

# Resolving the dilemma between corporal punishment and human rights in South Africa

First submission: 9 April 2009  
Acceptance: 31 July 2009

South Africa's Constitution protects the fundamental rights of all citizens, including children. The recent Children's Act and the Children's Amendment Act criminalise corporal punishment of children by their parents. This article endeavours to describe the dilemma between corporal punishment and human rights in South Africa. It investigates possible democratic approaches to resolving the dilemma and offers deliberative democracy as a possible way to guide discussions on this dilemma. The article evaluates the applicability of deliberative democracy to the case of corporal punishment and human rights and highlights the need to consider alternative strategies to discipline children.

## Riglyne ter oplossing van die dilemma van lyfstraf teenoor menseregte in Suid-Afrika

Suid-Afrika se Grondwet beskerm die fundamentele regte van alle burgers, insluitende kinders. Die nuwe Kinderwet en die Kinder Wysigingswet kriminaliseer lyfstraf van kinders deur hul ouers. Hierdie artikel poog om die dilemma tussen lyfstraf en menseregte in Suid-Afrika te beskryf. Moontlike demokratiese benaderings ter oplossing van die dilemma word ondersoek en oorlegplegende demokrasie word voorgestel as 'n moontlike wyse om gesprekke oor die dilemma te rig. Die toepassingsmoontlikhede van oorlegplegende demokrasie, in die geval van lyfstraf en menseregte, word verder geëvalueer en die behoefte om alternatiewe strategieë te oorweeg om kinders te dissiplineer beklemtoon.

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It is the duty of parents to raise their children to become responsible and well-adjusted young people. McWhirter *et al* (2004: 4) argue that the well-being of society depends on how well parents perform this duty. A family usually consisting of parents and children is considered to be the backbone of society. The relationship between parents and children is one of the most important relationships in society. According to Golombok (2003: 63), children's emotional and interpersonal well-being depends, to some extent, on the quality of the relationships between them and their parents. Parenting styles can therefore play a large role in promoting psychological adjustment or causing psychological problems in children. Children's well-being, however, also depends on the characteristics of the child (Golombok 2003: 98), the way in which these two factors influence each other, and the wider social world in which families live.

Taking the above into account and considering the responsibility of parents to appropriately nurture and discipline their children, it is not surprising that parents often need guidance in this challenging endeavour. The literature on parenting is filled with debates about the implications of corporal punishment on children (Bender *et al* 2007: 227). In addition to Section 28 of the South African Constitution (which protects the rights of South African children), South Africa also has a Children's Act (No 38 of 2005) and a Children's Amendment Act (No 41 of 2007). Although these Acts have already been promulgated, the sections on corporal punishment of children by their parents must still be implemented in practice. According to Article 139 of the Children's Amendment Bill, a physical hiding by a parent is tantamount to assault.

Should this amendment be accepted, corporal punishment of children by their parents will be considered a crime. The Children's Act and its amendment thus have serious implications for the rights of parents and children, and consequently pose an ethical dilemma. The Bill is highly controversial because various political parties and other groupings claim that it interferes with parents' rights and competencies to punish their children (cf SAPA 2007 & 2008). On the contrary, other stakeholders who argue from a human rights point of view maintain that it is the right of a child to be protected against physical injury

and harm<sup>1</sup> In order to review the Children's Act, the government published the revised Act in the *Government Gazette* and requested comments and input from the public. This procedure has, however, been criticised for lack of discussion (cf Waterhouse 2007: 1-3).

## 1. Legalising corporal punishment of children

The *Oxford advanced learner's dictionary* (Wehmeier *et al* 2005: 206) defines corporal punishment as "the physical punishment of people, especially by hitting them". This article adopts the legal definition of children as people between the ages of birth and eighteen, as indicated in the Children's Act. This article focuses on the legal processes of decision-making in order to determine whether corporal punishment of children by their parents should be addressed by law or not. In order to manage the complex topic of ethical dilemmas in corporal punishment, this article does not cover corporal punishment by teachers and other adults in authority over children.

According to the *Routledge encyclopaedia of philosophy* (Craig 2006: 867), democracy means "rule by the people". This implies a system in which decisions are made on the basis of everyone participating in decision-making processes. The challenges that majority rule and equal opinions pose to democracy can, according to this encyclopaedia, be met by means of a model according to which unanimous decisions are reached through a process of discussion that upholds respect for equal autonomy and the participation of all. Based on the above, this article uses the term "democracy" to refer to democratic principles that include a process of discussion and the simultaneous upholding of the values of freedom (liberty) and equality.

In analysing the problem of legislating what should be allowed in the relationship between parent and child, some tension is evident between the democratic values of freedom and equality. According to Ebenstein & Fogelman (1990: 169), negative freedom implies that a person should be "free from" negative influences, and positive freedom implies that a person should be "able to" achieve positive development. This is the dilemma of corporal punishment: while

1 Cf <<http://www.endcorporalpunishment.org>>

children should be free from bodily harm, parents should simultaneously be free to raise their children without interference from government. The fact that children and adults are not equal in cognitive development, experience and basic life competencies further complicates the issue. Parents are in a position of power over their children and therefore have an obligation to raise them to become moral, law-abiding citizens, while at the same time children have the right to appropriate socialisation and education.

When the revision of the Children's Act is placed within the context of democracy, Gould's (2002: 7) question as to "who may be said to have a right to participate and to what degree?" becomes relevant. My argument coincides with that of Gould (2002: 17): "those engaged in a common activity defined by shared goals, have a right to co-determine decisions as an expression of their status as free and equal beings". What should happen in a democracy regarding corporal punishment if children are not free or equal to parents and legislation? Before attempting to answer this question it should be noted that I concur with rational empiricists in that we have never arrived and will never arrive at final answers, and that truth is always tentative, changing and subject to constant checking and verification (Ebenstein & Fogelman 1990: 170).

In an endeavour to answer the above question, it should be noted that John Stuart Mill, when referring to liberty, states: "Over himself, over his own body and mind, the individual is sovereign" (Gutmann & Thompson 1996: 230). This statement is simple and true, until Mill defines the "scope of liberty" as follows: "The only part of the conduct of any one, for which he is amenable to society, is that which concerns others" (Gutmann & Thompson 1996: 233). The conduct of parents in raising their children certainly concerns their children now and in the future. It follows that parents are accountable to society and their children, in particular, for their conduct in performing their parental duties.

As mentioned earlier, the basic structure of society includes the family in one form or another (Rawls 2003: 10). Nobody will contest the fact that currently families take on many different forms. Orton (1997: 11) describes in detail how families have changed over the past

fifty years. She quotes Roberts' research findings that three quarters of American respondents chose "a group of people" as the preferred definition of a family (Orton 1997: 11).

Although parenting styles vary and are influenced by culture, religion and personality (cf Muzi 2000: 3-428), Langdren (2005: 226) argues that strengthening a protective environment for children - in which parents can optimise their duty towards their children - "requires many levels of engagement, including dialogue and partnerships between parents and children". It could therefore be argued that the process of deliberating the issue as to whether or not people should be allowed to punish their children - by means of corporal punishment - is crucial. Because children are vulnerable members of society and, according to Rawls (2003: 57), the least advantaged, they should be represented in this decision-making process by adults who care for and protect them.

## 2. Democratic approaches to resolving the dilemma

Since 1994 South Africa has been a democratic country, governed by the principles of the theory of democracy. The theory of democracy as a whole, according to Dryzek (2002: iii), made a deliberate shift in 1990. Prior to this, devices such as voting and representation were used to aggregate an individual's preferences or interests in collective decisions in politics. According to Miller (2003: 182), the institutions of free elections, competing political parties and freedom of speech underlie the conception of democracy, and this may be referred to as "liberal democracy". The aim of liberal democracy was to aggregate individual preferences into a collective choice by implementing these underlying institutions (such as voting) and by giving each person's preferences equal weight (Miller 2003: 183). Thus, in liberal democracy, majority preferences guided decisions.

Dryzek (2002: iii) states that in deliberative democracy, however, "the essence of democratic legitimacy should be sought instead in the ability of all individuals subject to a collective decision to engage in authentic deliberation about the decision". In deliberative democracy the premise that there will be conflicts in political

preferences between people is the starting point of the theory. The purpose of democratic institutions should then be to resolve these conflicts. According to Miller (2003: 183), deliberative democracy envisages the resolution of conflicts between people “through an open and uncoerced discussion of the issue[s] at stake with the aim of arriving at an agreed judgement”.

In addition to liberal democracy and deliberative democracy, Young (2003: 102) adds activism as a third major tier of contemporary democratic theory. The activist approach, according to Young (2003: 103), engages primarily in critical oppositional activity, rather than attempting to reach agreement with those supporting or benefiting from existing power struggles. She argues that activism should form an integral part of any democracy and should encourage and include demonstrations, street marches, sit-ins, musical works and cartoons that oppose and challenge political decisions. The activist approach ensures deliberation, according to Young (2003: 104), especially with people in power as they are seen to represent the institutions that perpetuate harm or injustices.

Lester (2006: 352) argues that all exercises of authority over individuals in a democracy should be justified. Democracy should not have authority over people but people should be actively involved in decision-making. Therefore if a government wants to take control of, for example, how people raise their children, this should be justified. In the South African context this principle has important implications for the legitimate extent of parents’ authority over their children’s upbringing, as well as for the rights of children. In evaluating an approach to the decision of legalising parental corporate punishment, I argue that the three tiers of democratic theory, namely liberal democracy, deliberative democracy and activism should be compared.

If activism is the preferred choice to approach the corporal punishment dilemma, people opposing and criticising the legalisation of parental practices will refuse to take part in discussions about the matter. They will actively oppose it by means of demonstrations, street marches, and other activist means (Young 2003: 118). If liberal democracy should be chosen as the approach to resolving the dilemma, people will all have equal rights, and they will accordingly

vote on whether parental practices should be legalised; the majority of votes then becomes the final decision (Miller 2001: 184). If deliberative democracy is applied as the means to resolve the dilemma, people will embark on a process of discussions on the corporal punishment issue with the aim of reaching an agreed outcome among all stakeholders. This judgement will take into account the views of all participants (Miller 2003: 184).

Although children may be implicitly represented in an activist approach, and some adults in a liberal democratic approach may vote with the best interest of children in mind, children's rights cannot be explicitly represented by these two approaches. In a deliberative democratic approach, however, children (and parents) will be explicitly stated as major stakeholders in the decision as to whether corporal punishment of children by their parents should be legalised. For this reason, I argue that deliberative democracy should be the approach of choice in an attempt to resolve the dilemma.

### 3. Deliberative democracy

Before discussing the concept of deliberative democracy, it is necessary to define it. Chappel (2006: 2) defines deliberative democracy as a "political process in which decisions are arrived at through open and inclusive dialogue rather than a mere aggregation of votes". Since the deliberative turn in democratic theory, extensive literature about the construct arose and many authors wrote on the theory (Dryzek 2002: 49).

Gutmann & Thompson (2003: 31) state that theories of deliberative democracy consist of a set of principles which are intended to establish fair terms for guiding political cooperation in a democratic society. Dryzek (2002: iii) prefers the term "discursive democracy" to "deliberative democracy", motivating his preference by arguing that deliberation can be a personal decision process and not necessarily a collective social process. He further argues that the term "discursive" is more expansive in the type of communication it allows, and that "deliberation" has connotations of calm, reasoned argument. Discussions about issues of morality are, however, seldom calm and reasoned. Despite this motivation he admits that the two terms ("deliberation"

and “discursive”) are used interchangeably as they both refer to the same set of core democratic principles (Dryzek 2002: iv).

Irrespective of what the theory is called, Dryzek (2002: 175) postulates that it promises a renewed focus on the authenticity of democracy which strengthened it. Walsh (2007: 2) welcomes this, arguing that all those affected by a common concern should be included in equitable processes of decision-making and self-government. According to her, deliberative theorists and the means whereby they want to strengthen democracy differ. However, they all want to invigorate democracy by means of deliberative ways of overcoming the limitations of liberal democracy by offering discussions as ways to transform it. Elstub (2006: 301) argues that democratic theory has evolved to such an extent that it has made deliberative theory relevant for use in moral decision-making. According to him, the general core of deliberate democracy revolves around the making of collective decisions. It therefore involves the participation of all relevant actors (the more equal, the more democratic), the consideration and exchange of reasons for points of view, and it should be aimed at transforming preferences (Elstub 2006: 303).

The theory of deliberative democracy developed by Gutmann & Thompson (1996) is a good example of incorporating all the ideals and general core values of the conception of deliberative democracy (Dryzek 2002: 16-7). For this reason this article will adopt the theory of Gutmann & Thompson (1996, 2003) as it represents the position of deliberative democrats, and will be applied as a set of guidelines for deliberation about the dilemma of parental corporal punishment in South Africa.

According to Gutmann & Thompson (1996: 1), deliberative democracy “secures a central place for moral discussion in political life”. The core principle (including all stakeholders in these discussions) necessitates the identification of all these stakeholders, including children (or their representatives), parents and institutions involved in the care and protection of children, in a discussion about corporal punishment. The role and responsibilities of parents as primary caretakers of children should be recognised, and they should therefore be accorded the main competence in raising their children. Considering the parental practices embedded in various cultural,



religious and personal differences in South Africa, it can be expected that conflict and disagreement will exist. Dryzek (2002: 175) advises that in such instances discussions between the stakeholders should occur across boundaries and between humanity.

In this deliberative process (as applied in the case of parental corporal punishment in South Africa) the conditions for deliberation may be defined, according to Gutmann & Thompson (1996: 55), as reciprocity, publicity and accountability. According to them, reciprocity “in this instance means the active seeking of fair terms of co-operation and mutually acceptable ways to resolve disagreement. This should be done in a spirit of mutual respect and accommodation” (Gutmann & Thompson 1996: 55). In other words, even if welfare, education, human rights activists, parents and children disagree, this disagreement should be discussed in a spirit of magnanimity and respect.

In my opinion, the debate on corporal punishment should be conducted openly and in public with appropriate publicity. Gutmann & Thompson (1996: 97) state that “modern democracies have found that publicity can be a powerful sanction”. According to them, publicity has the advantage that it forces stakeholders to focus on risks and benefits. Referring to accountability, they state “in a deliberative forum, each is accountable to all” (Gutmann & Thompson 1996: 128). It is also important to note that the way in which people understand liberty and opportunity influences the way in which they interpret and apply reciprocity, publicity and accountability (Gutmann & Thompson 1996: 349).

Now that the conditions for the deliberative process have been defined, the importance of opportunity in this case cannot be downplayed. Each and every child and parent in South Africa should “have a chance to have a chance” in the corporal punishment debate (Gutmann & Thompson 1996: 208). The sad fact is that there are neither basic nor fair opportunities for children in South Africa. However, according to the Children’s Act and the Children’s Rights, children should have a voice. Gutmann & Thompson (1996: 349) state in this regard:

No matter how earnestly citizens carry on deliberation in the spirit of reciprocity, publicity and accountability, they can realize these ideals

only to the extent that each citizen has sufficient social and economic standing to meet his or her fellows in terms of equal support.

Therefore, even though there is a lack of equality and opportunity, and one realises the injustice of this inequality, these factors should not prevent South African society from deliberating on the issue. It could, on the contrary, be a motivating factor to encourage the development of a more deliberate form of democracy. This is in line with Gutmann & Thompson (1996: 357):

Any adequate opportunity principle, whatever it may require now, should encourage government to find ways in the future to avoid denying opportunity to the opposite level.

It may be argued that the civil, public and private liberties of parents and children can be protected and enhanced by the process of deliberative democracy. Gutmann & Thompson (1996: 230) reject the position of moralists and paternalists regarding liberty and instead embrace “maintaining the priority of basic liberty”. Basic liberty, according to them protects physical and mental integrity as a precondition for other liberties (Gutmann & Thompson 1996: 237). Every child can therefore rightly ask for a chance to have a life free from corporal punishment, and similarly every parent a chance to raise their children free from government interference. In revising the Children’s Act, it becomes essential to decide whose basic integrity is more important. Gutmann & Thompson (1996: 294) support the egalitarian view that “the greatest benefit of the least advantaged members of society” should be ensured by deliberative democracy.

The Rawlsian rationale for protecting specific liberties such as those of children is based on a consideration of “which liberties are essential social conditions for the adequate development of moral personality over a complete life” (Gutmann & Thompson 1996: 211). Gutmann & Thompson (1996: 213) further encourage democracies in the face of competing values to decide “who counts as the least advantaged, and justify the maximization of their life chances”. If all the above is considered carefully, and if the South African government wishes to protect the basic liberty of children, it is clear that the revision of the Act was justified.

In addressing parents' liberty to raise their children free from government interference, it appears that by telling parents that they are not allowed to physically punish their children, no basic physical or mental integrity of the parent is violated. Rather, parents are now encouraged to find more constructive ways to discipline their children. Deliberation that serves liberty and opportunity results in new and more constructive ways to teach children respect, fairness and the democratic values of equality, liberty and opportunity. It follows that education at home and parents leading by example may result in the reward of children growing up to be moral citizens.

The concern, however, is that many parents in South Africa do not necessarily have the requisite knowledge of alternative disciplinary skills. It could therefore be argued that, in conjunction with the implementation of this Act, the government and social services should launch a campaign of training and support targeted at parents. Such a strategy could be reinforced if the education system and religious institutions provide a context in which children and families can practise their morality. It is hoped that the process of deliberation will be shaped by moral discussion that is justified in terms of the principles of accountability, participation and publicity. It is further hoped that the moral discussion will make provision for the diversity of participants in terms of religion, culture, and race, and that it will specify and apply new ways, identify issues and set priorities, and identify a range of options that lead to the provisional resolution of issues (Gutmann & Thompson 1996: 199-229). This will provide an opportunity for parents and children to embrace alternative ways of discipline and for parents to develop a variety of parenting skills. Their liberties and opportunities will thus simultaneously be protected and enhanced. It can be reiterated that the means becomes the end and it appears that the end also becomes the means, as the process is incomplete and continues under the constant influence of the principles of deliberative democracy.

The question remains as to whether deliberative democracy as a way to resolve the dilemma of corporal punishment and the rights of parents and children will be effective.

#### 4. A critical evaluation of deliberative democracy

In critical analyses of deliberative democracy both Walsh (2007: 2) and Holsten (2007: 3) argue that the theoretical approach is too abstract, static and universal. In addition, Young (2003: 118) proposes that deliberative democracy is not sufficiently critical and that it should expose exclusions and constraints in the “supposedly fair” processes in actual decision-making. She maintains that deliberative procedures are exclusive and that formal inclusion is usually not sufficient to guarantee representation of all major stakeholders (Young 2003: 108-9).

According to some critics, deliberative democracy has limitations in democracies such as South Africa where structural inequalities exist (Holsten 2007: 29, Young 2003: 102-3). In the context of the diversity and structural inequalities in South Africa, the criticism of Holsten (2007: 29) that the theory of Gutmann and Thompson relies too heavily on the proliferation of deliberative forums seems appropriate. According to him, the scarcity of resources, the incompatibility of certain values, the limited generosity and the inadequate understanding of particular disagreements are exacerbated as sources of moral conflict (Holsten 2007: 30). Holsten (2007: 29) warns that, although forthrightness, magnanimity, broad-mindedness and willingness to cooperate are potential outcomes of deliberative forums, they are not necessarily the consequences of human interaction over moral conflicts. It follows that, even if stakeholders enter into deliberation about corporal punishment in South Africa, the outcome may not be what was envisaged at the outset.

Elstub (2006: 301) also warns that deliberative democracy should not become everything to everyone and lose its core set of ideas and essence. The most relevant criticism that should be taken cognisance of in the South African context, however, is Holsten’s (2007: 31) argument that if decisions are not tied to political realities, they are often insensitive to the historical circumstances and contingencies of political contexts. He thus argues that in relying on institutions to promote civility and mutual respect, the cultural preconditions of behaviour are often ignored.

Despite the argument for deliberative democracy, Krupnikov *et al* (2007: 2-19), in a study on the psychological plausibility of deliberative democracy, investigated the effects of information processing on race, gender and bias in deliberative processes. Their findings portray a bleak picture in terms of the motivation of people to transcend individual and cultural differences in deliberative processes. They therefore propose that, for deliberative democracy to work, individuals will have to become more involved and overcome their biases (Krupnikov *et al* 2007). This could be a potential barrier in the context of South Africa.

Considering the above criticisms, it appears that in the South African context, deliberative democracy in the case of corporal punishment and human rights will only be plausible if the theory can be applied in a practical and critical manner. In addition, the inclusion of all relevant stakeholders from a variety of religious, racial, cultural and historic backgrounds must be guaranteed, while sensitivity for cultural and historical differences must be maintained. Finally, individuals should be encouraged to take part and be involved in the decision-making process and transcend their own personal biases.

## 5. Alternative strategies to discipline children

If corporal punishment of children by their parents becomes a criminal offence, it follows that family and its private internal sphere becomes public domain. Hale (2006: 355) refers to the UN Convention on the Rights of the Child, which states that “the child is not the child of the state” and that “the child is [also] not just the child of the family”. In South Africa, according to the Children’s Act, the High Court is the upper guardian of the child. When the family disregards and disrespects the rights of the child, the state has an obligation to protect the child. When, for instance, the bodily integrity of a child is violated, criminal legal action should follow.

With the practical implementation of this Act, many parents will need guidance pertaining to constructive alternatives to corporal punishment. Parents should be encouraged and assisted to strengthen the relationships between themselves and their children (Golombok

2003:63-74). Effective communication and non-violent disciplinary strategies as well as building coping skills should also be included in parental training (Christopherson & Martweet 2003: 45-99). It is hoped that these conditions will protect the rights of the parent and the child in discipline. Parental emotional well-being has been found to be associated with discipline practices (Regalado *et al* 2004: 1956), as well as genetic and environmental factors (Knafo & Plomin 2006: 148). It follows that parental well-being and environmental factors (such as poverty and other psychosocial political factors) will also need to be addressed in a training campaign for South African parents if this endeavour is to succeed.

## 6. Conclusion

This article discussed the dilemma of legislating parental disciplinary practices in the context of human rights in South Africa. Possible approaches for resolving the dilemma were investigated and deliberative democracy was proposed as a possible means of guiding discussions on corporal punishment and human rights. Deliberative democracy was critically evaluated and considerations for alternative strategies to discipline children were proposed.

In reflecting on the above, it appears that legislating what should occur between parent and child in South Africa is necessary, and will also take considerable effort from all stakeholders. It is hoped that participants who come from various moral, religious, racial and cultural backgrounds to engage in the deliberative processes will be able to reach agreement about corporal punishment that contributes to respect for and sensitivity toward different religious and cultural beliefs. It is also hoped that the rights of parents and children in South Africa will be protected in both the private and public domains of family life.

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