either public or private sources; the right not to be treated or punished in a cruel, inhuman or degrading way.

Section 12 of the Constitution combines the right to freedom and security of the person with the right to bodily and psychological integrity. Furthermore, Section 12 obligates the state to refrain from legitimising violence or cruel punishment that is abusive, inhuman or degrading. In addition Section 12 places a positive duty on the state to restrain or discourage citizens of members of the society from such archaic acts against children. State authorities have an overarching obligation which cuts across both public and private sectors of any country, hence the need for driving out corporal or degrading punishment from the daily lives of children whether in public or private spheres of life, including private colleges or institutions.

Therefore individuals or groups within society who believe in secular principles of raising children should be legally bound with the Constitution and law and refrain from moderate or reasonable child chastisement. The Constitution lays out principles of equality, freedom and democracy which should be observed by society in order to prevent the infringement of children’s rights.

During the certification of the Constitution by the Constitutional Court, the latter held that the Constitution directly compels the state to protect children (Mogale et al., 2012:3) as is. What this entails is that children in South Africa have the right to equally
enjoy the rights similar to any adult, including the right of security of Person as provided in Section 12 of the Constitution.

4.2.1.2. The rights of children in South Africa

Within the Constitution children’s rights have been given ample attention especially in Section 28 which specifically addresses various rights pertaining to them. In the same vein, the preamble of the Constitution acknowledges the disparities left on society by apartheid era discrimination, including discrimination which was based, *inter alia*, on gender, race, age and geographical location. Such unequal treatment has left acute inequalities in the modern society, giving the post-apartheid government a huge mountain to climb in an attempt to redress and address such inequalities.

A key tool which the ruling African National Congress government has employed concerns the use of legislative and policy measures. Thus as the supreme law of the nation, the Constitution has become the pinnacle for the advancement of children rights in the contemporary South African society. In advancing child care, protection and welfare, Section 28 of the Constitution is fully dedicated to children’s rights. These rights are aimed to ensure the full and unhindered development of children into adulthood.

Every child has an inalienable right to a name and nationality from birth; family care or parental care; or appropriate alternative care when removed from the family environment; basic nutrition; shelter; basic health care services and social services. Section 28 further accords children the right to protection from any form of maltreatment, neglect, abuse or degradation as well as exploitative labour practices
inappropriate for a person of their age. A key stance for Section 28 is its mandate towards child welfare by guarding against actions which place the well-being of children at risk. In the same vein, the section accords the rights to education, physical, mental health or spiritual, moral or social development.

In addition to the rights a child enjoys under sections 12 (security of person) and 35 (arrest and detention) of the Constitution. Children have a right not to be detained except as a measure of last resort. In instances where a child may be detained, note should be taken to minimise the length of the detention period to the shortest possible period of time, and the right to be kept separately from adult detainees. In a bid to stem-out children’s rights infringement during detention, juvenile offenders should be treated in a manner which takes into account the child’s age. Section 28 states that every child has the right to be protected from abuse or degradation, malnutrition and neglect (Cheadle & Davis, 2000:23). However, moderate child chastisement is still happening in modern society despite the clear provisions of Section 28 of the Constitution, hence the need for a state-led solution of children’s rights.

Sloth-Nielsen (2016:102) questions how the state intervenes in the family relationships to monitor the levels of the rights of children from being abused by members of the family and the relatives. In the case of the Government of the Republic of South Africa & Others v Grootboom & Others (2001), the court found that the state is directly responsible for managing and protecting the rights of the children. It is above the family and it acts as an overall overseer of all issues related to the rights of the children. Children’s rights to shelter are equally important since a lack thereof affects their
welfare and dignity. In addition to the above, Section 28 puts forward other rights of the children contained in the Bill of Rights, such as the right to equal protection of the law.

Further, Section 28 provides rights of children that protect them from situations that leave the children vulnerable to certain forms of poverty in the societies (Currie & De Waal, 2005:600). Subjecting a child to moderate and reasonable chastisement grossly constitutes an abuse of their rights to their care and protection. In support of this proposition, Cornock (2008:45) argues that the legislation on children’s rights prohibits excessive forms of child chastisement such as corporal punishment.

Mendez (2015:6) state that according to the United Nations Committee on the Rights of the Childs, there is no ambiguity on the issue that:

All forms of physical or mental violence’ does not leave room for any level of legalised violence against children. The Committee further stated that, “corporal punishment and other cruel or degrading forms of punishment are forms of violence and states must take all
appropriate legislative, administrative, social and educational measures to eliminate them.

Apart from the preceding argument, the UNCRC emphasises that in any issues that is concerned about the welfare of children that is being undertaken by either private of public sector, courts, and legislative bodies should put the interest of the children as the primary concern. The best interest of the child can be ensured when there is equality in the application of the law and interpretation of rights as discussed hereafter.

4.2.1.3. Equality and equal protection of the law

Section 9 of the Constitution provides that, everyone is equal before the law and has the right to equal protection and benefit of the law”. It further mandates the state to take a leading role in criminalising unfair discrimination by stating that:

no one may directly or indirectly unfairly discriminate against anyone on one or more grounds one or more grounds, including, race, gender, pregnancy, marital status, ethnic origin, colour, age, disability, religion, conscience, belief, culture, language and birth.

Hence infringing the rights of children to equality by disciplining them simply because they are minors can be correctly interpreted as unfairly discriminating against them on the basis of their age.

The study acknowledged that moderate and reasonable child chastisement defence affords children less protection from assault under the law than it affords adults. Moreover, defending this dehumanising act administered on children in South Africa
immunises parents or guardians from what would otherwise be considered as ‘assault’, unless the ‘assault’ is against a child and is reasonable, moderate and aimed at correction. In any case, their right to equality must be upheld and they must enjoy all rights and freedoms enshrined in the Constitution. In doing so, neither the state nor anybody can, or should, discriminate against the child.

4.2.1.4. Children’s right to human dignity

Human dignity relates to the position of being worthy to be treated with honour, integrity and respect. Similar to the right of their adult counterparts to dignity, children also have a constitutional right to human dignity. It is provided by Section 10 of the Constitution that, everyone has inherent dignity and the right to have their dignity respected and protected. Read together with Section 10 (right to human dignity), the founding provisions (Chapter 1 of the Constitution (1996) which provides fundamental values of equality, human dignity and the advancement of human rights. These provisions establish South Africa as a cradle for human rights, including children’s rights.

Dignity goes hand in hand with equality as seen in the case of President of the RSA v Hugo (1997), where the court identified dignity as a core value of equality and it is in this regard that the ruling emphasises that:

at the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups, and that the core aim of the Constitution should not be forgotten
or overlooked. Equality means that society cannot tolerate legislative distinctions that treat certain people as a second-class citizen that lowers them or that otherwise offends fundamental dignity.

It is within this context that the values of dignity and equality are bound in the notion of respect and dignity. In order to link human dignity, children and the overarching aim of the study, actions which include, *inter alia*, maltreatment, neglect, abuse or degradation are a gross infringement of their dignity since they affect both their physical and psychological beings.

In the wake of children and adults both qualifying for an equal enjoyment of human dignity in society, the study deduces that equal treatment is a major requirement for modern society. Thus subjecting children to moderate and reasonable chastisement becomes unequal and degrading.

To this end, the Constitutional Court usually refers to the Canadian case of *Law v Canada (Minister of Employment and Immigration)* which provides that:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Also, human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. Also, human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society, but rather concerns the manner in
which a person legitimately feels when confronted with a particular law.

In this regard therefore, the cited case from Canada explicitly determines the magnitude and net worth of human dignity and its vivid separation of equality from the status of different individuals in society.

4.2.2. Analysis of South African legislation on children’s rights

Quite clearly, the legislation on children’s rights in South Africa prohibits excessive forms of child chastisement such as corporal punishment. However, its stance on moderate chastisement is quite unclear. Child chastisement is a complex ideology as there is no clear indication on moderate and severe child chastisement (Cornock, 2008:43). A child may suffer from physical injury after being struck by a parent and emotional harm after being verbally reprimanded by his/her legal guardian.

In some cases, children have suffered extreme physical harm and sometimes death at the hands of guardians purporting to be administering chastisement such as elucidated in the Chapter Two of the study. Legislation in support of chastisement in South Africa mainly emerged during the pre-1994 era before South Africa was a democratic nation and after 1996, some forms of chastisement such as corporal punishment which had previously been permitted, began to be abolished. As such, some scholars argue that the common law argument of reasonable chastisement has become an outdated one in terms of present day legislation (Keating, 2006:17).
While there exist some discord and disjuncture in the local legal landscape as far as the use of moderate and reasonable child chastisement is concerned, the South African statutory framework has loopholes on the matter. These have manifested themselves through the common law defence of corporal punishment. Hence parents and/or guardians use it on children as a disciplining mechanism since the common law allows if it is moderately and reasonably applied. Lekgathe (1982:80) argued that common law defence of child chastisement has the benefits of maintaining child discipline. For an example; moderate chastisement allows parents to discipline their children as a family-based correctional measure. Apart from the above, Du Preez et al (1990:129) pointed out that:

Parents have the right and power to administer punishment to their minor children for the purpose of correction and education. In order to achieve this object parents have the right to chastise their children.

Du Preez (1990:130) illustrated the importance of providing for reasonable and moderate chastisement defence in order to correct and discipline their children. Nonetheless, corporal punishment has become difficult to measure and manage. It is also difficult to determine the severity of the moderateness of such actions, especially given the vulnerability of moderate and reasonable child chastisement to abuse. Therefore, child chastisement is a complex ideology since there is no clear indication on what constitutes moderate and severe child chastisement (Cornock, 2008:45).

In such scenarios as above, it will involuntarily lead to unintended consequences which are abuse, injury and even loss of life. Therefore, there is need for a clear
legislation that unambiguously outlaws the use of any form of corporal punishment. Such a legislation should be enacted through an all-stakeholder approach to enable the dispelling persistent religious, cultural and societal beliefs which condone the use of moderate and reasonable child chastisement. These key stakeholders should also include religious organisations such as Christian Education South Africa which lobbied the Minister of Education to allow child chastisement in its schools. The request was however, opposed by the minister due to its violation of the child’s right to dignity and protection from harm in the case of Christian Education South Africa v Minister of Education (2000).

4.2.3. Interventions to curb and restrain the use of child chastisement

In this section, the study discusses the measures which South Africa has put in place to discourage and outlaw the use of moderate and reasonable child chastisement in society by parents, guardians or individuals under whose custody a child might be under.

Firstly, the enactment of the Children’s Act (No. 38 of 2005) was a great achievement as far as the discouragement of moderate and reasonable child chastisement is concerned. In terms of the Children’s Act, the best interest of the child’s principle is given priority; children must be protected from any form of harm either physical or emotional. Often chastisement results in harm where a child succumbs to injuries inflicted when he/she is beaten by a parent, even when the latter claims that he/she had intended only to chastise the child (Parsons, 2007:21). The Children’s Act clearly
lays lists the forms of harm and ill-treatment which a child must be protect from. In fact, the wellbeing of children is to be promoted through safeguarding them from all forms of ill-treatment, discrimination, exploitation or moral harm.

However, there are other forms of chastisement such as giving a verbal reprimand to a child which is harmless and constitutes no violation of the law. Such chastisement is still acceptable before the law so long it does not result in psychological harm to the child.

Secondly, the provisions of the intervention discusses in the preceding section is substantiated by the Child Justice Act (No. 75 of 2008). The Act provides guidance for it guides the administering of justice to children. In some common law jurisdictions, excessive forms of chastisement, such as corporal punishment, were acceptable as a form of discipline used within penal institutions. Accordingly the Child Justice Act prohibits corporal punishment by making no provision for child chastisement. In fact, it is biased towards protecting the child whose rights are inclusive of protection from abuse, maltreatment, neglect or degradation.

The Child Justice Act also prohibits subjecting a child to practices that could endanger their well-being, education, physical and mental health or spiritual, moral and social development. Lastly, the Child Justice Act abolishes the juvenile sentencing of strokes of a cane to child offenders but recommends correctional interventions aimed at making children more productive adults.
4.2.4. Legislative challenges with regards to child chastisement

The defence of reasonable and moderate chastisement offers the legal right for parents to practice their own right in regulating discipline for their children in order to correct children in their daily lives. Reasonable and moderate chastisement defence will protect parents from the law when children claim that they have been assaulted by the parents in the process of correcting them or disciplining their children.

However, if the reasonable and moderate chastisement defence was not permitted, parents would be charged with assault or physically harming children while correcting them even at home. On the aspect of the severity of moderate child chastisement, Felthous and Sass (2008:5) outline that:

In practice, the difference between corporal punishment and physical abuse hinges on whether the child is injured seriously enough for the case to be classified as ‘abuse’ by child protective services, regardless of the intent of the parent. Evidently, this is shown by research showing that about two-thirds of cases of physical abuse begin as corporal punishment, but due to circumstances such as a defiant child or the child hitting the parent, escalate out of control and the child is injured.

Furthermore, Article 19 (1) of the UNCRC obligates member states to:

Take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of
physical or mental violence, injury or abuse while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. 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 for identification, reporting, referral, investigation, treatment and follow-up of instances of child and, as appropriate, for judicial involvement.

Thus there is a legislative challenge of balancing local common law defence of moderate and reasonable child chastisement and the global stance of condemning corporal punishment of any magnitude or form.

4.2.5. Limitations of children’s rights and child chastisement

Section 36 of the Constitution covers the limitation of rights, including those of children. There is a relationship between the intended limitation and the purpose to be achieved. Legislation that explicitly outlaws moderate and reasonable child chastisement and explains that use of common law defence of the action as unlawful is absent. Section 36 limits rights of children to care and protection as constitutionally invalid has led to the perpetual use of corporal punishment in society and homes. Sometimes such actions are abusive in the presence of the theory of unintended consequences by Merton (1936).
Findings from various studies that have been undertaken on the effects of corporal punishment on children have proved that it brings more harm than good. Accordingly, the discipline that is being offered to children in the short and long term through corporal punishment is viewed as having more negative effects to children. Gershoff, Purtell and Holas (2015:36) writes; studies in the educational disciplines found that corporal punishment makes children comply within the shortest possible time. On the other hand, moderate and reasonable child chastisement does not qualify to facilitate the process of moral internalisation of children. This is because it lacks training mechanism that teaches children what is required of them in the society (Gershoff et al, 2015:39).

Corporal punishment fails to teach children of the morals, values and ethical standards that are expected of them in society so that they are not involved in deviant behaviour. Although short term compliance of the children is good for the family, parents should consider the importance of long term compliance. The long term goals should be considered for the future benefit of children. Short term compliance will help children to change their behaviour, which can put them in danger.

The discipline that should be given to children is supposed to offer a long term development of, not the immediate compliance. Corporate punishment will end up frustrating children instead of instilling child discipline. There are instances when corporal punishment results in psychological problems such as suffering from traumatic disorders (Gershoff et al, 2015:38). Apart from the preceding arguments, corporal punishment results in problems such as aggression and delinquency, poor parental relationships between children and their parents, low level of empathy and mental problems such as depression.
The issue of aggression that results from the effects of corporal punishment was raised by children that were involved in a study undertaken by Clacherty (2005) on the effects of child chastisement in South Africa. The following findings are from child victims of chastisement spread across rural and urban areas of three provinces, namely, Limpopo, Gauteng and the Western Cape (Clacherty et al, 2005:56):

- The punishment was not balancing to me, it was too much. I just felt angry and I went to my bed. (Girl, 13-18, urban, Western Cape Province).
- I thought it was unfair because it was an accident. I felt a little bit angry, but just forgot about it because it will go past faster if you forget about it. (Boy, 9-12, urban, Limpopo Province).
- He started getting really angry and then he tried to throttle me and if I remember correctly he tapped me in the face and I got really, really angry. (Boy, 9-12, urban, Gauteng Province).
- When we arrived at home she continued to shout at me telling me that I will fall pregnant and she hit me with a shoe again and I hit her back with a shoe and told her to understand I am a teenager now and I was very angry and I left the house and I went to take a walk with my boyfriend. (Girl, 13-18, rural, Limpopo Province).

The cases above show that corporal punishment does not only result in aggression in childhood but affect children for the rest of their lives. In adulthood, it would lead to continuous violence cycles that can continue to affect them mentally.
The transmission of aggression in parental relationships is an indication of parents who suffer from corporal punishment in their childhood. Hence they will keep on applying it to their children. Furthermore, corporal punishment can model aggression and behaviour that is violent in nature. At the end of the day, children will end up thinking that aggression is a way of making them comply to certain things in life. In a nutshell, from all the studies undertaken, it can be evaluated that corporal punishment affects the relationships between parents and their children.

The main effects of corporal punishment are that it evokes certain negative feelings in the children such as anger, anxiety and fear. Apart from that, children will end up fearing their own parents and therefore avoiding them. This will reduce the chances of children enjoying parental love and guidance as there will be no good relationships between them. Some of the parents can become emotional when they use corporal punishment to correct the children. If parents suffer from high levels of emotions such as frustration, anger and stress, they end up reacting to their children in a harsh manner. The parents will end up applying corporal punishment in a manner that can harm their children. In general, child abuse researchers have found that if corporal punishment can be applied to the children in an excessive manner, it will result in physical abuse (Gershoff et al, 2015:37). The researchers regard the use of corporal punishment to be similar to any other form of physical abuse on children.

4.3. CONCLUSION

This chapter presented the relationship that exists between the reasonable and moderate chastisement defence and the purpose of actions that advocate for the use
of corporal punishment. Corporal punishment seeks to foster compliance from children to rules, norms, values and ethical standards of the society. The study is of the view that corporal punishment is being regarded as being ‘ineffective at best and harmful at worst’. Mainly due to unintended consequences of moderate and reasonable child chastisement, corporal punishment brings more harm than good to children, especially given that it can have a long term effect on their lives.

In addition, child chastisement suffers from the absence of a yardstick to determine its magnitude or severity; oftentimes it often brings unintended consequences and above all it affects the physical, emotional and psychological development of a child. Thus South Africa needs further statutory interventions to explicitly outlaw any form of moderate and reasonable child chastisement. The next chapter gives a summary, conclusion and recommendations based on the analysis of the South African common law defence of moderate and reasonable child chastisement.
CHAPTER FIVE
SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1. INTRODUCTION

Child rearing remains one of the chief responsibilities of society, parents and guardians. It is also important to note that child discipline is part and parcel of child rearing. Thus some societal, religious and cultural groups believe that moderately chastising their children is the correct way to foster good behavioural patterns in their children. Although moderate and reasonable child chastisement is being practised in South African families, oftentimes it becomes abusive. Similarly, the misuse of moderate and reasonable child chastisement leads to the unintentional harming of the victims of the ‘beatings’ rather than correcting the child. Hence global, regional and local calls have been made to employ child-friendly methods of raising children, thereby doing away with these degrading and inhuman actions of disciplining children.

This chapter covers the conclusion and recommendations of the study on the analysis of the South African common law defense of reasonable and moderate child chastisement. Its secondary objective is to show that the objectives of the study as presented in chapter one, have been achieved. In the closing section, the chapter offers recommendations for consideration by the various stakeholders towards finding a common ground in the abolishment and of the practice of reasonable and moderate child chastisement.
5.2. SUMMARY AND CONCLUSION OF THE STUDY

The summary provided hereafter centres on the research objectives of the study, which sought to resolve the escalating problem of the abuse of moderate and reasonable child chastisement in South African families and societies.

The overarching objective of the study was to analyse the South African common law defence on reasonable and moderate child chastisement. The findings of the study have shown that the defence of reasonable and moderate chastisement is a ground for defence raised by parents to justify their actions against the ‘assault’ of children. The defence of moderate and reasonable child chastisement by parents and guardians remains in place based on its common law justification. However, constitutionally chastisement is an infringement of the rights of children since it is inhuman and degrading. Furthermore, the loophole of common law defence for corporal punishment in the home and society has been largely influenced by religious, cultural and societal beliefs on the matter.

According to section 36 of the Constitution, rights can be limited. The limitation of children’s rights to dignity and equality is further supported by section 37 of the Constitution dealing with Non-Derogable Rights. The study however found that defence of reasonable and moderate chastisement falls under the law of general application (common law).

The law outlines that the rights of children can be limited after the rights have been scrutinised according to the guidelines provided in Section 36 of the Constitution.
Based on the current common law defence of moderate and reasonable chastisement, the study establishes that there are many rights of children that are being affected by the defence of reasonable and moderate chastisement, include the right to:

- Human dignity.
- Equity and equal protection of the law; and
- Freedom and security.

The children’s rights presented above are of great significance to the future of South Africa. The practice of child chastisement of any form and magnitude subjects children to actions that grossly infringe rights on their rights to care and protection. South Africa is a democratic state which is built upon the principles of human dignity and freedom from all forms of violence, thus there is a need to respect the rights of the children. The common law defence of moderate and reasonable chastisement and absence of a clear stance determining that this defence should be abolished complicates the promotion of children’s rights to be protected from inhuman and degrading actions. This defence of chastisement also promotes parents and guardians to apply this ambiguous ‘moderate and reasonable action’.

In most cases, the lack of benchmarks on the severity of corporal punishment makes it prone to misuse and abuse. Hence it cruelly harms children, sometimes unintentionally. The defence also enables abuser of corporal punishment to do it with impunity and dodge criminal prosecutions in cases of child abuse. If the defence was not in the common law, the parents would have been liable for prosecution in all cases related to the violation of children’s constitutional rights.
Children are the future on society and should be cared and protected especially considering that South Africa’s population is relatively young.

On the issue of the existence of stern measures to combat the abuse of moderate and reasonable child chastisement, statutory interventions have been put in place to this effect. Such legislations have outlawed practices such as; *inter alia*, the flogging of juvenile offenders, and use of corporal punishment in schools and inhuman detention of juvenile offenders. Apart from the local stance taken on moderate and reasonable child chastisement, global statutes and conventions have been clear in criminalising even the moderate actions of corporal punishment. There exists a disjuncture between international and national laws in respect of outlawing corporal punishment.

There are also legislative challenges in the absence of a local statute that clearly deal with outlawing even the minimal use of child chastisement in the home. Such a law would help the Children’s Act and the Child Justice Act to advance the rights and welfare of children. As mentioned earlier, parents and guardians who abuse or chastise children are shielded from criminal prosecution by the common law justification of these degrading actions against children.

However, enacting such a bold legislation needs thorough and extensive engagements of all stakeholders since it tramples upon religions, cultural and societal beliefs that condone child chastisement. Local laws have been explicit in emphasising on the dignity of children entrenched in Section 10 of the Constitution. Therefore, corporal punishment is legally invalid since it is inhuman, cruel and degrading. As emphasised in the study, there is a growing
movement against corporal punishment which prohibits the infringement of human dignity of its victims, the children.

Moderate and reasonable child chastisement brings more harm than good to its victims. In this regard, the findings of the study have shown that numerous studies have argued that corporal punishment does not achieve its main aim of correcting children. Some societal beliefs regard chastising children as making them responsible and law abiding citizens. It is therefore argued that corporal punishment does not result in the intended aim of moral internalisation which is the driver for the socialisation process in any society.

In the short and long term, moderate and reasonable child chastisement results in negative effects such as delinquency in children, aggression, anti-social behaviour, crime and poor child-parent relationships. In general, from the preceding arguments and information from the entire study, it can be seen that the relationship between the common law defence of moderate and reasonable child chastisement and its purpose is negative and weak in nature because it fails to bring about the intended outcomes. Therefore, it implies that moderate and reasonable child chastisement is ineffective in correcting the behaviour of children and making them law-abiding citizens.

Nonetheless, there are more humane ways of raising children instead of abusing them. Juvenile offenders now also have more rehabilitative ways of correcting their mistakes than to condemning them to corporal punishment. Moderate child chastisement has proven to have a negative physiological, psychological and emotional effect in the lives of children, sometimes haunting them at a later stage in life.
Covered in the preceding section is the summary and conclusion of the study based on the objectives presented. The last research objective sought to explore ways of solving challenges related to the use of moderate and reasonable child chastisement. The recommendations presented hereafter give effect to the attainment of the research objectives.

5.2. RECOMMENDATIONS OF THE STUDY

The recommendations of the study are divided into two sections covering the respective areas as presented.

5.2.1. Recommendations on moderate and reasonable child chastisement

Based on the evidence gathered in the study, the following recommendations should be considered in a bid to resolve the problem of child abuse that results from the use of the common law defence for moderate and reasonable child chastisement.

5.2.1.1. Giving effect to global and regional statutes

Aligning local laws with global conventions on the rights and welfare of children is important in order to ensure that children get the care and protection they deserve. Global conventions and regulations on the rights of children are clear and there is no place for minuets form child chastisement. The UNCRC (1989) and the ACRWC (1990) have given effect to the rights of children. This is so despite the continued defence of the common law for child chastisement in South Africa. Therefore, South Africa needs to enact a concrete law outlawing corporal punishment in the home. This
is one of the obligations of UN and AU member states undertaken namely, to put in place legislative interventions and other measures that give effect to the provisions of the UNCRC and the ACRWC.

5.2.1.2. Raising awareness on the negative effects of child chastisement

There is a need to raise awareness on the negative effects of moderate and reasonable child chastisement. Parents and guardians, most of whom use religious and cultural beliefs to support this common law defence for the use of corporal punishment on children, need to be aware of the unintended effects on the children. Such awareness needs to target introduction of better and more advanced ways of rearing children, the negative effects of beating children and the impact of child chastisement to the future of their children. Parents and guardians need to acknowledge that 'spare the rod, spoil the child' is prone to abuse and harming children impacts hugely on the future prospects of children as they become adults.

5.2.1.3. Statutory clarification of the limitations of children’s rights

There is a need to clarify the relationship between the Section 36 limitation of the rights of children and the common law defence of child chastisement. As discussed in chapter two, the application of the law and limitations of law in South Africa needs also to take cognisance of what international law provides. Furthermore, the Constitution is supreme and hence another law cannot contradict it. For example, it cannot accord children the right to dignity and allow a common law loophole to infringe on this right. Before using the common law defence on the practice of moderate and reasonable child chastisement, one has to take into account what the UN and AU instruments provide about child chastisement.
5.2.1.4. Foster care interventions

The government should introduce stringent foster care regulations. The abuse of children can be credited to the failure on the part of the foster care system. Policy makers need to consider how to co-ordinate foster care programmes in order to ensure that children whose parents or guardians have pre-existing substance abuse or misuse cases are not allowed to keep any children. Such children are most vulnerable to abuse. In the event of foster programmes being fully operational, there needs to be stricter policies to ensure that foster children are not placed with families whose beliefs support child chastisement of any kind. Potential foster parents can be subjected to a stringent screening process before they qualify to adopt a child.

5.2.1.5. Criminalising all forms of child chastisement

Criminalising corporal punishment can serve as a useful intervention to solve the problem of the rise in the abuse of the action. The first recommendation seeks legal interventions to stop moderate and reasonable child chastisement. As a follow-up to such a solution, South Africa needs to criminalise offenders who are guilty of abusing or misusing corporal punishment on children. Parents and guardians should not be shielded from criminal prosecution by the common law defence of moderate and reasonable child chastisement but should be brought to book. Such parents and/or guardians should have deterrent custodial sentences imposed on them in order to contain this escalating problem of the abuse of child chastisement under the guise of instilling discipline on their children.
5.2.2. Recommendations on areas of further research
The study recommends other researchers to expand their studies of this nature to other regions outside South Africa since the study was limited to an analysis of the common law defence of moderate and reasonable child chastisement in South Africa.

5.3. CONCLUDING REMARKS
Determining the magnitude of ‘moderate’ and ‘reasonable’ child chastisement has become the Achilles heel of policy makers and parents alike. Thus no benchmark exists to ascertain what is permissible or excessive in terms for child chastisement. In as much as child chastisement can foster child discipline and be part and parcel of acceptable child rearing practice, it is tantamount to abuse.

In addition, Merton’s (1936) theory of unintended consequences indicates that good intentions can easily go bad especially when emotions come into the equation.

In addition, the common law defence of moderate and reasonable child chastisement has left a gaping hole in the local statutory framework, a grey area which has been exploited by parents and guardians to promote corporal punishment on their children at home. Sometimes this chastisement results in the unfortunate loss of life, temporal or permanent disfigurement and perennial physical, emotional and psychological scars on its victims. These scars will constantly haunt the child even during their adulthood, thereby affecting their ability to realise their full potential in their later years of their lives.

The judicial prosecution of the perpetrators of child abuse disguised as the practice of moderate child chastisement is needed. Abusers of children who use corporal
punishment in the home have always escaped prosecution due to the presence of the common law defence of this dehumanising action. Global instruments have been concrete in outlawing child chastisement. In order to swiftly and effectively eradicate child abuse and the defence of moderate and reasonable child chastisement, the study recommends the employment of an all-stakeholders approach. This will include, enacting laws which directly criminalise this practice, tightening foster care regulations, and making parents and/or guardians aware of the negativity of their actions. Hence, children will be protected from cruel, inhuman and degrading actions of their parents and/or guardians, and accorded equal treatment similar to adults and have their welfare secured in South Africa.
REFERENCES


