

**Towards children's rights in the home:  
A philosophical consideration of the parent child  
relationship in the era of human rights and the  
concept of an 'enlightened parent'**

**Submitted in part requirement for a Masters degree in Child Care and  
Protection through the University of KwaZulu-Natal**

'... fundamental rights should take us back to fundamentals, to the very bedrock of existence. They are natural inasmuch as they are based on the nature of human beings in the world and not on special rights conferred by a political or legal system. While the latter are contingent, the former are primordial. They are man's response to his condition, and that is why they should command respect. Only in this sense are fundamental rights 'individual'. They are not rights obtained by individuals in virtue of certain contingent attributes or transactions. On the contrary, they are the substratum of the rights of every human being after these have been discounted.' (Samek, 1982 p 774).

**Dr Gordon Nicholls**

**204001710**

## ACKNOWLEDGEMENTS

Research is always a collaborative endeavour. I gratefully acknowledge the assistance that I received from the persons listed below.

- Professor Noel Zaal, my promoter, for his ready support and wise counsel in completing this research project
- Professor Carmel Matthius, the co presenter of the Masters degree in Child Care and Protection with Professor Noel Zaal. Their dedication to children and their rights was an inspiration
- To the visiting lecturers, leading experts in their field, who so willingly shared their experience and knowledge with our class. We were fortunate to have interacted with such dedicated persons from so many helping disciplines
- To my class mates – the perspectives each brought from their specialist fields was enlightening and greatly enhanced the learning experience
- To the library staff, both throughout South Africa and in various university libraries in England, who so readily gave me access to their facilities and assisted me in my research pursuits
- To Susan, who did a valuable proof reading of the first draft

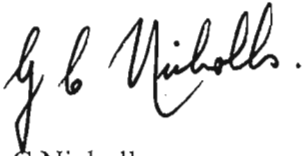
I acknowledge, with sincere gratitude, the support and encouragement I have received from my wife over all my years of study. Thank you Estelle.

## STATEMENT OF ORIGINATION

I hereby declare that this research is a product of my own work.

A list of the core references consulted has been appended.

Sources have been appropriately acknowledged.

A handwritten signature in black ink, appearing to read 'G C Nicholls'.

Dr G C Nicholls  
14 December 2006

<u>TABLE OF CONTENTS</u>	<u>PAGE</u>
ACKNOWLEDGEMENTS	1
STATEMENT OF ORIGINATION	2
TABLE OF CONTENTS	3
SYNOPSIS	7

## CHAPTER ONE

1	CHILDREN'S RIGHTS?	9
1.1	INTRODUCTION	9
1.2	THE RESEARCH TERRAIN	10
1.3	ASPIRATIONAL VALUES AND ASPIRATIONAL RIGHTS APPLIED TO CHILDREN	16
1.4	HORIZONTAL APPLICABILITY OF HUMAN RIGHTS VIS-À-VIS CHILDREN	18
1.5	HORIZONTAL APPLICABILITY OF THE BILL OF RIGHTS FOR PARENTS	19
1.6	THE CURRENT FOCUS	20
1.7	CONCLUSION	21

## CHAPTER TWO

2	PARENTING AND THE EMERGING RIGHTS OF CHILDREN IN A HUMAN RIGHTS ERA	23
2.1	INTRODUCTION	24
2.2	THE TRADITIONAL PARENT – A CRITIQUE	24
2.3	PATERNALISM AND CHILDREN: A CHANGING PARADIGM	29

2.4	THE CHANGING CONCEPTIONS AND STATUS OF CHILDREN: THE CHILDREN'S LIBERATION MOVEMENT	31
2.5	THE CHANGING CONCEPTIONS AND STATUS OF CHILDREN: CHILDREN'S RIGHTS AS THE RIGHTS OF A PERSON	33
2.6	THE CHANGING CONCEPTIONS AND STATUS OF CHILDREN: THE EMERGENCE OF CHILDREN'S RIGHTS VIA CHARTERS AND LEGAL PRECEDENTS	34
2.7	PARENTS AND THE REALISATION OF CHILDREN'S RIGHTS	36
2.8	CONCLUSION	38

### CHAPTER THREE

3	FUNDAMENTAL HUMAN RIGHTS VALUES AND THE CHILD	39
3.1	INTRODUCTION	39
3.2	FUNDAMENTAL VALUES AND RIGHTS FOR CHILDREN	40
3.3	THE CONCEPT OF PERSON AND RESPECT FOR PERSON	42
3.4	DIGNITY AS THE FOUNDATIONAL HUMAN RIGHTS VALUE	45
3.5	EQUALITY AND THE CHILD	47
3.6	AUTONOMY AND THE CHILD	51
3.7	FREEDOM AND THE CHILD	53
3.8	JUSTICE FOR CHILDREN	54
3.9	CONCLUSION	56

### CHAPTER FOUR

4	CORPORAL PUNISHMENT IN THE HOME	57
4.1	INTRODUCTION	57

4.2	CORPORAL PUNISHMENT AND THE RSA CONSTITUTION	58
4.3	CORPORAL PUNISHMENT AND PARENTS	60
4.4	THE DIMINUTION OF CORPORAL PUNISHMENT	64
4.5	ENTRENCHED CORPORAL PUNISHMENT POSITIONS IN SOUTH AFRICAN SOCIETY	66
4.6	IMPETUS FOR CHANGE IN CORPORAL PUNISHMENT IN THE HOME	67
4.7	CONSTITUTIONAL HORIZONTAL EFFECT, EQUALITY OF TREATMENT, AND CORPORAL PUNISHMENT IN THE HOME	69
4.8	LEGAL PROCESS PROBLEMS IN CURBING CORPORAL PUNISHMENT IN THE HOME	73
4.9	THE AXIOLOGICAL ARGUMENT AGAINST CORPORAL PUNISHMENT OF CHILDREN BY PARENTS IN THE HOME	74
4.10	CONCLUSION	79

## CHAPTER FIVE

5	FREEDOM OF RELIGION IN THE HOME FOR CHILDREN	80
5.1	INTRODUCTION	81
5.2	FREEDOM OF RELIGION: VALUE AND RIGHT FOR A CHILD	81
5.3	FAITH, BELIEF AND WORSHIP IN A FAMILY: CHILDREN'S RELIGIOUS AFFILIATION	84
5.4	RESISTANCE TO A CHILD'S RIGHT TO CHOOSE A RELIGION	89
5.5	WHY CHILDREN SHOULD BE PERMITTED TO CHOOSE THEIR OWN RELIGION	92
5.6	THE ENLIGHTENED PARENT AND THE CHILD'S RIGHT TO A CHOICE OF RELIGION	96
5.7	CONCLUSION	98

## CHAPTER SIX

6	FUTURE PERSPECTIVES ON CHILDREN'S RIGHTS IN THE HOME	99
6.1	INTRODUCTION	99
6.2	<i>QUO VADIS</i> CHILDREN'S RIGHTS?	100
6.3	THE CONCEPT OF AN ENLIGHTENED PARENT	101
6.4	ROGERIAN VISION OF THE PERSON	102
6.5	TOLERATION	104
6.6	THE ETHIC OF CARE AND CONCERN	105
6.7	CHILDREN'S RIGHTS ARE A PRODUCT OF PARENTS' PERCEPTION OF THEIR CHILDREN	107
6.8	THE WAY FORWARD	108
6.9	CONCLUSION	110

## CHAPTER SEVEN

7	CONCLUDING SUMMARY	111
8	BIBLIOGRAPHY	116
8.1	BOOKS AND JOURNALS	116
8.2	CONVENTIONS, BILLS AND ACTS	124
8.3	CASES	125
9	ABBREVIATIONS	125

## SYNOPSIS

Research on children's rights very often deals with the legal aspects of their rights, based on perceived protection and provisioning needs, and focussed on deficiencies in children's lives. There is obviously a place for such considerations. It is rare however for writers on children's rights to deal with the personal, ontological and moral rights of children in a principled way. This study aims to address this deficit and reveal the axiomatic and essential rights of children in their home setting.

The standing of children's rights in the Republic of South Africa (RSA) is reviewed. Although the primary focus will be on the South African situation, it will be illuminated by references to cogent international experience and positions, apposite to the prosecution and theme of this study. This is appropriate, as South Africa is integral to the international initiatives and imperatives in human rights, especially as they apply to children.

In terms of the South African state, children's rights have been given formal recognition in the Constitution, as well as in laws and policies flowing there from. It is noted that there may be deficiencies in the implementation and realisation of these rights in practice, however.

Only a fraction of children's rights apply in the public sector. Children live their lives predominantly in the home and so the realisation of their rights very often comes down to the attitudes and actions of their parents, in a horizontal application of the Bill of Rights. This study explores what rights children should be bestowed by their parents in their home and according to what values and criteria.

The traditional and emerging roles of parents are considered, as they relate to the realisation of rights by their children. The evolution of the concept of childhood is explicated, including social change advocacy and social movements designed to assist children to realise their rights optimally.



This study is not based on legal rights per se, but is predicated on an ontological vision of personhood, as it applies to children. Instead of natural rights, the fundamental and universal values that underlie human rights are considered. These values include respect for person, dignity, equality, autonomy, freedom and justice for children in their relationships with their parents.

In order to generate the debate on children's rights in the home, two exemplars are considered, based on first principles and fundamental, axiological values.

The first exemplar is the child's right not to receive corporal punishment from parents.

The second exemplar considers the child's right to realise freedom of religion in the home, including the right to hold different religious beliefs from his or her parents, and to act on these beliefs, in contradistinction to the religion espoused by his or her parents.

The thesis contained in this study is that children's rights can only be realised and assured if parents treat their children as persons of worth and dignity, and raise them to become fully functioning adults. The concept of an 'enlightened parent' is critical, if children are to realise their rights. Enlightened parenting involves a lifetime of support and education by parents in order to assist their children to achieve their own special ends as persons. The concept of an 'enlightened parent' is proposed as the portal through which children's rights will be realised. An 'enlightened parent', as the ideal type of parent, should form the basis on which an advocacy campaign should be mounted to enhance the realisation of children's rights in the private domain.

The values implicit in an 'enlightened parent' are briefly sketched, incorporating critical values such as tolerance, good will, respect, care, concern and unconditional positive regard. These are the relational values between parents and children that will deliver the human rights values, and therefore ensure, in effect, the accomplishment of children's rights.

## CHAPTER ONE

### CHILDREN'S RIGHTS?

'Childhood is the most intensively governed sector of human existence.' (Mc Gillivray, 1997, p 1).

'Children's rights: a slogan in search of a definition' (Rodham, 1973, p 487).

'The Convention on the Rights of the Child stands as a powerful symbol of a new perception of childhood. It invites a reconstruction of childhood which recognises children's needs and the children's capacities.' (Mc Gillivray, 1997, p 234).

#### 1.1 INTRODUCTION

The rationale behind this research is established in this chapter. The position of children's rights in South Africa, and the standing of children under the Bill of Rights in the RSA Constitution, is considered.

Although on paper, South Africa can hold its own with the leading nations of the world when it comes to human rights, and in spite of deficiencies in trying to reach the desirable level of implementation in some respects, the realisation of the fundamental aspirational rights for children, particularly in the private domain of the home where children live most of their lives, is found to be wanting, if not non-existent. This is not a problem peculiar to South Africa alone.

The introductory chapter leads on to a consideration of the parent child relationship in the next chapter, followed by a reflection on the central rights values that should be accorded to children as persons in the third chapter. The following two chapters address concrete examples of human rights that are seldom accorded to children in the home in practice. The final substantive chapter considers how the situation can be ameliorated via the concept of an 'enlightened parent' by ensuring rights for children via an empowering parent child relationship.

## 1.2 THE RESEARCH TERRAIN

Do children have human rights? This apparently innocuous question may give rise to some quite disparate responses.

Some persons may cite the various international human rights agreements, universal in their principled application, that South Africa has subscribed to, and is bound by, including some that are specifically targeted at children's rights. South Africa is required to implement the stipulations contained in these documents and is required to give an account as to their progress in realising the values and rights enshrined in these international agreements. In fact, rights may be viewed as the concretisation of those universal, fundamental values that are encapsulated in the provisions of these documents. These declarations, *inter alia*, include:

- The United Nations Universal Declaration on Human Rights (1948)
- The United Nations International Covenant on Civil and Political Rights (1966)

- The United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion and Belief (1981)
- The Organisation of African Unity African Charter on Human and People's Rights (1986)
- The United Nations Convention on the Rights of the Child (1990)
- The United Nations Declaration of Family Rights (1994)
- The Organisation of African Unity African Charter on the Rights and Welfare of the Child (1999)

The fundamental human rights values contained in the above documents are encapsulated in the Constitution of the Republic of South Africa (108 of 1996) and especially in the Bill of Rights contained in this Constitution. South Africa is widely reputed to have a 'model' Bill of Rights and so the claim could well be made that all our citizens, including children, are well protected by the rights regime in the country.

The origination of human rights is based on a complex set of notions. The more legalistic/administrative current gives rise to those rights that have been formulated to protect the person (child). If a phenomenon, or a social manifestation, appears to be limiting or threatening a person, rights are designated to protect or care for such persons and protect them from harm or untenable situations. Many of these rights are actually enshrined in law. Examples of these rights are the right to life, the right not to be enslaved in any way, labour rights, property rights, social security and care rights, and the right to basic education. These rights are protection or provision rights and are the responsibility of the state on behalf of all the citizens. They are legally enforceable and designated in philosophical parlance as 'freedom from ...' rights (e.g. freedom from

exploitation, ignorance, malnutrition).

When it comes to protection rights, on paper, South Africa can hardly be faulted in meeting the requirements and stipulations of the international community, as contained in various human rights agreements, even although it may fall short on the implementation thereof. Efforts are also constantly being made by Parliament to improve compliance in realising these rights goals in their implementation. Laws and policies are enacted and introduced and court cases are contested to protect the human rights regimen. For example, corporal punishment was banned in the justice system and subsequently in schools. A challenge in the Constitutional court by independent Christian schools to be permitted to administer corporal punishment on claimed religious grounds was opposed by the state and the state's view prevailed in law.

The Children's Act of 2005 (38 of 2005) and the Children's Bill of 2006, attest to South Africa's efforts to improve the rights of children and the implementation of their rights. The former aims at giving effect to certain rights as contained in the Constitution. It includes in its provisions a defining of parental responsibilities and rights, and it aims at ensuring that the child is afforded the full and harmonious development of his or her personality. It envisages a child growing up in a family environment within an atmosphere of happiness, love and understanding (preamble). As general principles, the Act envisages dealing with a child in a manner to respect, protect, promote and fulfil the child's rights, as set out in the Bill of Rights, with respect for the child's inherent dignity, recognising the need of a child for development and in a spirit of equal and fair treatment (section 6 (2) refers). The Children's Amendment Bill (2006) extends these imperatives to make further provision regarding the protection of children.

South Africa can claim a sound record in meeting the human rights requirements within the state sector. This is referred to as the vertical application of human rights, namely the state protecting all the citizens against the substantial powers of the state, with redress channels to counter any intransigence that is encountered, or any contestation of these

rights.

However, on the other hand, some persons may argue that signing documents, setting policies or enacting laws is well and good, but if the requirements are not substantially realised in practice, as widely occurs, especially where children are concerned, then the children in South Africa do not, in effect, have human rights, or only have partial human rights. Freeman (in Davel, 2000, p155) notes that the symbolic value of such words (espousing fundamental rights) should not be underestimated, but true recognition of children's rights requires implementation in practice.

In substantiating their claim that children do not have real rights in effect in South Africa, persons who believe this would cite the appalling human rights statistics applicable to South Africa, highlighting the incidence of maladies that befall children, such as child abuse, murder (including infanticide), incest, rape, street children (homelessness), poverty, hunger, health (including HIV/AIDS), child headed households, child prison population, abduction, sexual and labour exploitation. An endless list could be proposed, and the substantiation of these claims would make a decisive argument that children's rights are still a dream for many children in South Africa.

Another current that can be discerned in the human rights notion is the vision of what it is, or means, to be human. This may be considered from a more philosophical (metaphysical) point of view. Historically, this debate has logically centred on, and been related to, the religious sense of what it means to be a person, especially from the Western Christian tradition, but in many other religions as well. These religions hold that man is made in the guise of God. This very special origin requires that man should be viewed and treated in a special and privileged way.

However, human rights are not theological manifestations or phenomena. Klug (2000, p 200) refers to the proclaiming of human rights as an attempt to establish a set of common values that are not intended to be exclusive to one religious group or nation, based purely on the prime value of the dignity of each human person. This value can be espoused by

persons who believe in a god, as an inherent dignity and essential equality are reconcilable with a religious heritage based on the conviction that every person is created in God's image. Rights then become the affirmation of this inherent human dignity, as a foundational value (Chaskalson, 2000, p196). Nor are human rights exclusively from a legal terrain. Donnelly (in Freeman, 2004, p382) refers to human rights representing a choice of a particular moral vision of human potentiality, an ontological conception of personhood.

This philosophical and theological vision has given rise to, or developed the meaning of, certain fundamental values implicit in rights concepts and subscribed to in rights documents, such as pre-eminently dignity, freedom, and equality. These and other related values are central and critical values in the RSA Constitution. They are captured in the concept of the person, a being who is worthy of respect, care and consideration. Freeman (1983, p 54) notes that the central mark of ethics is not respect for what people currently are or for particular ends, but rather a reverence for an 'idealised capacity' of what they can become if treated as autonomous persons with their 'own system of ends'. Thus children should be valued for what they are (a person) and what their personhood can become.

These rights are based on the fundamental aspirational values, entrenched in those rights, and geared at giving the person (child) the rights required to be a person. These aspirational values are deemed to be universal, fundamental and non-derogable. They fall under the rubric 'freedom to...' rights, that is, freedom to do or be whatever it is that a person does *qua* person. Whilst society tends to enforce protection or provision rights, the aspirational rights are difficult for a child to enforce in law. In most instances, they are the rights that are realised by persons in the private sphere, including those which are upheld by parents in the home, or at times denied to children in the private domain (i.e. not directly a state concern and hence not enforced in the same way).

This research will review whether children in South Africa<sup>1</sup> in effect realise these aspirational values. The central question is, 'Are children accorded the fundamental and universal rights, values and freedoms envisaged in the various human rights charters?' After all, if the fundamental values underlying human rights are held to be universal, then the rights themselves ought to be universally granted and assured. In answering such a question, it is necessary to delineate the kind of rights that are envisaged and indicate who would be responsible for giving children their due in rights terms. Certain examples will be considered in more detail later in this study (q.v. chapters 4 and 5).

Related to aspirational values, is the realisation of certain rights (freedoms) without which a person would be trammelled in trying to become a fully fledged person. These include rights such as privacy, freedom of religion, belief and opinion, freedom of expression, freedom of association, freedom of movement and even access to information. These could be termed aspirational rights. They are based on the aspirational values and ensure that a child is treated as a person.

The kernel consideration raised in this study is based on the fact that that there has been limited research and debate on what the Bill of Rights actually means for children and how its provisions should be applied to these disempowered and not yet franchised minor children. It is a good feeling to state (section 28 of the RSA Constitution) 'a child's best interests are of paramount importance in every matter concerning the child', but what does this mean for a child<sup>2</sup>, especially from a parent's perspective in the home? It is in the home environment where the child lives for the bulk of his or her formative years and these are critical years in the child's progress towards becoming a fully developed and functioning adult person.

With the establishment of a Bill of Rights, and especially the developments in children's rights, it is necessary to review the current rights aspirations and practices. The past dispensations, such as parental rights based on power and authority considerations, can

---

<sup>1</sup> It will also be elucidated more broadly from international perspectives.  
<sup>2</sup> A child is defined as a person under the age of 18.



no longer be taken for granted; nor can it be business as usual for parents in a human rights era. The relationships between parents and their children must be reconsidered in the light of developments in the RSA Constitution and its Bill of Rights, especially as they concern children's rights. The new value dispensation must be acknowledged and acted upon.

### 1.3 ASPIRATIONAL VALUES AND ASPIRATIONAL RIGHTS APPLIED TO CHILDREN

The RSA Constitution contains a Bill of Rights. It is widely accepted that it is one of the most enlightened documents of its kind in the world. Not only is this so because it was formulated long after most nations had derived their rights documents, and so South Africa could benefit from considering their provisions, but also because, given the serious and general widespread abuse of the fundamental freedoms and human rights in the *apartheid* era, the formulators of the RSA Constitution were adamant in their intention to move away from our unacceptable past record in human rights, and to transform the South Africa society into one which is a model of democratic values and human rights imperatives.

The essential values enshrined in the RSA Constitution are<sup>3</sup>:

Dignity

Equality

Freedom

---

<sup>3</sup> The aspirational values, as they apply to children, will be more fully considered in chapter three.

Democracy

Respect

Justice

The rights contained in the Bill of Rights apply to all the citizens of the country without distinction. Section 7 (1) refers to 'enshrining the rights of all people in our country' and there is no reference to children having reduced rights provisions in the Bill of Rights. In particular, the contentions in the equality clause, section 9 (3), 'prove' that the values and human rights in the Bill of Rights should be seen as applying equally to children, as age is declared not to be a discriminating factor. The limitation of rights, as envisaged in section 36, are specific to a context, or a circumscribed set of conditions, and require the proofs of being both reasonable and justifiable. The limitation clause is not intended to undermine the rights of a category of persons, such as children.

The aspirational values are those that are necessary (not merely desirable, note) for a human being to be a person, or to be a human being of worth. If the above rights and freedoms are denied to persons, they would cease to be persons in the normal understanding of this conception. They would revert to being objects to be manipulated by the powerful and used as these persons please.

In state endeavours, much progress has been made in realising human rights values and rights for children. For example, *inter alia*, in law (child witness mechanisms to protect children; adoption concerns to protect the child's interests; children getting a sound deal in divorce settlements), in medicine (children being consulted on treatments) in social work (no more behaviour modification regime; contracts between a residential institution and the child) and education (a democratically elected representative council of learners; prohibition of initiation and corporal punishment; freedom of religion). However, Feinberg's sentiment (1980, p 89), that the state should be required to intervene to a

much greater degree to safeguard children's rights, needs to be addressed. This would presumably refer to rights in the private domain as well?

#### 1.4 HORIZONTAL APPLICABILITY OF HUMAN RIGHTS VIS-À-VIS CHILDREN

If the Bill of Rights is to be relevant to children in the private sphere, the provisions would need to be applicable and realised in what is referred to as a horizontal application, that is, between person and person and outside the direct sphere of the state<sup>4</sup>.

In human rights literature, rights in the private domain are mentioned at times; at other times they are left out of contention entirely, presumably either because they are not considered to be as important, or because they are considered too esoteric to have any chance of being enforced in a legal conception of rights. Rights in the private sphere may also be seen as embarrassing to discuss, because they may give rise to unacceptable debates from an adult perspective, such as the right of a child to take his or her parent to court to account for the parent's actions or failure to act, even to the point of divorcing his or her parent in extreme circumstances. Such matters appear to be best left well alone. Where private domain rights are mentioned, they are often not rigorously or critically addressed.

There is little real debate in the literature on what it means for a child to have certain rights in the privacy of his or her home. For example, what does it mean for a child to have rights such as freedom of movement and freedom of expression? This is possibly because the common law rights of parents predate the advent of an articulated human rights dispensation for children. Usually, these human rights are upheld verbally, and then whittled away by references to children not being rational, responsible, independent

---

<sup>4</sup> It has been noted already that the vertical application refers to the relationship between the state and its citizens.

*et cetera*, or they are trumped by references to children's duties towards their parents, thereby effectively reinforcing the power and authority relationships that parents have with their children and consequently diminishing any chance of affording real rights to children in the home.

A child's young age should not to be abused by parents, however, as a useful cover for their self serving interests or their personal convenience, thereby denying children their rights. It is interesting, with the AIDS crisis ravaging the RSA, and the advent of a significant number of child headed households, to see how successful many young and minimally educated children are at carrying the full household responsibility for themselves and their siblings, as well as terminally ill parents very often. This includes in certain instances the raising of money to care for the family and to put food on the table.

Children as a cohort may be powerless and voiceless, but they are still persons who are worthy of being treated as having an equal, yet independent, moral standing and worth as is applicable to adults, and to be treated as such.

In the RSA, the common law gives parents widespread powers and discretion in deciding how to carry out their duties to raise their child, but the Constitution does envision that the values and rights enshrined in the Constitution may have horizontal applicability.

## 1.5 HORIZONTAL APPLICABILITY OF THE BILL OF RIGHTS FOR PARENTS?

The state has shown a general reluctance to get involved in parenting decisions, apart from where these are dictated by law (e.g. neglect of children) or where children are in a potential position to be in an antagonistic or contested decision-making process in relation to their parents, such as where the child may be disadvantaged because of the power differential between the parent and the child (e.g. divorce settlement conditions).

It has just always been presumed to be axiomatic that parents act in the best interests of their offspring in all that they do. This is a disputed terrain in theory, but one which is not generally contested in practice. The incidence of child abuse has, however, opened up this debate, but it is seen as a rare and esoteric exception to the much touted 'best interest' parent relationship with the child. The softer crushing, or denial, of child rights within the family setting is seldom investigated or commented upon, unless it becomes a criminal matter or it is thrust into the public light perchance.

An example of this was the Gillick case in England, where the court found for the children, that they had the right to be given contraceptive information at school. By implication, Mrs Gillick would not have provided this information to her daughters in her home, undermining the girls' right to gain information, which may have been pertinent to the way in which they conducted their lives. If Mrs Gillick had not taken the case to court, the children would have been denied this right by their mother<sup>5</sup>.

This applicability of rights values for children in their home will be touched upon throughout this study, whilst the basis for this discussion has been succinctly delineated above.

## 1.6 THE CURRENT FOCUS

The emphasis in this research is not on what the law says per se. It is not a legal judgement that is in contention. It is rather what could be, or should be, when children's rights are considered through the portal of the RSA Bill of Rights in the Constitution, especially as they apply to parents and their children in the home.

---

<sup>5</sup> In South African terms, access to information is contained in section 32 of the Bill of Rights.

The values espoused in the Bill of Rights may form the basis for a consideration of what children's rights hold out as possibilities. This is especially so when inspecting specific rights. What do questions such as, 'What is meant by the right for a child to be treated with dignity and respect?' mean for parents and children in a family setting? 'What does freedom of religion mean for children in a home? How could or should parents optimise such rights for their children?'

The reason that the discussion is not focused on jurisprudential points is because children's concerns could not realistically be dealt with legally, except in extreme cases. If many children were to take cases to courts, the cases could clog the legal system in practice. However, some kind of provision may have to be made to support children whose critical rights are put in jeopardy by their parents. The emphasis in this study is rather on what enlightened parents could believe, and consequently do, to make the home a terrain where their children's rights are substantially met, in line with the intentions contained in the universal and local rights dispensations.

With this in mind, a consideration of the parental role and the parent-child relationship, will be considered in the next chapter.

## 1.7 CONCLUSION

In this chapter, the status of rights, especially as they apply to children, was considered. In terms of vertical rights between the state and children, it is apparent that an articulated rights regime exists. However, in spite of provision in the RSA Constitution for rights values to be recognised between persons, via horizontal rights provisions, this does not occur to any extent between parents and children in the private domain, especially concerning aspirational rights (the rights contingent upon being a person). It was established that these rights are not likely to be realised via legal protocols, but as a function of the parent child relationship.

In the following chapter, the domain of parents and children will be considered, to extend the insights established superficially in this chapter.

## CHAPTER TWO

### PARENTING AND THE EMERGING RIGHTS OF CHILDREN IN A HUMAN RIGHTS ERA

‘To recognize the right of the child to self-determination is to treat that child as a person and to respect his autonomy. But to assume that rational and moral capacity exists, when in fact it does not, may lead to an abandonment of the protections, processes and opportunities that children should enjoy.’ (Hafen in Davel, 2000, p 155).

‘I am not saying that nobody should have a right unless everyone has it... What I am saying is that unless relevant differences can be demonstrated, it is not right to treat people differently; it is unjust. In my view, the differences between adults and children, such as they are, have been overstated by those who support the double standard. Children are presumed to be weak, passive, mindless, and unthinking; adults are presumed to be rational, highly motivated and efficient. The picture is drawn too sharply of course, and nobody pretends that there are not exceptions. The trouble, however, is that a decent account of equal rights for children cannot be based on exceptions. If it is, we have only readjusted the double standard; we have not eliminated it’ (Cohen in Matthew, 1994 p 72).

‘To rescue our children we will have to let them save us from the power we embody; we will have to trust the very differences that they forever personify.’ Jordan 1978 (in Smith, 2000, frontpiece).



## 2.1 INTRODUCTION

The notion of children having rights based on the universal values in founding rights agreements and included in the RSA Constitution, was established in the previous chapter. This included the requirement that children should also realise their rights in the home.

In this chapter, the debate is broadened via a consideration of the standing of children vis-à-vis their parents, especially in terms of parenting roles and children's claims to be treated as persons, fully and in their own right, because children's rights are often the product of parenting. This discussion is further extended in chapter six, when the concept of an enlightened parent as an empowering parent is developed.

The traditional role of parents is discussed, especially from a paternalistic perspective, as it impacts on the realisation of children's rights in the home. The balance of the chapter deals with the children's liberation movement and the impetus world wide to free children from the constraints imposed by parents in the home, including conceptual changes and changes being wrought in law.

## 2.2 THE TRADITIONAL PARENT – A CRITIQUE

What does it (or should it) mean for a child to be regarded as a person in his or her home? When do actions by parents on behalf of their children amount to being in their children's best interests and when do they deny them their very humanity? May a child decide, or do, that which will permit him or her to be a unique person with inherent potentialities to be his, or her, own person? Brennan & Noggle (1997 p 22) hold that even quite young children are persons; they have identities, histories and personal attachments. These are the kinds of things that are constitutive of humanity and need to be acknowledged by

parents in their dealings with their children. The role of parents will now be considered as it impacts on children and their rights as persons, who are worthy of equal consideration and respect.

The right of natural parents to raise their children is founded on the long tradition of history and the culture of Western civilisation (Martin, 1996, p189). Miller (in Mc Gillivray, 1997, p10) describes Western European child rearing as a 'poisonous pedagogy deriving from a pathological parental need for control'. Throughout history, the father has been the dominant parent, with legal rights to oversee his child and control him or her. The ancient *pater potestas* concept even went so far as to give the father the right to the life of his child and he could kill his offspring if he so wished. The child was effectively an object, a possession, to be treated according to the father's whim. Many hundreds of years later, in 1646, the Commonwealth of Massachusetts passed the Stubborn Child Statute under which repeatedly disobedient sons over the age fifteen could be put to death!

One of the problems with the perception of the image of children, lies in the broadly Christian conception of children. Childress & Macquarrie, (1986, p 85) describe the Christian perspective on child raising as an essentially moral act involving the formation<sup>6</sup> of children in a character appropriate to Christian life. Thus every parent's version of what God and the Christian community want, becomes a sacred duty and is acted on, often uncritically. The child is effectively on a conveyor belt being turned out as a standardised Christian product, thereby diminishing his or her unique personhood.

Although the parenting role has become more enlightened in the modern era, fathers still wield immense power within their family unit. Eekelaar (1986, p168) notes that the welfare of the child is routinely equated with the transmission of conventional social norms and one of the most powerful of these norms is the interests of parents being enforced in law (in practice the father's interests). The state usually does not intervene in

---

<sup>6</sup> Note that 'forming' is controlling parent behaviour and thereby discounts the child.

the parent child relationship, and it is generally acknowledged that parents have the right to raise their children as they choose, within the limits of the law, and without interference. There is no set of guidelines as to how much power parents may rightfully exercise in their role as care givers (Andre, internet, p 2). In this aspect, parents are considered to be the most knowledgeable and best judge of what is good or bad for their offspring and can act unfettered in their conception of their role.

The underlying problem is that what transpires between parents, and children in the home, is veiled in a mist of privacy. Parents may be well intentioned, but who knows what dynamics emerge? Commentators aver:

Fineman ( 1999, p1216) holds that 'family privacy has been charged with obscuring and fostering inequality and exploitation'.

Purdy (1992, p 225) reminds, '...love by itself is no real guide to the decisions that daily confront those (parents) who deal with children.'

Freeman claims that benevolence is not enough (McGillivray, 1994, p 243)

A body of opinion has emerged that challenges the myth of the conceptualisation of the parent child relationship. The challenge has been linked initially to attempts to escape the perceived patrimony in families vis-à-vis wives, and it has been extended to the lot of the children in father dominated and controlled families.

The concepts or constructs, such as 'father', 'child' and 'family', need to be challenged and 'deconstructed'<sup>7</sup> to lay bare the power relations implicit in the family setting.

Woodhouse (1999, p1251) points out that 'family as a legal construct is a coercive institution' involving subjugation. Children's rights have been severely limited in practice, because they depend upon adults for articulation, assertion and enforcement

---

<sup>7</sup> Deconstruction would entail unlayering accumulated meanings aggregated over time and get to the essence and substance of the words/concepts.

(Woodhouse, 1992 p1051/2). Jagger (2000, p 506) talks about colonising children, by denying them their rights in the name of paternalistic concern for their welfare. History has shown in politics (and we are referring to the politics of the family) that in order to emancipate the colonised, we need fundamental shifts in perceptions and actions, as well as in traditions such as law and religion. The power needs to be confronted and attitudes need to be changed.

Changes will also be needed in the socially constructed relationships in the family, to alter or ameliorate the power and privileged positions of the parents, as children rights, or lack thereof, are the very stuff of these parent-child relationships. We are ultimately talking about imbalances of power and resources, which are deeply embedded in the way we live and are organised (in Davel, 2000, p 155). The facts that children are relatively inexperienced, reliant on others, not fully rational, not financially independent and not autonomous, become self-perpetuating premises, which are used in a parent's mind to keep his or her child in an inferior position. Authoritarian and exploitative regimes can then become established in the home and prevail, with parents dominating through the familial power dynamics

The moment that it is said in generalised terms that (say) 'a child is...' or 'a child ought to...', conceptual meanings take over our understanding, and the concept, and the value judgements implicit in such terms, take hold as factual statements in person's minds. It has been said that 'A child is immature, irrational, illogical...' the list goes on and the stereotypes become deep-seated received 'truths' or 'understandings'. They are difficult to challenge, simply because they are value judgements and emotionally held.

In philosophy, 'is - ought' statements fall under the naturalistic fallacy, whereby claimed 'facts' are used to (falsely) draw evaluative conclusions, as if they too are factual by extension. An example could be: children cannot comprehend all the consequences of their decisions (the 'is' premise), therefore the parent must decide for them on every matter (the 'ought' premise). The argument looks logical, but the so-called factual statement (the child cannot comprehend) and the evaluative conclusion (parents must

choose) are both open to contestation. In fact, there are many possible evaluative statements that may be drawn from the 'factual' premise. For example we could conclude, 'therefore parents must provide information and empower their children to make sound decisions' is equally logical. The difference in parental behaviour in each instance of interpretation could be immense, with one child being discounted and the other empowered.

Thorne (in McGillivray, 1997, p 234) states that: '...children tend to be constructed as 'the other', as opposite and inferior to adults'. The family hierarchy reifies the 'autonomy' of adults and the 'dependency' of children.' In the process of imposing a construction or conceptualisation, power becomes the right to have your conception of reality prevail (John, 2003, p 47). Bartlett (1988, p 303) points out that 'the child' is highly contingent on social construction. Children are caught in an emotional trap, which they can seldom escape without assistance. Even in attaining their majority status as adults, these emotions may persist and even perpetuate from generation to generation.

The conditioning goes beyond a familial disciplinary regime however. Miller (in McGillivray, 1997, p10) elucidates the problem:

' Since training in many cultures begins in infancy during the initial symbiotic relationship between mother and child, this early conditioning makes it virtually impossible for the child to discover what is actually happening to him. The child's dependence on his or her parents' love also makes it impossible in later years to recognize the traumatizations, which often remain hidden behind the early idealization of the parents for the rest of the child's life.'

The immense parental power and responsibility in rearing a child is eloquently captured by Miller. This shows how important the parenting task is and underlines the need for optimal parent child relationship based on human rights values.

### 2.3 PATERNALISM AND CHILDREN: A CHANGING PARADIGM

Parents are described as being paternalistic towards their children. In fact the '*pater*' root is Latin for 'father' and demonstrates the co-extensiveness of the two concepts.

Paternalism involves a claimed 'justified' interference in the liberty of a child for reasons ostensibly related to the child's welfare, interests, needs, good, or happiness. In so doing, the parent limits the choice (autonomy) of the child, supposedly in the child's best interests.

Paternalism can be justified in certain instances and for the valid reasons which may be given in such instances. For example, 'you may not get married at the age of ten', would be a statement of good protective parenting. But paternalism can also become a slippery slope for the use of influence, and even coercion, for a parent to get his or her own self centred way. It may entail the use of duplicity, such as nondisclosure of information, deception, manipulation and lying. Such paternalism may not be justified, in attaining the parent's ends, and certainly not justify the parental means for handling a child in a particular instance. The philosopher, Kant, spoke of not treating another as a means to our end, but as an end in himself or herself. This should apply to parents in dealing with their children wherever possible and feasible. The personal sovereignty of the child is defeated by abusive paternalism, especially if it is unnecessary to do so in the child's best interests.

What is needed is proportionality between the ends that are reasonable and justifiable, and the decisions taken as a means to that end. There also needs to be a proportionate and justifiable balance between the parents' rights and the child's rights. The questions that such a suggestion raises are: 'Who will know how parents treat their children (will they be found out)? Who will assure accountability by parents for their decisions and actions vis-à-vis their children?' It is at this level, that children's rights become obscured or lost in the implementation by all powerful parent figures. Childress & Macquarrie (1986, p 450) advise that the means of intervention chosen by parents in treating their children

should be the least restrictive which is acceptable in the circumstances, or the least insulting, or the least humiliating. Foster & Freed (in Breen, 2006, p 5) commented that 'the status of minority is the last relic of feudalism', and contemporary parenting relationships need to be far more subtle and sophisticated to realise a children's rights' culture in the home.

Paternalism should be made to equate to the 'stewardship' or 'trusteeship' of one's children, and not to being their 'owner', or the child being an object of parental whims and prejudices. It should not be a matter of parent power, but empowerment of the child. It should be remote from any form of oppression, coercion or control, especially as these are not necessary or justifiable, except in extreme instances.

The family should be the child's first and most powerful experience of democracy, based on trust and faith, just as occurs in the relationship that adult citizens have with an enlightened state, which is based on a human rights regime. Democracy in this sense is generic: it is not a majoritarian concept, nor a ruler taking control as an appointed leader. It is rather based on the initial Greek state ideal of each citizen being of equal worth and hence having an equal say, a quantum of only one vote each. In this process of respecting others, the test of a democracy is how it treats its minority citizens. Similarly, democracy in families is a test as to how a powerful parent treats a vulnerable child.

Fisher (1997, p 422/423) described this relationship with a child as: 'it is the parent's privilege (not right) to care for and raise their children and their responsibility to ensure the temporal interests of his or her child'. In the process, parents' 'rights' must be modulated to accommodate the real needs and interests of their offspring. It is not so much about parental authority, but parental responsibility.

There is a greater significance attributed to children in the contemporary family and an increasing appreciation of pluralism in our society, rather than on imposing a stifling conformity<sup>8</sup>. Unity within a family can be achieved in diversity. Every good democracy

---

<sup>8</sup> This is especially so in our multinational, multiracial and multifaith South African society.

does precisely that. It simply takes an adjustment of parental needs and goals to consider the needs and legitimate requirements of their children. The assumption that children's gratifications and desires are of lesser significance than the parents is simply not true for enlightened parents. The parent child relationship is a fiduciary relationship for such parents. Their faithfulness towards their child is sacred.

#### 2.4 THE CHANGING CONCEPTIONS AND STATUS OF CHILDREN: THE CHILDREN'S LIBERATION MOVEMENT

Another impetus towards the establishment of children's rights was the children's liberation movement. Coincidental to the era of emancipation of women in the second half of the twentieth century, a children's liberation movement emerged. Although it highlighted many important facets surrounding children's rights, it also did the cause of children's rights much harm because it was taken to excess by some commentators.

For example, the notion by Farson in 1974 that 'children had a right to conduct their sexual lives with no more restriction than adults'<sup>9</sup> (in Andre, internet, p 3), confirmed for probably the majority of parents that children's rights were an ungrounded and dangerous liberal excess that should be rejected and contested. This had the effect that parents had a powerful moral argument that children's rights would acquiesce into hedonism and lack of discipline. Many parents reacted by taking a more entrenched stance to control their children and to assert their own protective and nurturing rights, contrary to their children's rights and their child's best interests in many instances. What the children's liberationists tried to accomplish was roundly being defeated by the excesses of their own arguments and the realisation of children's rights were consequently set back.

Where these children's liberationists erred was in treating children as adults. There is a distinct difference between the 'same rights' and 'equal rights'. Even for women adults,

---

<sup>9</sup> In our age of sexual promiscuity giving rise to AIDS, this stance is even more questionable.



the distinction is made between equal treatment with men based on equal moral consideration (e.g. the right to participate in professional sporting competitions, but against other women) and the same treatment as men, which is not context or person related (e.g. women competing in sporting competitions directly against men) (Weisberg, 1993, section 2). The difference between men and women is acknowledged and accommodated, without detracting from women's rights. Similarly, children are not adults, but they need to be treated with equal consideration and respect to adults.

What should have been argued by the children's liberationists, was the moral equivalence of children and adults. In the process, the differences would be acknowledged, but not used as a pretext to deny children their rights and without using the differences as an excuse to deny children their dignity and respect. Children should be accorded their legitimate rights in an acceptable way in the appropriate circumstances. Mac Cormick (in Fortin, 2001, p 247) points out that parents can accept the concept of their children having rights, without being committed to outrageous permissiveness. This is the fear of many parents and agencies, such as religious groupings in society. These fears are played upon and used by groups and individuals who like to dictate and control the upbringing of children according to their controlling beliefs, the fears being perceived as mandating their stance.

However, the children's rights process, and in particular the child liberationist stance, has challenged parents and conservative groupings in society. Cohen (in Davel, 2000, p 152) acknowledges that: '...rights is a militant concept and usually forms part of a campaign for social change'. Any change in the status quo is challenging and hence resisted. The uncompleted liberation of women is a recent example in point, as is the campaign against racism. This may also account for some of the bad press that the child liberationists received. They took on the power and it was met by parental and entrenched societal power.

Other aspects of the children's liberation movement were simply based on applying the human rights values, and articles in charters, to children's lives. As such, the

liberationists opened up a useful debate and much has been done to try to secure real, fundamental and appropriate rights for children.

## 2.5 THE CHANGING CONCEPTIONS AND STATUS OF CHILDREN: CHILDREN'S RIGHTS AS THE RIGHTS OF A PERSON

It is contended that there are no morally relevant differences between children and adults. Certainly differences in chronological age between the two generations are not morally relevant. The question remains: 'Do parents have the right to decide by which values and traditions their children will be raised or do children have the right to choose for themselves when they show a reasonable disposition to do so?' In other words, do parents' rights prevail, or do children have the right to give content and direction to their own lives, noting that universal rights requires us to treat persons similarly unless there are morally relevant differences between them (Purdy 1992, p 3).

Parents rights are no longer universally held to be absolute and their word sovereign on all matters concerning their children. Children have rights and 'ought' to have a say. Holt (in Freeman, 1983 p 2/3) held that '...nobody can know better than the child himself.' Cohen (in Purdy, 1992, p 42) makes the pertinent point that we cannot know much about the interests of others. Parents do not have a monopoly on wisdom and it cannot be presumed that they know better. Children may not be as articulate, or as logical, as adults, but this does not mean that their choices are irrational and less sincere than those of adults. They could be just as legitimate as choices, for them.

Autonomy does not equate with treating children as adults and abandoning responsibility towards them. It is more an attitude to be adopted by parents towards their children, in which their children's competencies are respected and their decisions given credence where due. The International Year of the Child (1979) initiative declared their aim as being to promote the acknowledgement that children and youngsters must be allowed to

participate as independent human beings in all decisions concerning their lives. In short, children's rights commences with an acknowledgement that children have rights independent of other family members. They are sovereign. Alaimo, (2002, p xiv) sums the position succinctly when he said 'children matter and matter in their own right.' Archard (1993, p 300) declares that children are self-owning. If children are going to be allowed to have rights by their parents, they must be given the optimal degree of personal choice to create their version of themselves and their own lives, as far as this is possible.

## 2.6 THE CHANGING CONCEPTIONS AND STATUS OF CHILDREN: THE EMERGENCE OF CHILDREN'S RIGHTS VIA CHARTERS AND LEGAL PRECEDENTS

There has been a concerted movement internationally towards the awarding of human rights to children. This is evident in various charters and bills of rights, sometimes directly via specific enforceable rights for children, and sometimes by inclusion of children as members of the human race and as persons worthy of dignity and respect, by allusion to the fundamental values, which are inclusive of all persons.

The unanimity internationally is remarkable, with the vast majority of the United Nations members signing up for the various agreements. The United Nations Convention on Children's Rights is the most widely ratified human rights instrument in the world. The unanimity crosses racial, cultural and religious groups to a phenomenal extent. The challenge now exists to get better implementation of the agreements and compliance with the aspirations expressed in these accords. There is also a compelling need to address what human rights for children mean in the private sphere.

The emergence of children's rights has been a multi-pronged, but related, set of victories. The various charters and conventions in the second half of the twentieth century, were a massive step forward in the 'idea' of children's rights. The United Nations Convention on

the Rights of the Child (Article 12) adopts a typical enlightened view on participation rights, as expressed by Steiner, 2000, p 516):

‘The right of the child not only to express an opinion but also to have that opinion taken into account in matters that affect him or her is a highly significant recognition of the need to give children a greater say in their lives.’

Since the articulation of such conventions and charters, the emphasis has been the entrenching of children’s rights and their implementation.

The courts, in various countries, have been a significant factor in bringing children’s rights into the public imagination. For example, in the US, in the re Gault case of 1967, the Supreme Court, held that neither the 14<sup>th</sup> amendment, nor the Bill of Rights, was for adults alone. In the Tinker case, children were declared to be persons under the Constitution (Freeman, 1980 p 14). In Britain, the celebrated Gillick case declared that parental rights ought to exist only in so far as they benefit their children, especially children who have the, albeit undeveloped, capacity to receive information that will make it possible to decide on issues that affect their lives for themselves. In other words, parents’ rights acquiesced to children’s rights in this case and established a significant precedent. In England (Freeman, 1996 p170), the court recognised that children have individual minds, and wills, and views and emotions (i.e. that they are persons in fact). Chadwick (1998, p 451) indicates that children should be recognised as beings with independent moral worth and legal standing. Children’s views are not automatically assumed to coincide with the rights of parents, nor do their parents necessarily represent their interests. In South Africa, the court decision to ban corporal punishment in private Christian schools, had a decided effect on establishing that children have rights, contra their parents’ rights and against established institutions, such as certain influential churches in this instance.

The outcomes of such cases establish the principle in the public mind that children have personal rights, which are enforceable, and they have had a decided public effect on child

rights advocacy. The legislation is a powerful symbol of legitimate action, which the outcomes of court cases can reinforce or pre-empt. Children do not have to wait to achieve legal majority status to receive their just rights deserts, or in fact to claim their rights.

The significance of this development is that children are enabled to claim their dignity and demand what is their due in terms of their rights. This is independent of their physical, intellectual and moral development, which are often touted as reasons not to give children rights and a degree of autonomy, because they are held to be underdeveloped in such areas. Children's rights protect children from arbitrary or unacceptable interference. Lewin (in Hegelson, 1989, p 9) reminds that '...the capacity of the child has nothing to do with their rights to be treated fairly, decently and humanely.' Children's rights become a matter of fairness to them as persons.

Based on the fundamental values enshrined in human rights parlance, children's rights reflect an extension of the rights accorded to adults, to the extent that it is possible and in a way that is acceptable, as being in their best interests. Essentially, the rights that go towards the making of a person, are claimed as being owed to children, as they are moral persons from birth and are required to be treated as such.

## 2.7 PARENTS AND THE REALISATION OF CHILDREN'S RIGHTS

The problem in the realisation of children's rights is that parents are ingrained in a protectionist role, which they equate with good parenting. Parents feel that perpetuating what has gone before (i.e. the way they were treated by their parents in turn) would suffice as a social template and so they pass on the outmoded social values and norms to their children (e.g. 'children should be seen and not heard' type of conventional Victorian wisdom from the nineteenth century). The emphasis in this kind of protectionist regime is predicated on the interests of the parents themselves. Hence all claims to be acting to

protect children need to be treated with scepticism and inspected for the true motivation behind the claims. Blackstone (in Eekelaar, 1986, p162) spoke of parents 'natural affection' towards their child and felt that the law needs to restrain a parent's protective impulses rather than to encourage them. Protecting children in effect begins with protecting their rights, including their impulse for self determination.

To accomplish more enlightened parenting roles, parents have to change. Davel (2000, p 153) suggests that the only right the child requires is for his or her parents to protect and promote the freedom and human dignity of the child. In doing this, parents will need to balance their nurturing role with the child's emerging need for self-determination. These are not the parental 'duties' that authoritarian parents find so onerous, but rather the obligations that parents incur when they take on the responsibility of having (or adopting) a child and raising him or her. Self-determination is the essence of fundamental rights values for all persons. It does not however imply an independent, monadal existence.

All persons in a family have the same rights and so cohesion in the family can be attained by the parents discussing issues and making joint decisions with their children. In this way, parents include their children as members of the family, instead of stifling their individuality. This process will inherently develop the child's sense of self worth and increase his or her judgement and capacity for decision making, so critical in attaining maturity.

This style of parenting requires from parents, according to de Mause (in Eekelaar, 1986, p161), the emotional maturity needed to see the child as a separate person from himself or herself. The emerging emphasis has been towards giving children greater autonomy, with the commensurate choice, responsibility and freedom to be their own person, including making decisions that would ultimately permit them to realize their personal goals in life. A greater self-determination regime, increasing with age, experience and capacity, has become more acceptable over time, permitting children to have a say (or even decide) on matters directly affecting them. This is so for children at a suitable age and maturity, for example in matters such as making medical decisions for themselves, as

to whether to undergo a medical procedure without their parents consent necessarily<sup>10</sup>. Similarly, the children's courts permit the child to make inputs into divorce arrangements, which are being made for the children.

Having considered the traditional role of parents and the changes that are being wrought in society with the emerging rights of children, we will consider the philosophical values that underlie these changes in a human rights era in the following chapter.

## 2.8 CONCLUSION

The traditional role of parents vis-à-vis their children was problematised in this chapter. It was found that parents are not universally contributing to the realisation of children's rights in the home, in fact. Their approach is often self-interested and their consideration in ensuring children's rights for their offspring is often cursory or merely honorific.

A number of initiatives over the years, both philosophical and legal, have started to bring about the necessary change in the lives of children, in order for them to achieve the 'best interests' refrain touted concerning children's rights.

In the ensuing chapter, the fundamental values that underwrite children's rights claims are interrogated as they apply specifically to children.

---

<sup>10</sup> This includes the right for a child to have an abortion at an early age (12) without the parents even being informed (Robinson, 1997, 10).

## CHAPTER THREE

### FUNDAMENTAL HUMAN RIGHTS VALUES AND THE CHILD

‘...the significance of children’s rights is that any qualification to the range of rights they are accorded by society has to be fully justified by reference to other human rights principles rather than to the predilections, prejudices, or narrowly conceived self-interest of adults’ (Alston, in Davel, 2000, p 153).

‘We cannot treat persons as equals without also respecting their capacity to take risks and make mistakes. We would not be taking rights seriously if we only respected autonomy when we considered the agent (child) was doing the right thing.’ (Freeman & Veerman, 1992, p 38).

‘The higher status of human rights is seen as a result of their legal universalisation, of the triumph of the universality of humanity. The law addresses all states and all human persons *qua* human and declares their entitlements to be a part of the patrimony of humanity, which has replaced human nature as the rhetorical ground of rights.’ (Douzinas, 2002, p 116).

#### 3.1 INTRODUCTION

In the previous chapter, the deficiency in the realisation of the fundamental aspirational rights for children was situated in the traditional parenting role, which is overly, and often, unnecessarily paternalistic and protective.



In order to make the claim that children indubitably have fundamental rights that are their due, the axiological and fundamental values underlying the human rights edifice are reviewed, as they apply to children in particular. This concretises the claims made in the first chapter for horizontal rights in the private domain for children. In addition it provides criteria for considering the deficiencies claimed in the second chapter in parenting roles. It also looks forward to the two articulated examples to be addressed in chapters four and five, as well as the resolving of these problems via the concept of an enlightened parent in the summative chapter six, wherein enlightened parents treat their child as a person, worthy of being treated with respect and dignity. The claim is that the child is equal in moral consideration to adults when it comes to fundamental human values, which are enshrined in universal human rights.

### 3.2 FUNDAMENTAL VALUES AND RIGHTS FOR CHILDREN

What bearing do human rights have on children in the home? What should or could human rights mean with reference to children? What does it mean for children to be given their rightful dignity in the home? What is meant by parents respecting their children? What do we mean when we speak of treating children equally? How can children be awarded freedom under the Bill of Rights, especially in their private worlds? How can democracy be a factor in children's private lives? What does it mean to parents to ensure the best interests of their child?

These are the sort of concerns that should be being researched, and debated, and applied to children, if children's rights are to have any real and coherent meaning. The obverse should also be considered in giving direction to their meaning. What constitutes being treated in an undignified way? What is unacceptable and unjust treatment in child terms? What behaviours by parents rob their children of their respect and autonomy?

The legally enshrined rights are useful to assure certain values for persons, but their very legality often makes them remote from the world of children in the private sphere. Samek (1982, p 786) views the notion of fundamental rights as a dynamic response to man's condition in the world and not as a bundle of claims with a static ideological content. To assure rights for children, we are looking more towards advocacy and education of parents, than legal processes per se. Stoker (in Forsyth, 1979, p 16) talks of ontic rights, as the rights of a human person in his fundamental uniqueness, ontic as being related to 'being'. Similarly, Christianity is accredited with providing some of the metaphysical foundations of the concept of a person as a moral subject (Morris, 1994, p 4), as a sacred concern for the intrinsic value of a person. Modern human rights are predicated on fundamental values that inhere in human beings and permit them to flourish as persons. We need to address the fundamental conditions for the dignified existence of the human person, as applies to a child.

There exists in human rights concepts, a variety of fundamental values, expressed as ideals, which form part of an integrated and multiple interrelated set of meanings that overlap with each other, and add nuances of meaning to each other. These values, that impact on children's rights, are:

Respect for person

Dignity

Equality

Autonomy

Freedom

Justice

Each of these will be considered in turn, as they relate to the child's world.

### 3.3 THE CONCEPT PERSON AND RESPECT FOR PERSON

The bearer of rights is a person. Person is a status conferred on an individual from birth and denotes a human being of worth and consideration. It is a moral concept of personhood, not a legal construction. Persons should be respected for their individuality and uniqueness. Person denotes the open endedness of an individual, what he or she is, and what he or she may become via their own agency. Person, as a concept, implies infinite value. Therefore, a person starts out as a valued, but empty set, which becomes self-determinate during the course of a lifetime, including development that takes place in the childhood years. In order for this to come to pass, a person (child) needs to be conscious of being a person, because of the way they are treated by others, and having some degree of agency to realise his or her own meanings, values, attitudes, feelings and ideas that enable the child to emerge as a fully fledged person (Boy & Pine, 1982, p 145).

Peters (1972, p 213) talks of letting the (children) determine their own destiny and order their own preferences, conceive their own goals, deliberate on their alternatives and implement those of their choosing. Personhood is not a passive concept of being put on a pedestal and protected, even by well-intentioned parents; it requires engaging in the life of a community (including a family).

Hastings (2000, p 533) talks of persons being constituted in their relationships, rather than being grounded in some abstract ontology. The concept *Ubuntu* in African humanism, is rendered more fully as '*umuntu ngumuntu ngabantu* with the meaning 'persons depend on persons to be persons' (Schutte, 2001, p 3). In short, it means 'I am human because you are human.' *Ubuntu* implies 'humaneness'. Makgoro (in Devenish, 1999, p12) describes *ubuntu*:

'While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it

denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.'

In philosophical terms, a person is not essence (set at birth) but existence (forged through living life). In so doing, persons create themselves as their own projects.

Kohlberg postulated different levels of functioning morally. The highest level is described as 'belief in the sacredness of human life as representing a universal human value of respect for the individual' (in Vandenberg, 1983, p 49). If parents all functioned at this level, children's rights would be assured in practice. They would treat their offspring with tolerance and charity, as beings of intrinsic worth. Words such as deference, esteem, sympathy, honour, courtesy, compassion and consideration would be used to describe such a parent child relationship. Such a parent would respond to his or her child's needs and promote his or her welfare.

The child has developmental tasks to accomplish to realise a higher level of functioning. Maslow postulated a hierarchy of needs and the highest need is for 'self actualisation', defined as the desire to become everything that one is capable of becoming (in Hjelle, 1981, p 373). The person must take responsibility for himself and the world. He or she must develop the capacity for self-direction, self-regulation and self-understanding. This cannot happen if the child is not brought up with some degree of freedom, to have his or her own ideas, values, attitudes and beliefs. A person (child) will be severely limited in the realisation of his or her personhood, if he or she is instrument of the purposes of others (parents). Kant referred to this as being treated as an end, rather than being treated as a means to another's end. Persons are beings in the process of becoming (Boy & Pine, 1982, p 143) and they must increasingly set their own ends, getting there via their self-chosen means.

A person ought to be acknowledged as a full member of the community of human beings, with all the privileges attached thereto, as for every other person. This is expressed as having 'respect for persons'. It could also be rendered as having reverence for person,

highlighting the sacred respect due to all persons. These relationships clearly denote the absolute value of a person. Kant expressed it succinctly: 'I have a duty to promote the happiness of others, but not their perfection, as this is necessarily the work of his or her own freedom' (Childress & Macquarrie, 1986, p 542).

We need to treat children as determiners of their own destiny. In so doing, we need to take an account of their feelings and their view of the world, their aspirations and their values, and ultimately their choices. Peters (1972, p 211) describes personhood as follows:

'The concept of being a person...is derivative from the valuation placed in a society upon the determining role of individual points of view. Individuals will only tend to assert their rights as individuals, to take pride in their achievements, to deliberate carefully and to choose 'for themselves' what they ought to do, and to develop their own individual style of emotional reaction – in other words they will only tend to manifest all the various properties which we associate with being 'persons' – if they are encouraged to do so.'

The critical role of parents in fostering personhood in their children is evident, as seen through the portal of respect for person. Treating a child with compassion or benevolence is important, but it may be patronising and done without feeling. Parents must show true respect and permit the child to have his or her dignity. The child must be permitted to be his or her own person, to have personal choices and personal integrity. This is seen in according to the child the maximum realisation of personal values, such as freedom/liberty, autonomy, individuality, uniqueness, privacy and equality. To hold back on such values is to treat a child as an object of the parent's perceptions and will. To that extent, the child is depersonalised and not respected as a person. The child must be recognised as a person and acknowledged in his or her own right.

Personhood is contingent on a related set of aspirational values which are typically described as 'fundamental' values in human rights terms, because they are also

constitutive of attaining the ontological status of personhood. The first, and seminal value in the RSA Constitution, is personal dignity.

### 3.4 DIGNITY AS THE FOUNDATIONAL HUMAN RIGHTS VALUE

Equality of rights is predicated on the equality of dignity. It is dignity that is the essence of the other rights. Without dignity, other rights would be meaningless. Dignity promotes living together in harmony and is a crucial aspect in accommodating conflicting human interests, as everyone has an equal right to being treated with dignity. Dignity is symbolic of the worth of all persons. It requires others to show due deference to the value of other persons as persons. It means having unconditional positive regard, including for a child. The right to dignity ensures that everyone's humanity is protected. There would be no need for human rights, if there were a perfect realisation of dignity in humanity. Everyone must be accorded a life commensurate with dignity.

The dignity of the person is the first and most fundamental value mentioned in the RSA Bill of Rights. Similarly, the German Constitution, places dignity as the core and primary value. Both these countries had experienced the greatest affront to persons imaginable, the RSA via the *apartheid* era and Germany via the atrocities experienced under the Hitler regime.

However, dignity is also an aspirational value in human rights parlance and is espoused by these two countries for that reason as well. Dignity is fundamental to being worthy as a human being and being respected as a person. It encapsulates the value and goodness of being human and it is the foundation of morality. It is central to all human rights documents in civilised countries. It even receives specific approbation in those countries that have poor human rights records. Dignity is a quality that each and every person has at birth. It does not have to be earned and it cannot be taken away. In effect, dignity is a gift that is given by every person to every other person. To treat someone in an

undignified manner does not mean that they are denuded of their inherent dignity; it merely means that someone is acting in a demeaning way towards them, which would be immediately criticised in any humane and civilised society. Schlacter (in Chaskalson, 2000, p 198) sums up this foundational value:

‘Political leaders, jurists and philosophers have increasingly alluded to the dignity of the human person as a basic ideal so generally recognised as to require no independent support. It has acquired a resonance that leads it to be invoked widely as a legal and moral ground for protest against degrading and abusive treatment. No other ideal seems so clearly accepted as a universal social good.’

In article 1 of the German basic Law, dignity is held to be unassailable. Dignity for Kant is associated with unconditional and incomparable worth. Nothing may detract from the worth of a person, including the age of a person, so children have to be accorded as full a measure of dignity as adults. Parity of dignity and equality of treatment are intrinsic to a human rights culture. For religiously disposed persons, dignity may be associated with God and equated with the spark of the divine in each and every living human being.

For Feldman (2002, p 127), dignity as an ideal must be protected. It gives rise to a positive duty to provide conditions in which dignity can flourish and a duty to protect persons against assaults on their human dignity. For example, there should be a concern to prevent treatment by others, which may damage a person’s self respect, including his or her physical integrity and moral integrity. Thus the law will protect one’s life and one’s reputation, for example. But moral dignity is not merely a matter of reputation; it is distinct from status, honour or reputation. It is an inherent quality that is acted upon in dealing with others, no matter what. It is faceless in that it applies equally to all.

When it comes to children, the need for protecting the dignity of children and their personal moral integrity is more nuanced and subtle than it is with adults, but just as compelling. The problem is that there are no external criteria and no acid test to ensure dignity is being acknowledged, as dignity is very often an internal feeling or a felt

experience. It is sometimes easier to discern indignity, if a child is treated unjustly, or in a dehumanising manner, or without respect, or in degrading and humiliating way. In Roman Dutch Law, dignity was equated with self esteem. Dignity is respecting, in each unique person, our common humanity (Ammicht Quinn 2003, p 53). Dignity is realised in relationships. In this regard, the subtle distinctions should be noted with regard to relatively powerless children, that treating a child with dignity is related but different to treating a child as having dignity, and again in allowing a child to have his or her dignity. Children's rights relate to all these propositions.

Parents, in their actions and words, need to acknowledge the worthiness of their child. Children's very humanity is the source of their dignity. Acknowledging children's individual uniqueness will evoke respect for the child as a person. We noted above the value repository that inheres in personhood. It entails treating children's life choices with respect. It requires treating others with tolerance, compassion, kindness and altruism, even when dealing with relatively powerless children who are so easily overlooked or disregarded.

Treating children in a dignified way, relates to the parent child relationship and involves a mutual understanding, an active and positive appreciation of the value of human difference. Arendt (in Douzinas, 2002, p 141) holds that 'the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself.' Such humanity should first be realised in the home and learned from parents, by the way they treat their sons and daughters.

### 3.5 EQUALITY AND THE CHILD

It is the essence of human rights values and the central pillar of democracy that every person is worthy of the same moral consideration and needs to be treated equally. Children are easily disregarded, because they lack the power to stand up and claim their



rightful place in the community and the home. Yet to treat them as inferiors, or persons of little consequence and standing, is an affront to their personhood and human dignity.

The philosophy of Levinas<sup>11</sup> is pertinent to our understanding. Levinas postulates ethics as first philosophy, meaning that the deeply engaging metaphysical questions, such as the meaning of life and the existence of God, are of secondary consideration. The first responsibility is how we treat our fellow person, any fellow person. By this is not meant charity, or good works on behalf of others less fortunate than ourselves, although our fundamental relationship with every 'other' that we encounter may require such considerations in certain and appropriate circumstances. Our relationship with 'the other', or 'the face' as Levinas refers to it, is much more fundamental. We are condemned to respond to every person that we countenance, even avoiding interaction is a response, and we are ethically committed in that response. The 'face' designates a neutrality with regard to the persons encountered, a lack of any predisposition based on prior knowledge of the person's status or power.

Our reaction to the other should not be according to empirical criteria such as age, gender, class, intelligence or beauty. We need to react to the inner person who is worthy of equal consideration and response, no matter who they are. They are of equal worth and hence of equal concern. A beggar is entitled to the same equal reception and treatment, as we award to our most beloved other. Flowing from this ethical construction of mankind, Levinas sees rights and duties being derived from the ethics of love and justice (Reese, 1996, p 407). Alves (2000, p 495) encapsulates it well: 'It is essential to respect 'the other' and 'the human community present in him' as both capacity and promise.' What is needed is widespread affirmation of the right to difference.

This approach is reminiscent of Rawls 'original position', wherein we decide in advance of our knowing our fate, what the allotments will be in life (under a 'a veil of ignorance'), how the 'goods' (not material per se, but life and personality chances) will

---

<sup>11</sup> A good introductory work is *Ethics as First Philosophy: The Significance of Emmanuel Levinas for Philosophy, Literature and Religion*, edited by A T Peperzak, 1995. Routledge, New York.

be distributed in society. The basis is then set for the contractual relationships that will serve in our idealised society, and we need to accept our allotment in life, as we decreed the rules that would apply and must suffer the fate that we decided in advance. It would be similar to a parent deciding in advance of any specific knowledge, how a child should be treated, prior to him or her becoming that child and encountering the implications of their prior decisions.

In Christian terms, similar considerations apply. Every person is created equally in the eyes of God, and is worthy of equal consideration and treatment. The relationship to concepts such as respect, personhood and dignity is evident, as these entail equal concern and respect for all persons. Thus persons in the ontological sense have an equality that is infinitely compelling and overrides any empirical differences between them (Childress & Macquarrie, 1986, pp 199-200). All human beings are of equal inherent worth.

It is therefore treating persons unequally, that needs justification. The Constitutional Court (in de Waal, 2003, p 232) acknowledged the centrality of human dignity to the prohibition of unfair discrimination:

‘In our view unfair discrimination...principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.’

Under the Constitution, there is no place for prejudicial treatment or unfair discrimination. There is therefore no place for a second-class personal sovereignty. Klug (2000, p 200) notes that the fundamental rights are an attempt to establish a set of common values that are not intended to be exclusive to one religious group or nation. She expresses this sentiment thus:

‘The idea of human rights, as it is understood today, does not require a belief in anything more than the dignity of each person. Nor is the human rights approach necessarily secular in the sense of being incompatible with belief in a

god...concepts like the inherent dignity and essential equality of each human being can equally be said to have a religious heritage based on the conviction that every person is created in God's image.'

Equality is also a concept with legal overtones. It is a core value in the RSA Constitution, given the transforming required in our society, in order to move away from our inequitable past. Equality is, at a simplistic level, the treating of individuals in exactly the same way, irrespective of the context involved. However, nuanced equality is more appropriate very often in dealing with children, where equality is tempered by the circumstances involved. Distinctions may be made in certain circumstances to accommodate specific needs and interests in a credible and justified manner. It is just as unacceptable to treat persons as if they were the same, when differential treatment is required in the context. A child does not have an equal right to drive a vehicle on the public roads, but does have a right in the home to expect to be transported to school each day, as appropriate. This distinction results in unequal treatment on a fair and justifiable basis. The differentiation is fair and appropriate and therefore not discriminatory. The Constitutional Court decided that (de Waal, 2003, p 200):

We need...to develop a concept of unfair discrimination, which recognises that although a society which affords each being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one that furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.'

These subtleties in applying the equality principles in law, apply with equal force when parents are treating their children in the home. The difference is that it is the parents who have to be the arbiters as to whether the equality right is being introduced correctly, or whether their children are being unfairly discriminated against, thereby diminishing their

dignity and adversely affecting them as persons, in their development and personal progress.

The universalisability test of Kant would be a good gauge for parents. Could I make my actions appropriate as a template for all parents treating all children in the same or similar circumstances, or is my decision or behaviour unreasonably idiosyncratic to the relationship between my child and me and hence biased? It would be unacceptable if the difference arose in an arbitrary or a capricious manner. It would be unacceptable if the treatment was unjust, unnecessary or placed unreasonable limits on their child. Ebenstein (in Devenish, 1999, p 36) claims that all persons' basic equality derives from what they have in common, rather than from what separates them. Differential treatment requires that the question be asked: Would the inequality be considered legitimate and justified, if considered by an impartial panel of enlightened parents? For any limitations on the child's freedom, to be his or her own person, to be valid and acceptable, the burden of proof would fall on those who wish to limit that child's freedom (i.e. the parents).

Differential treatment on the grounds of age is discriminatory under the Constitution, unless valid grounds exist for the limitation of the right to equality for children. De Waal (2003, p 215) points out that age has been misused in the past to categorize, marginalize and often oppress persons. This holds the potential to demean persons in their inherent humanity and dignity. Biology is not a consideration in the implementation of fundamental human rights. For example, in the past, boys were often the recipients of corporal punishment, whereas girls were not. Children were hit, but adults were not.<sup>12</sup>

### 3.6 AUTONOMY AND THE CHILD

An essential quality in being a person is to have autonomy. Autonomy is the fundamental right to be one's own person, to be unique and different, to be oneself. At one level this

---

<sup>12</sup> Corporal punishment will be considered at greater depth in chapter 4.

cannot be avoided. But at another level, a child's efforts to be a person may become circumscribed and frustrated, for example, by overweening parents. A child needs opportunities to develop as a person with his or her own goals in life. To do this a child must have personal space, physical space and psychological space, to be themselves. Autonomy for children is only realised to the extent that they can resist the power of their parents on occasions. Children are not clones of their parents. They have different aspirations and perceptions, and this is an important part of their growing up to become autonomous adult persons.

Nelson (in Spiegelberg, 1971, p 50) attributes the dignity of man to be in his self-determination. Even a child can formulate purposes for him or her self and a child requires a degree of independence to realise these goals. It is a matter of self-respect. The child's personal locus of control should be permitted to the greatest extent possible. In effect, all that may be required may be an absence of coercion and manipulation on the part of the parents, a freedom from domination and unnecessary constraint. The child's personal choices are likely to be within the range encapsulated in his or her culture or community, but the choices will be his or her own, rather than imposed, and this is significant for the child.

Autonomy has been defined (Routledge, 2000, p 69) as the right to act on one's own judgement about matters affecting one's life, without interference by others, a sovereignty of choice on a moral level, a personal freedom. For parents, this does not mean permitting licence that may harm a child and thereby foreclose future possibilities for the child. It is more a matter of forbearance from interfering with the child's choices and actions, or at least refraining from arbitrary interference in these matters. Burman (2003, p 151) refers to how parents respond in a meaningful way to the expressed wishes of a child who is not yet fully competent. It may involve listening to the child as a respected member of the family, without always accepting the child's preferences within the family. A child centred family will promote autonomy, by demonstrating to the child that he or she is respected as a person, that his or her ideas count, and establishing the *modus operandi* of autonomous adult decision making.

Autonomy would also include values like respecting the child's confidentiality and privacy, in short his or her personal space. This privacy enables a child to develop his or her personality, without undue influence from others. Privacy is an all encompassing concept, including:

‘...the right to live one's own life with a minimum of interference. It concerns private family and home life, physical and moral integrity, honour and reputation...’ (Devenish, 1999, p 137).

Autonomy requires some cooperation from others, such as parents, to make options available. Parents can foster a child's capacity as a decision maker to aid the process of their gaining control of their lives, within the fiduciary parent child relationship, which helps to contribute to the child's well being and welfare. The point is made by O'Neill (1979, p 271) when she stated that those who do something merely because it is a custom, make no choice. He or she gains no practice either in discerning or desiring what is best. It is important that the child should learn, or be taught, how to form an opinion and act on it.

### 3.7 FREEDOM AND THE CHILD

Closely related to autonomy is the concept of freedom or liberty. Freedom may imply ‘freedom from’ something that would normally constrain one and ‘freedom to’ do something, which would be the wherewithal to pursue one's own personal project unfettered. Parents are all powerful in a family setting and their actions, however well intentioned, should not be arbitrary, despotic, autocratic, or controlling, if the child is to have a measure of freedom. Feldman (2002, p 31) claims that the individual's choice should normally outrank social preferences in relation to matters lying within the private sphere.

Freedom equates with having significant choice, based on inner principles and values, in matters that closely affect one's life. The choices made are unique and individual, not determined by societal forces to conform to standards and patterns of behaviour that prevail in a community. Freedom allows for action based on one's own inner motivation. A free will is one that is not trammelled by internal psychological constraints, which may wittingly, or unwittingly, be as a result of the socialisation process in the home. Freedom is predicated on being independent to an extent. Parents need to optimise their child's freedom by creating and fostering those conditions in which the realisation and application of freedom may be protected. Freedom is essential to becoming a human person. A very restricted individual cannot attain the true status of a human person.

### 3.8 JUSTICE FOR CHILDREN

In an ontic sense, justice is equated with fairness, righteousness, and harmony. It creates a framework in which each person can pursue what is perceived to be his or her own good or his or her own ends. The legal principle of *suum cuique tribuere*, to allocate to each their own, would be a useful maxim for parents to act on in their home. Aristotle (in Jagger, 2000, p 487) held similarly that justice requires treating all cases alike and different cases differently.

The origin of human rights arose in part as a counter to injustices. In the case of children, this was particularly from the manifestation of child abuse in the family. The result has been that the need to treat our children more justly, has been posited in law and in morality. Treating children morally implies that parents must evidence a sincere care and concern for their child and be prepared to put their child's interests before their own interests, if it is required of them. Purdy (1992, pp 58/59) expresses it as:

‘moral individuals are persons who can be relied upon to respect rights and be sensitive to the lesser interests of others...more willingness to put them before our own (self interests).’

Rights aim to reduce oppression, exploitation, marginalisation, powerlessness, violence and cultural (including religious) imperialism (Jagger, 2000, p 494). These manifestations serve the almost exclusive interests of the dominant in our society and children are often on the receiving end of such injustices. Benn & Peters talk of law acting as a constraint against constraints (1971, p 213). Freeman (2002, p 62) reminds that where justice prevails, appeals to rights are unnecessary.

Woodehouse uses the term ‘generism’ to describe an ideal child centred legal regime, which would resonate with the standards that should exist between parents and their children in the home:

‘Justice across generations, or generism, calls for a metaphor of dynamic stewardship, in which power over children is conferred by the community, with children’s interests and their emerging capacities the foremost consideration. Stewardship must be earned through actual care giving, and lost if not exercised with responsibility. Generism would place children, not adults, firmly at the center and take as its central values not adult individualism, possession and autonomy, as embodied in parental rights, nor even the dyadic intimacy of parent/child relationships’ (in Fisher, 1997, p 423).

After considering the empirical position of the parent child relationship in the home, and how it is evolving in the era of human rights articulations, as well as considering the essential fundamental human rights values, especially as they apply to children in the home, two exemplars will be considered below to highlight the possible realisation of children’s rights in the home in practice.



The first exemplar as to how children's rights could be dealt with in the home will fall under the rubric 'freedom from...'. In the chapter that follows thereafter, a 'freedom to...' exemplar will be considered.

### 3.9 CONCLUSION

In this pivotal chapter, the fundamental basis for the rights of a child, is articulated. The argument draws on threads established in the previous chapters, that the child is a person in his or her own right and is therefore entitled to be accorded, in realistic terms, the fundamental rights, which are routinely available to adults.

Having established the principled basis of children's rights, especially in the private sphere, two exemplars are considered in the next two chapters, to outline rights which are generally not accorded to children and the articulation as to why these rights should be available for children in the home.

## CHAPTER FOUR

### CORPORAL PUNISHMENT IN THE HOME

‘Nothing is a clearer statement of the position that children occupy in society, nor a clearer badge of childhood, than the fact that children are the only members of society who can be hit with impunity.’ (Freeman in Fredman & Spencer, 2003, p 167).

‘It is shaming that the smallest and most vulnerable of people should be the last to be protected by law.’ (Phillips & Alderson, 2003, p 187).

‘Children ought to be led to honourable practices by means of encouragement and reasoning, and most certainly not blows nor ill treatment; for it is surely agreed that these are fitting rather for slaves than for the freeborn...’ (Plutarch in Breen, 2006, p 108).

#### 4.1 INTRODUCTION

Having established the universality of human rights values and the deficiencies in according children their rights, it is necessary to take an example of human rights values in the child’s world, in the light of the axiological criteria in the previous chapter. A ‘freedom from...’ instance is considered.

The state has banned the use of corporal punishment for all citizens, but parents are entitled in law to administer hidings in the home. This is contrary to the spirit of the

human rights initiatives and practices, that should apply to children, but which have not been curbed by the state.

This example clearly indicates how children should realise their respect for their person and their dignity, if they are to be treated as human beings of equivalent worth, entitled to be treated in a just way by their parents, and free from a practice that is forbidden in the Constitution, even for the most loathsome convicted murderers and rapists.

The insights gained in this chapter will lead directly to the concept of an enlightened and empowered parent and its advocacy, envisaged in the sixth chapter.

#### 4.2 CORPORAL PUNISHMENT AND THE RSA CONSTITUTION

Should parents administer corporal punishment in the home with regard to their children? It needs to be noted at the outset that corporal punishment is not a contiguous term with discipline, although the two concepts are fairly widely considered to refer to the same thing. Discipline can refer to a style of raising children to 'know right from wrong', to be aware of values, such as responsibility to others, and to consider whether their actions and speech conform to what they feel is socially acceptable or desirable (e.g. the rights of others). The intention of this disciplinary regimen is to cultivate children who become self-disciplined persons as they mature. The Bill of Rights gives general direction on children's fundamental rights. These values and provisions are therefore relevant to any consideration on the administration of corporal punishment in the home.

The Constitution specifically refers to the matter of including children in its ambit and intent. Section 7.1 enshrines the rights of all to dignity, equality and freedom. Children, as a recognisable category of persons, are not exempt from the provisions of the Constitution. Section 28 (2) of the Bill of Rights requires that in all matters affecting the child, the child's best interests must be paramount importance. Section 12 (1) (e) assures

everyone the right to freedom and security of the person, including the right not to be treated or punished in a cruel, inhuman or degrading way. Section 28 (1) (d) reinforces such provisions especially for children, by providing every child with the right to be protected from maltreatment, neglect, abuse or degradation. Degradation means treating persons as lower grade persons, as mere objects of a higher and more absolute will. The less a person is capable of protecting his or her own dignity, the greater the obligation ought to be on others, especially parents, to protect the dignity of others, such as children.

The Constitution in section 36 permits the limitation of rights if it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Furthermore, the context and implications of any limitation of a right must be considered. To treat a child differently is acceptable if it is to pursue an appropriate end and if there is 'reasonable relationship of proportionality' in the means to be employed. In other words, the limitation must be sufficiently important to warrant overriding the child's right. The concerns must not be trivial, but should be pressing and substantial in a free and democratic society (Breen, 2006, p 30). The decision taken to limit a child's rights must not be arbitrary, unfair or based on irrational considerations and the reduction in freedom of choice should be impaired as little as possible. If it is not justifiable, then treating a child differently becomes unfair discrimination (Breen, 2006, p 19).

In addition, certain rights are non-derogable, such as the right to dignity, (entirely), freedom and security of person (especially related to the right not to be treated or punished in a cruel, inhuman or degrading way) and child rights to be protected in the home from...abuse and degradation. The onus is clearly evident, that corporal punishment is questionable in the light of these provisions in the Constitution.

In section 7 of the Children's Act (38 of 2005), the need to protect the child from any physical or psychological harm is stressed, whether caused by subjecting the child to maltreatment, abuse, neglect, exploitation or degradation, or by exposing the child to violence or exploitation or other harmful behaviour, or in exposing the child to maltreatment, abuse, ill-treatment, violence or harmful behaviour.

Is corporal punishment an affront to a child's dignity? Devenish (1999, p 89) describes corporal punishment as offending notions of decency and human dignity. De Kock & de Kock (1999, p 136) hold that punishment, by its nature, is a forcible intrusion on an individual's privacy and that it abrades the individual's integrity. Those states internationally that have banned corporal punishment by parents are doing so on the basis of similar values to those contained in the RSA Constitution<sup>13</sup> and obviously, the authorities in these countries would see all corporal punishment, including by parents on children, as being unacceptable in terms of children's rights framed in their national Constitutions and/or Bills of Rights.

In the light of such strictures in the RSA Constitution, the state banned all corporal punishment in the structures under their direct control. Consequently, corporal punishment (including the death penalty) has been banned in the police and prisons services for example, and may not be prescribed in law as a punishment, for adults or children. Similarly in schools, corporal punishment has been banned, although the implementation of this proscription is sorely lacking in many schools. Corporal punishment in schools is specifically forbidden in the teachers' disciplinary code. Severe corporal punishment by teachers will be treated as an assault under the disciplinary code in the Employment of Educators Act 76 of 98, (section 17.1 d) and can lead to the perpetrator being fired from his job, or being struck off the educator roll with the professional teachers' council, the South African Council for Educators (SACE).

#### 4.3 CORPORAL PUNISHMENT AND PARENTS

As far as parents are concerned, corporal punishment is legal, ostensibly for the parents to have the necessary powers to carry out their duties of being a parent or guardian of a child. The provisions of the law permit the use of corporal punishment by parents

---

<sup>13</sup> They are all based primarily on the internationally agreed conventions of the United Nations.

provided it is administered in a 'justified, reasonable and moderate way' (Robinson, 1997, p 133), whatever that may mean to a parent? No guidelines are given in law on the frequency or severity of corporal punishment for various age cohorts. The irony is that the law protects hardened criminal rapists and murders from being beaten, but it legally protects the rights of parents to hit innocent children.

There are no checks and balances in the administration of corporal punishment by parents in the privacy of their home. Unless the corporal punishment is very severe, discovered by a competent person, reported to the police and acted upon as an assault or child abuse, parents virtually have a free rein. The 'unless' caveat holds little hope for the child condemned to severe, authoritarian, sadistic, or simply psychologically damaged parents. The child has few due process rights. In law, parents are permitted to administer corporal punishment. Whether parents have administered an allegedly unacceptable level of corporal punishment is a matter of interpretation of the law. As such, the legal investigation is circumscribed by due process. Before parents are held to account and punished for excessive corporal punishment, there must be tangible and credible evidence, which is seldom possible to obtain, the parent must be charged, the charges must relate to the alleged breaking a well delineated law, there is an opportunity for the parent to be heard, with the assistance of a well trained lawyer, and to put up a defence in public in a court ruled over by an objective and dispassionate legally trained judge or magistrate, based on rational argument. Even then, a sanction handed down by the court, if a parent is found to be guilty, may be appealed. This is part of the separation of powers to ensure a balanced judgement to the end of achieving justice.

What chance does a child have in these processes to achieve justice? A child has no such legal opportunities. He or she is powerless to intervene on his or her own behalf. Hobbes held that the one who has no power, has no recognition and hence no dignity (Ammicht-Quinn, 2003, p 30). The child does not have the knowledge or the standing to oppose a punishment in the home administered by a parent. He does not have the right, or the finances, to be represented in the unlikely event that the matter is taken to court. He does

not have an objective and dispassionate arbitrator to ensure his interests. He has no channel of appeal when the decision to punish is made by his parent.

In deciding whether to punish a child physically, the parent decides what 'rule' has allegedly been broken, according to what supposed evidence, and the parent is the prosecutor, judge and punisher. Phillips & Alderson (2003, p 183) remind that:

'In justice, one person cannot at once be the aggrieved person, witness, judge and agent of punishment'.

Strangely enough, it would be better for corporal punishment to be permitted in a school setting, where at least some accountability and appeal structures, would exist for children.

The right of parents to control over their children, including the administration of corporal punishment, is backed by some of the most powerful agencies in the land. The state gives the parents sanction to administer corporal punishment, the law will support the parents, unless the corporal punishment is excessively severe, society would generally not interfere with parents administering corporal punishment and the churches would generally support (exhort) parents in the administration of corporal punishment. What chance do children have in this regard when the power system upholds parent's rights over children's rights in law and in accepted societal practices?

By legally accepting parent's rights to administer corporal punishment, public reporting is discouraged and any violent behaviour by parents is legitimised from their own, and society's, perspective. The result is a societal understanding that we should defer to the caretaker's (parent's) judgement on how to manage his or her child (Moelis, 1988, p 2) resulting in (Phillips & Alderson, 2003, p 183) an immense structural power for parents and a hegemony of parental rights, to the exclusion of children's rights. Brunner (in Forsyth & Schiller, 1979, p 28) reminds that to possess power is a constant temptation to abuse power. It may be an unconscious process as far as parents are concerned, but it is very real for the child.

Consequently, the state does not interfere with the long tradition of parental autonomy (established before the United Nations' documents on human rights and the Bill of Rights in the RSA Constitution). Underlying parental rights is an affirmation of parental power, with the concomitant diminution of children's rights and a confirmation of children's lack of power. These power relations are then played out in the family context. By giving parents the right to administer corporal punishment on their offspring, it makes 'violence' a legitimate child rearing practice. Breen (2006, p 206) sees this as age based discrimination and questions the prioritising of parents' rights over children's rights.

Any changes in such a state of affairs will have to address children's rights issues in the home and implicitly put parent rights and parental autonomy in question. In fact, parental dominance should not be 'civilised' by including it in the civil codes; it should be interrogated in line with the new Bill of Rights and the values contained therein. Only the state, or substantial grass roots public opinion, can bring this about. Long standing public support is of no consequence, when a principled decision needs to be made to give proper effect to children's rights under the Constitution.

Parents may well cling to their prerogative in deciding on the 'correct'<sup>14</sup> form of discipline. Fortin (2001, p 246) notes that:

'We have been conditioned by a culture in which deliberately hurting a child is still acceptable both socially and legally; in which concepts of adult 'ownership' of children who should be seen and not heard persist.'

The situation is then, that the state protects the rights of children when it comes to the administration of corporal punishment as it applies to the civil service institutions, but the parents in the home, who are allegedly entrusted with carrying out the guardian, carer, nurturer, protector and supporter roles, may hit their children with carefree abandon for who knows what alleged crimes? In short, the child is recognised as being a person

---

<sup>14</sup> Note the word correct as in correction of behaviour.



internationally and nationally, but not in his or her own home! In this regard, the home is an impenetrable black box, where all kinds of indignities, or even crimes, may occur, which are apparently sanctioned by the state and society, without any checks and balances being present.

#### 4.4 THE DIMINUTION OF CORPORAL PUNISHMENT

The *apartheid* era in South Africa was replete with administrative and legal injustices. In particular, man's inhumanity towards his fellow man was evident, with scant respect for the person, his dignity and his rights. The worst manifestation was the death penalty, which was relatively common, and which was widely held to be biased in its application between races. The African people were held by government policies at the bottom of society<sup>15</sup>. They had virtually no way to enforce justice or to protect their rights, with the concomitant loss of dignity, because of these inhumane provisions.

It is hardly surprising, therefore, that when the Bill of Rights was devised, it placed the person's dignity and equality at the centre of its values. As a result, the death penalty and corporal punishment were abolished in state institutions, including in schools.

This also accorded with what was happening in other countries. In Sweden, corporal punishment in the home was banished in 1966. Sweden was subsequently followed by other enlightened countries, which took the right of children to be treated with dignity and respect to heart.

Does corporal punishment by parents in the home impugn the child's dignity? Those parents who argue that, 'I was hit by parents/teachers when I was a child and it did me no harm', would deny any indignity in the administration of corporal punishment, or

---

<sup>15</sup> The differential education policies as applied to the various races and the job reservation policies *inter alia*, were designed to keep African people at the bottom rungs of society.

possibly claim that it was justifiable. But wiser counsel prevails. Justice Langa, now head of the RSA Constitutional court held that:

‘There is no dignity in the act itself; the recipient might struggle against himself to maintain a semblance of dignified suffering or even unconcern; there is no dignity even in the person delivering the punishment. It is a practice that debases everyone involved in it.’ (Devenish, 1999, p 89).

In the United Kingdom, Klecker in a dissenting court opinion, stated that:

‘Corporal punishment amounts to a total lack of respect for the human being; it therefore cannot depend on the age of the human being...the sum total of adverse effects whether actual or potential produced by corporal punishment on the mental and moral development of a child is enough...to describe it as degrading within the meaning of article 3 of the Convention.’ (Davis et alia, 1997, p 272).

In South Africa, there have been voices suggesting that corporal punishment should be banned for children in their homes<sup>16</sup>. The impetus for this to gain a groundswell of public opinion, has not yet gained momentum. This is probably so, in that children do not have real voice, legally or economically or politically. Children’s rights claims are not a ‘popular’ subject in communities, albeit that it receives lip service and a degree of application and implementation by the state structures.

---

<sup>16</sup> Home is used here as a generic term for the place where they live and have their personal and private being, in association with their parents, guardians or caregivers.

#### 4.5 ENTRENCHED CORPORAL PUNISHMENT POSITIONS IN SOUTH AFRICAN SOCIETY

The biggest problem to possible changes being wrought in corporal punishment in the home is, however, the nature of our societal groupings. Most of the traditional groupings in South Africa are paternal in nature (male/father dominated) and this manifestation is upheld by widespread church observance in patriarchal religions (Muslim, Christian, Jewish and African churches in particular). The church has propagated the Old Testament notion of 'spare the rod and spoil the child' and promotes the use of corporal punishment by parents to bring up their children in a 'disciplined' and a 'god-fearing' way. The impetus for change is thus very diffused and unorganised, when compared with the establishment views in these powerful societal agencies. Why should parents change that which generations of parents have done before them with the backing of church, society and tradition and to give legal effect to their parental 'duties' towards their child?

The claimed religious (Christian) basis for the belief in parents administering corporal punishment on their children is not a compelling one. The claims are based on Old Testament injunctions. It is interesting that some other Biblical injunctions are conveniently forgotten and not obeyed by the faithful, such as the requirement in Leviticus 20:9: 'Everyone who curses his father and mother shall be put to death'. Proverbs xxiii sums up the fundamentalist Christian belief of many 'beating' parents: 'Thou shalt beat him with the rod and deliver his soul from hell'. The idea of children being inherently evil is not the stuff of the New Testament. Christ said: suffer the children to come unto me and forbid them not for such is the kingdom of heaven (Mark 10 14). Many Christian parents do not feel the need to hit their children and so the church arguments are power faction arguments in essence.

#### 4.6 IMPETUS FOR CHANGE IN CORPORAL PUNISHMENT IN THE HOME

The conventional reasons against corporal punishment of children are not being punted in this study, albeit that they may provide compelling reasons to do away with corporal punishment. These conventional arguments essentially are:

1. Banning corporal punishment would cause problems in society and in the home

Other enlightened countries have banned corporal punishment throughout their societies, without any significant increase in discipline problems. The approach in these countries has not been primarily legalistic, but rather educationally promoted and community supported and frowned upon as 'not the thing to do'. It begs the question as to why corporal punishment should be considered necessary, or desirable by anyone, apart from persons with a sadistic or power hungry streak, if many parents can accomplish discipline without resorting to corporal punishment. If corporal punishment 'works', as is claimed, these societies should have suffered severe consequences, but this has not proven to be so. In fact the vast majority of the parents in these countries support the ban on corporal punishment by parents.

2. Child abuse is seen as a fringe phenomenon, the preserve of a very small fraction of parents and as it such it is unfortunate, but necessary, contingent damage.

Campaigns, against child abuse in the family setting, have been used to sensitise society as to the 'criminal behaviour', which is embarked upon by certain parents. The assumption that parents form a bipolar dichotomy, some being abusive and the rest as loving and caring parents, is known to be simply not true. Parents range between these two ends of a continuum and discipline may be relatively enlightened and supportive, or show varying degrees of abuse. Any corporal punishment is, by definition, essentially abusive, working through the

effects of fear and pain

3. Corporal punishment does no long-term harm. It is good for the child.

The psycho/sexual/sadistic trauma occasioned by the use of corporal punishment is too well established and credible to be denied by all, but bigots or the very ignorant. Epidemiological studies of the incidence of such pathological syndromes and anomalies would indicate that collectively, this would represent a not insubstantial number of parents. Beyond the numbers of parents that can be diagnosed clinically as having personality abnormalities that would negatively impact on relationships, especially parent child relationships, there would be a significant number of parents who show aberrant behaviour that is not sufficiently severe to warrant clinical psychological diagnosis, but whose behaviour towards their children would be less than desirable at times, verging on sadism at worst, or showing little feeling towards the plight of their children at best.

The empirical figures in the United States are alarming. Pollard (2003, p 583) cites statistics that 2000 children die at the hands of their parents each year, 18000 are permanently disabled, and 142000 are seriously injured as a result of excessive discipline. It is further claimed that 1.7 million children in the United States per year are severely assaulted by their parents and 5.4 million are assaulted with objects. So much for the societal image of the benign altruism of parents in raising their children and the 'best interests' mantra!

4. It is widely claimed that corporal punishment works in disciplining children.

The greatest indictment against corporal punishment is that it does not accomplish what it sets out to achieve and in fact elicits undesirable negative effects. Mc Gillivray (2004, p 150) sums it up thus:

'Not one study showed that corporal punishment benefits children. It does not achieve the child's compliance, except in the very short term. It is positively associated with childhood aggression. Its use predicts delinquency in adolescence and violence in adulthood. It is the primary risk factor in child physical abuse.'

It is not clear why, in the face of such evidence, parent corporal punishment persists, unless it satisfies some deep seated sadistic needs in the parents themselves?

In this study, the arguments that should hold sway are not the empirical reasons however, but the values implicit in the Bill of Rights. There are principled and related reasons why corporal punishment should be banned in the home in South Africa, which will be discussed below.

#### 4.7 CONSTITUTIONAL HORIZONTAL EFFECT, EQUALITY OF TREATMENT, AND CORPORAL PUNISHMENT IN THE HOME

Let us first consider a more legalistic argument under the provisions of the Bill of Rights as to why corporal punishment should be banished in the home.

The Bill of Rights is referred to as 'having vertical effect and application' in that it applies first and foremost to the state in dealing with its citizens. It does not, in the first instance, apply between private individuals and other private individuals, termed the 'horizontal effect or application'. Yet human rights provisions in the Bill of Rights are rendered in law to apply to individuals, such as the classical prohibition against murder (the right to life) and to the curbing of interpersonal racist behaviour between persons, such as racist speech and actions (right to dignity and equal treatment). There is a strong case to include the horizontal application of human rights more specifically in our

Constitution in order to regulate the relations between individual persons in the light of the founding values entrenched in the Constitution. This would include the relationship between the parent and the child.

With regard to corporal punishment, the relationship between the state, as the senior and powerful partner, and the citizens, is curbed by the recognition of rights to protect relatively powerless adult citizens. As a microcosm of this vertical relationship, the relationship between parents, as the senior and powerful partners, and their child, as the relatively helpless recipient of their disciplinary actions, should likewise circumscribe parents in their dealings with their relatively powerless children. In banning corporal punishment in the private sphere, the state would be protecting and safeguarding the child against the excessive power and influence of a parent. In this matter, the state would be justified in limiting the autonomy of the parent to ensure the rights of the child. This would be a tangible realisation of section 28 (2) of the Bill of Rights, that 'A child's best interests are of paramount importance in every matter concerning the child'.

Section 8 (2) of the Bill of Rights lays the legal foundation for the horizontal application of the rights of all persons (including children): A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right'. This would present an opportunity to question the behaviour of private persons who are proceeding in contradistinction to consequential requirements in the Bill of Rights, and the values enshrined therein, depending on the context or circumstances. De Waal (2003, p 56) avers:

'The purpose of the right to human dignity does not necessarily demand differentiation between state and private conduct. The right is to protect an individual against an assault on his or her dignity from any source, whether private or public.'

In other words, the right of all not to be unfairly discriminated against by others should be protected in the Bill of Rights.

The question then is whether a child's dignity and rights are impugned by parentally administered corporal punishment? Section 9.4 of the Constitution entrenches the equality clause, prohibiting any unfair discrimination either directly or indirectly against anyone, *inter alia* on grounds of age. Fair discrimination would be that discrimination that applies equally to all persons in similar circumstances. A test of the human dignity and other fundamental rights that come into play in considering corporal punishment, would be to pose the question why children have to suffer corporal punishment, whereas adults do not.

If adults are guilty of behaving badly, or criminally, surely if corporal punishment by parents has the sanction of society, then society should sanction corporal punishment for adults who 'misbehave'? If adults are breaking the traffic laws for example, should they not receive corporal punishment from the state? The corporal punishment would obviously be humanely given, out of love to make them more worthy citizens, and according to their mature adult status to tolerate a really good hiding. Would these parents, treated equally under the law to their children, feel dignified in presenting their buttocks for a punishment? Would they feel respected as persons? Of course, there would be no recourse to law, no defence, and no appeal, as happens with children, if they are to be treated equally. The traffic officers and policemen would decide and summarily administer the beating there and then, with suitable privacy measures that should prevail in a civilised society of course.

Any democratic government, founded on human rights values in dealing with its adult citizens, which is foolish enough to introduce corporal punishment for adults, would receive a barrage of abuse from its citizens and would probably be voted out of office. The state's defence that corporal punishment is proving very effective in reducing, say, traffic violations (with the concurrent saving of billions of rands), that it has reduced the drunken driving rate, that there are fewer deaths on our roads, that the effects of the



corporal punishment pass quickly, leaving no residual psychological problems, that hidings lovingly administered will leave no feelings of resentment, would be dismissed with derision by adults. Whither for children then?

The onus must lie firmly with the adults (parents) to clearly demonstrate why they have a right to treat their children differently from how they are treated by the state. It is likely that anyone bold enough to attempt a rational defence, would quickly look very foolish. The only honest answer is that parents are permitted to administer corporal punishment because they are powerful and their children are not considered worthy of being treated with respect and as dignified persons. If their argument is that it is effective, we are on the slippery slope back to condoning abusive treatment by parents. If the argument is that they have duties to perform as parents, it must be explained that corporal punishment is illegal in children's homes, orphanages, youth correctional facilities and school hostels, where children may display behavioural problems because of their traumatic life experiences and hence display acting out behaviours. So why should corporal punishment not be illegal in caring home environments with loving parents in charge? In addition, many parents do not see the need to resort to corporal punishment and it works for them, so why not for all parents?

In all these cases, of enlightened countries and enlightened parents, alternative means of effective discipline are to be found. In the Gillick case judgement in England, the point was made in the judgement that parental rights exist only in so far as they benefit children; they are not rights over children. It is not a matter of overriding the rights of children in the interests of the parents. Adult might is not right; nor should it be a right in the Constitution. By permitting the punishment of powerless children, in fact, potentially, child abuse is being legalised.

The hypothetical adult corporal punishment scenario outlined above makes a serious comment on the so-called 'rights' of the parents in raising their children. The logic is firmly on the side of the child. All that is needed is a powerful lobby and sustained advocacy to treat children as worthy of rights and to ban corporal punishment in the

home, in sympathy with the state ban on corporal punishment in all its institutions. The state should apply the horizontal effect and ban corporal punishment by parents in the home, as is happening in more and more countries. In terms of the arguments presented, it would be the 'right' thing to do.

However, legalistic changes will evidence other problems in trying to bring them to fruition, as outlined briefly below.

#### 4.8 LEGAL PROCESS PROBLEMS IN CURBING CORPORAL PUNISHMENT IN THE HOME

The rights of the child are difficult to secure from a legalistic perspective. The arguments under the Constitutional provisions may be logical, and even compelling, but policing any legislation applied to children's rights, in contradistinction to adults' rights, are very difficult to implement and monitor. It is known that corporal punishment in schools is strictly illegal, but it perseveres as a practice on what appears to be a quite widespread basis. If corporal punishment by parents were to be banned, the problems would be the detection of the 'crime' of administering corporal punishment in the home, the resulting criminalisation of parents who are found guilty, and the powers and resources that adults would have to put up a defence, making it out to be a trivial offence and one not worthy of bothering busy courts with, in the light of their more compelling needs. This would result in tending to trivialise children's rights.

Similarly, so often in rape cases involving children, the case is thrown out because of the so-called lack of credible witnesses. Seldom can a child stand up to rigorous cross questioning, especially if the 'accused' they are bearing witness against, is a loved one, such as a parent, who will land in trouble with the law if found guilty of the alleged offence. A similar scenario is likely if corporal punishment by parents were to be banned in law. How would reliable evidence be adduced to convict an errant parent?

This does not mean that the fight for children's rights to be treated with dignity under the Constitution must be abandoned. Parents have had these so called 'rights' to administer corporal punishment for thousands of years. It is very difficult to change person's perceptions and his or her resulting actions. Even with adults, re-educating persons to treat women equally, to treat other races fairly, or to treat the handicapped with compassionate consideration, have proven very difficult in practice. What chance is there, when society backs practices, in dealing with relatively helpless children, which are inherently undignified (e.g. corporal punishment), especially in a country where the Bill of Rights is just over ten years since its inception? Yet just such a process must commence and be realised increasingly over time, as our society becomes more harmonious and our citizens become more respectful of the rights of every person, according to the values in the Constitution.

Corporal punishment should also be banned because of the values implicit in the personhood of a child, as being worthy of altruistic consideration, as presented below.

#### 4.9 THE AXIOLOGICAL ARGUMENT AGAINST CORPORAL PUNISHMENT OF CHILDREN BY PARENTS IN THE HOME

The second option, of a parental advocacy campaign instead of criminalizing corporal punishment by parents, has had success in Sweden and other countries, where corporal punishment has been banned. The Swedish approach involves a moral advocacy campaign in order to transform the society to one based on the fundamental values contained in the Constitution, which are accepted by the overwhelming majority of the nations of the world and are inherent in all the major religions of the world. Educating the citizens to bring about a rights based culture, which is realised in relationships with all other persons, is a project that the state, churches, communities, educational institutions and the media could promote (if advocacy campaigns convince them of the cause).

The conviction of persons to human rights values would be a better campaign, than a legalistic top down and authoritarian series of laws, policies and declarations. Rights values need to become part of our corporate understanding, our national conscience, our humanity. How would we convince adult persons of the rights of children to be treated more as persons who have a right not to be disciplined via corporal punishment? The Swedish Ministry of Justice (in Barnen, 1992, p 8) outlines the positive outcome that would flow from banning corporal punishment for children:

‘By the prohibition of physical punishment, the legislator (will) show that a child is an independent individual who can command full respect for his or her person, and who should thus have the same protection against any physical punishment or violence as we adults see as being totally natural for ourselves.’

The message is clear, that children’s personal integrity should be preserved in exactly the same way that rights are protected for all other human categories.

One level could be to say what is wrong with corporal punishment. This could be by showing both what is wrong with corporal punishment, or alternatively by holding out the positive values and by reinforcing the need for a two-way relationship between a parent and a child and a new vision of what it means to be a parent.

The former could entail an advocacy campaign as to why corporal punishment is wrong. It could include an understanding that corporal punishment is based on a power role to make the child compliant with his parent(s) wishes by obeying their demands. If it is truly in the child’s interests, such as protecting the child from danger to himself, or unacceptable behaviour towards others, this can be accomplished quite effectively without resorting to corporal punishment. After all, not all children are beaten; it is often more a function within the parent than a characteristic in the child that ‘requires’ a child to receive corporal punishment.

Why is corporal punishment wrong from a parent's perspective? The problem with disciplining out of fear and pain, is that obedient children may appear to be model children, but they become vulnerable to all 'authority figures', which is not in their best interests when they grow up and become adults. The aim appears to be to ensure an 'ideal' family, in which children are compliant and do unquestioningly what their parents expect. The goal is a quiet and submissive child, based on compulsion, coercion, manipulation and indoctrination. It is interesting to note that the Italian Supreme Court (in Pollard, 2003, p 585) found even the expression 'correction of children' offensive. Correction implies fitting a child to the predetermined idealised mould as to what the 'perfect' child should 'be'. Correcting the child to comply with such an ethereal parental or societal image, is not held to be good parenting. Exacting compliance is more akin to the training of an animal. It implies that children should be shaped, moulded and wrought in some preordained image in the parents' minds. What is needed is a critique of parent power in our age of rights and enlightenment.

Children should be raised to be civil, but also to be self reflective and critical of others as a defence mechanism. However, this is not always so in practice. Karp claims:

'Physical punishment is not an isolated issue but reflects a domineering, non-communicative attitude towards the child, one which disregards the child's opinions and views, leaves the child outside the realm of understanding and logic.'

The problem with 'moulding' the child and 'shaping' his or her behaviour, is that the motivation for behaviour arises from cruelty, the child is treated as an object to be 'trained', rather than being treated as a human being. Corporal punishment debases the child and has little deterrent or rehabilitative effect in practice, according to weighty research findings. This is because corporal punishment often results in feelings of resentment, humiliation and powerlessness. When the overly controlled child can get away with aberrant behaviour, he may delight in doing so. When a child faces a novel situation, he may not know how to react until he receives direction or guidance on how to respond. Worse still, children who are subjected to a regime of corporal punishment often

adopt a 'might is right' belief and this approach is subsequently used in their lives with their children and possibly their wives. They may become bullies as they get older and they are more likely to beat their own children, according to empirical data on the matter and so the maladaptive behaviour perpetuates across succeeding generations. Fortin (2001, p 244) sums it up as follows:

'...the use of corporal punishment is associated with significant increases in physical abuse, long term anti-social behaviour, and later as an adult the abuse of a partner or a child, as well as significant decreases in beneficial outcomes including moral internalisation, conscience and empathy.'

It is the thesis in this research that, the realisation of children's rights in the home, is not a matter of legalistic interventions, but sound parent child relationships on the part of enlightened parents. Nowhere is this more true than in the matter of the discipline of children by parents in the home. Much can be learned by considering the experience from countries that have banished corporal punishment by parents. In Sweden, corporal punishment by parents was banned, including ridiculing, frightening, threatening and locking up children, in short the mental bullying that some parents are prone to relying on to discipline their child (Pollard, 2003 p 585). In 1965 when this dispensation was introduced in Sweden, few parents supported the ban on corporal punishment by parents. In 1994, almost 90% of the parents supported the ban on corporal punishment. Sweden proclaimed, in a Children's and Parents' Code, that children are entitled to care, security, and a good upbringing. They shall be treated with respect for their person and their distinctive character, and may not be subjected to corporal punishment, or any other injurious or humiliating treatment.

Likewise in Finland (Child Custody and Rights of Access Act, 1983), it was declared that:

'A child shall be brought up in the spirit of understanding, security and love. He shall not be subdued, corporally punished or otherwise humiliated. His growth

towards independence, responsibility and adulthood shall be encouraged and supported.'

Parents are urged to be altruistic in dealing with their offspring. The family should be participative, thereby giving the child from a young age the opportunity to be responsible and sensitive to the needs of others. Certain values can be achieved by banning corporal punishment, such as creating a culture of human rights, promoting tolerance, enhancing respect, building confidence, engendering self discipline, creating self esteem, enhancing the child's feeling as being responsible for his own actions, building a caring parent child relationship and creating proper and productive patterns of communication. What is wanted is a child who is brought up in a spirit of understanding and love, and to enhance human dignity in children. The result will be a child who learns in the home a culture of decency and respect for the rights of others, in place of a hitting culture based on authority, which legitimizes the use of violence.

This sums up what is meant by children having rights in the home concerning a ban on corporal punishment, arising from a sensitive application of human rights requirements, within the conception of personhood. It should not be threatening to parents or unacceptable to society in any way. The law should be changed to forbid parent 'rights' to administer corporal punishment, as well as passing legislation to protect children and to promote their interests as persons, with their own rights, based on respect for their inherent dignity.

In this chapter, the rights associated with the 'freedom from' protective category were elucidated via a consideration on the banning of corporal punishment of children in their homes by their parents. In the next chapter, an example of 'freedom to...' be or do what the child wishes, will be considered. The right in question will be the right of a child to choose a religion in contradistinction with the religion of his or her parents and family.

#### 4.10 CONCLUSION

The practical example of a child's right to be treated with dignity, respect and moral equality, was discussed above. The deficiency of parents in according these fundamental human rights values to their children in the home was established in theory and in practice.

Arguments were presented in human rights parlance as to why this situation is untenable and it highlights the need for research into children's rights in the home. What is needed is for the state to excise its legislation that permits parents to continue to hit their children at will, without monitoring or constraints, and to promote that the banning of corporal punishment in the state's domain, should be extended to the private domain, especially where children are concerned.

Another exemplar is considered in the following chapter to further elucidate the child's rights that should exist in the home and be honoured by parents.



## CHAPTER FIVE

### FREEDOM OF RELIGION IN THE HOME FOR CHILDREN

Every child shall have the right to freedom of thought, conscience and religion (article 9.1).

Parents ...shall have the duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities and best interests of the child (article 9.2).

African Charter on the Rights and Welfare of the Child (OAU, 1990).<sup>17</sup>

‘Human dignity is reflected, inter alia, in the ability of the human being as such to forge his personality freely, as he wishes, to give expression to his aspirations and to choose ways to fulfil them, to make free choices, not to be enslaved to arbitrary compulsion, to receive fair treatment by every authority<sup>18</sup> and by every other individual, to enjoy equality between human beings, to receive the proper attention of the society in which he lives and to accept or reject ideas, as he wishes.’  
Kretzmer (2002, p 167).

‘When a child is mature enough to distinguish his religious beliefs from those of his parents, his beliefs ought to be consulted’ (Gutman in Montgomery, 1988, p 324).

---

<sup>17</sup> Article 14 of Convention on the Rights of the Child (United Nations, 1989) expresses similar clauses.

<sup>18</sup> This would include parents from a child’s perspective.

## 5.1 INTRODUCTION

In the previous chapter, a 'freedom from...' example of children's rights was considered. In this chapter a 'freedom to...' example is presented, to further elucidate the problems that children may encounter in the home from their parents when they try to assert their rights.

There is nothing as fundamental to personhood as the right to one's own religion, including the right to believe as one wishes, and to worship in a way appropriate to one's faith. Many parents are likely to greet the claim that their children have a right to believe and worship differently to the other members of the family with disbelief, or even derision, but the human rights oeuvre maintains this right for children based on fundamental principles of personhood.

In this chapter, principled reasons are given as to why the child should have this right to a faith of his or her choosing in practice, against the backdrop of the human rights values and standards articulated in chapters one and three. A discussion is also presented as to why parents are likely to resist their child changing his or her espoused religion, and why their stance is unacceptable in a human rights ethos.

## 5.2 FREEDOM OF RELIGION: VALUE AND RIGHT FOR A CHILD

The rights enshrined in the OAU Charter and the United Nations Convention are reflected in the RSA Constitution. Section 15(1) holds that 'Everyone has the right to freedom of conscience, religion, thought, belief and opinion'. The African Children's Charter upholds the rights and duties of parents, including that of ensuring the religious and moral education of the child article 11 (4), but it does not say 'in the parent's faith'. The Children's Act (38 of 2005), in section 10, stresses that the child has the right to

participate in an appropriate way and that views expressed by the child must be given due consideration.

Schools are required to be very sensitive to the religious views of the children. It should be noted that religious education is not the same as religious belief and faith, as the Department of Education has been at pains to differentiate (Davel, 2000, p 290). Religious education is not coextensive with religious instruction, the latter being conducted in faith communities of choice.

The African Charter on Human and Peoples' Rights (article 8, 1981) specifically states that 'the profession and free practice of religion shall be guaranteed' and cannot, unless by law, be restricted. The rights of adults, to freedom from and for religion, should be mirrored by the child having these rights equally.

It is evident that this does refer to ideas or beliefs in the 'forum internum', or private mind, which should be beyond the control of anyone, safe in the privacy of the individual person's mind. Taylor (2005, p 24) describes the forum internum as:

'...a concern with the freedom of each individual to choose a particular religion, to maintain adherence to a religion, or to change religion altogether at any time, and therefore the right to be free from restrictions or coercive forces that impair that choice.'

This is the domain of the inner faith and conscience of a person. No interference in the private realm of a person's innermost beliefs can be justified in any set of circumstances, let alone based on the age of the child. This would amount to an attempt at brainwashing and constitute an unacceptable violation of the individual conscience of the child. Eberhle (2002, p 79) holds the private sphere to be the ultimate domain of inviolability in which a person is free to shape his life as he sees fit.

Davis (1997, p 192) states that:

‘The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning, but without understanding.’

Parents are in a very influential position to interfere with their child’s concerns, especially if they are preoccupied with matters that are of central concern to their own personality constitution. One’s religion is based on an emotional response, which can cause problems for a child if the parents feel strongly about their own faith beliefs and notions of family cohesiveness.

Freedom of religion would imply not only the choice of religious persuasion, but also the ability to act on such beliefs. It is stipulated in the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief (1981) that a person has the right to assemble and worship with others of the faith, the right to make, acquire and use the necessary articles and materials related to the rites or customs of a religion or belief, and to observe the special days, ceremonies and celebrations associated with that religion and belief.

It is therefore evident that the right to religious freedom must be underwritten by the recognition of other rights, namely the right to human dignity, to equality, to freedom, to privacy, to expression, to movement and association, to property, to (religious) culture, to education, to access to information, to avoid servitude, to access to the courts if need be, and to not be detained (restrained). These collectively are the essential rights that permit a person to be a person in a just and democratic society. All of these must be permitted in the spirit of the ‘best interests of the child’ to be his or her own person (in Kantian terms an end in themselves and a person worthy of dignity and respect). These rights are seminal in the realisation of religious freedom.

### 5.3 FAITH, BELIEF AND WORSHIP IN A FAMILY: CHILDREN'S RELIGIOUS AFFILIATION

Should children be permitted to leave the faith of their parents and espouse their own faith? Why would children wish to have a different religion to that of their parents? This example of a right that involves 'freedom to...' has been chosen because, if we exclude the rare religious cults which may be 'bad' for the child and require the parent's protection, most religions are perfectly acceptable ways of believing, worshipping, and relating to God and man. There are no 'right' and 'wrong' faiths. Logic cannot demonstrate that one faith is logically 'better' than another. One's faith, and the inherent beliefs associated with it, is simply a matter of one's personal feelings, ideas and beliefs, collectively referred to as a religious conscience. Parents can forbid their child from becoming an adherent of another faith, if it can clearly and reasonably be demonstrated that the limitation of these rights of a child are 'reasonable and justified' and 'important' or 'compelling' enough<sup>19</sup>. If not, it is a trumping of the child's rights and a power play by the parent(s).

It needs to be stated at the outset that it is, in all probability, an unlikely occurrence that a child would wish to change his or her faith. A change in faith by children will not occur in the vast majority of the families, as children are brought up in a faith and espouse it willingly as their faith, because of the influence of their parents and the reassurance in perpetuating that, which is known to them and with which they feel comfortable. It is often a complex and emotional condition that pins children to their faith of origin, just as it does to their culture in general. Their faith becomes a meaningful social and cultural part of their lives into which they are socialised, and many children retain their beliefs in their faith of origin all of their lives.

However, as with adults who change their religion, there may be compelling reasons for a child to change his or her faith, depending on the age and circumstances of the child.

---

<sup>19</sup> This is according to the RSA Constitutional limitation criteria, as contained in clause 36.

Higginbottom (1997, p 594) maintains that 'thoughtful teenagers often change their religions, increase their dedication to their present religion, or declare themselves agnostics or atheists'. This may simply be a testing process to discover one's real beliefs, or it may presage a more radical and fundamental change in the child's religious convictions. There are a variety of reasons why a child may wish to change his or her religion.

A child may prefer to go to a church to which a friend belongs. A particular youth guild or teen church may be more appealing. A tent revival church may appeal to the emotions or conscience of a child. A child may feel that he or she does not 'fit in' to his or her own church. A fire and brimstone ministry, condemning sinners to eternal damnation, may be offensive to the child, whereas a faith that has a more appealing version of a loving and merciful God, may be preferred. The question that needs to be asked is why a Roman Catholic<sup>20</sup> child should not attend and ultimately join a Methodist church, for example, out of personal conviction and choice?

More compelling would be an ideological conviction that their church is 'wrong' and another faith is 'right' for certain children. During the *apartheid* days, the Dutch Reformed churches scripturally backed the unethical *apartheid* policies of the Afrikaner nationalist government and attempted to give them God's backing. A child, who found that this theology was abhorrent, would need to be able to change his or her religious affiliation. A similar instance may occur in those Muslim mosques, which are reported to be recruiting and backing acts of terror in England, for example.

A girl may fall in love with a boy of a different faith and the families may bitterly oppose the romance/marriage on religious grounds. One of the couple may wish to change religious affiliation to make a lifetime commitment to his or her partner in this way. Some half a century ago, when Western values impacted on traditional Indian family values in South Africa, there were reports in the press from time to time of suicides by young couples of different faiths that chose death together, rather than breaking up,

---

<sup>20</sup> Any example would suffice.

because of their different and untenable religious and family tradition and familial pressures.

A church (sect), or a local priest, may be so corrupt that it would be desirable, if not mandatory, for the child to be permitted to change his or her faith. A boy or girl may have been abused by a priest and naturally wish to change their church affiliation. He or she may wish, under the circumstances, to retain his or her reasons as private and not enter discussion on the matter, either with their parents or with their birth church, and especially not with the priest in question.

Worse still, the children in Jonestown, who died of poison along with their parents, when they all committed suicide, would have acted correctly if they had left the Jim Jones' cult. Landa's view (1990-1, p 621) is that it is the parents' right to become martyrs, but not to make martyrs of their children, would apply in this instance.

Similarly, the children in the Davidian sect, who were regularly sexually abused by their leader, David Koresh, who demanded absolute loyalty and devotion, as he believed he was god's prophet, would have been wise to have changed their religious affiliation. Under this regime, his members had no option to make an autonomous choice and to decide their faith and beliefs for themselves. Ultimately seventeen children died along with their parents in the blaze, when the US troopers rushed the Davidian compound and the order was given by Koresh to torch the building and die in the resulting inferno. Bates (1978, p 299) expressed the view that '...courts should be more willing to protect children from their parents' unbalanced and extravagant religious beliefs.' He later (p 307) declares that '...Constitutional freedom of religion is not an excuse for failure to protect children from the consequences of their parents' beliefs and actions.'

Related aspects of a child's right to freedom of religion would be the right to retain his or her religion if his or her family moved to another faith community and not to be forced to comply with their decision to change faiths. Or it may be that a child with agnostic or

atheist parents, who wishes to attend the faith community of his or her choice, should be permitted to do so.

A more complex aspect of the right to freedom of religion would be if a child resisted going to a religiously based school (e.g. Roman Catholic, Muslim, Anglican) because he or she does not subscribe to that faith and is not prepared to be indoctrinated in what to him or her may be an alienating faith. In our society, how would a child in this position realise his right, in the face of the enormous power vested in parents concerning their child's education, including his or her religious education? Is a child able to register a conscientious objection to his or her parents' imposition of their faith beliefs on him or her in the choice of which school he or she is forced to attend?

The obverse is also worthy of consideration. A celebrated legal case (Yoder) involved parents in the Amish community who wished to keep their children physically and mentally within their faith community, and so they kept their children out of school (Fisher, 1997, p 408). They wished that their children should avoid contact with, and knowledge of, the world outside their communities in order to focus exclusively on their own religious way of life. Their children on the other hand wished to be masters of their own destiny, rather than having their parents' notions of religion foisted upon them. The court over ruled the parents' wishes and upheld their children's rights to a more secular education and hence socialisation.

However, the case is not specifically being made that children under duress should be permitted to change their religion, without parents intervening in their choice. Alston (1992, p 54) considers rights as enforceable interests and holds that:

'...interests are our own plans and projects, our concerns and our states of mind, without which our lives would be bereft of much of their meaning. The recognition and protection of these interests is what makes human life more human. In this sense civilization is dependent in part on a culture which acknowledges the integrity and personality of each individual.'



There is no reason why this idea should not apply to children's rights in general and the right to freedom of religion in particular. The above instances demonstrate that children may have very valid reasons, even compelling and desirable reasons, for leaving their home faith and adopting a faith culture of their own.

In court cases, the child is increasingly being listened to on matters such as choice of religion, especially when the issue becomes pertinent in divorce proceedings, where parents of different faiths tussle to retain their child in their own faith. The Danforth case (in Steinberg, 1995-6, p 226) in the United States in 1976 established the proposition that if a minor child is mature and intelligent enough to understand the consequences in asserting constitutional rights, then the child can exercise these rights without first having to consult his or her parents. Age should not be the defining criteria in giving a child the right to have freedom of religion.

The freedom for a child to decide on his or her own religious beliefs and form of religious observance, should not be recognised in the breach thereof. There is a difference between permitting a choice and sustaining that choice of the child, by supporting him or her in realising the implications of the choice. A child's choice of religion should not be trivialised or frustrated by parents. A religious faith, and accompanying beliefs, are realised in practice. A parent cannot cynically agree to his or her child's choice of religion, but refuse any support to give effect to that choice of religion. To refuse the child transport to get to worship and religious observance opportunities, to unreasonably deny the child the opportunity to purchase the necessary articles of faith, such as religious books (e.g. the Bible), religious tokens (e.g. a prayer wheel), religious garb (e.g. a veil), or to avoid certain dietary regulations (e.g. avoiding beef for persons of the Hindu faith and pork for persons of the Jewish faith), would be a cynical undermining of the child's right by a parent who is (ab)using his or her powers to achieve his or her desired outcomes at the expense of the child's rights to freedom of religion.

#### 5.4 RESISTANCE TO A CHILD'S RIGHT TO CHOOSE A RELIGION

There are strong powers and pressures that permit parents to deny their children their rights. The drag in the enlightenment process means that parents' rights remain in laws and conventions, which if applied strictly, would deny children their rights. It amounts to the two sides of the ongoing debate. The protectionist position holds that parents should decide for their children what they (the parents) deem is in their (the children's) 'best interests', which often means a trumping of the children's rights and the realisation of the whims and subjective wishes of the parents. On the other hand, the autonomy 'rights' position is one that upholds children's rights, and their realisation, with the parents having duties to assist the child. Sinclair (1999, p 71) sums up the movement from the former protectionist position to the latter emerging autonomy position:

'There is no doubt that over the last number of years the emphasis in thinking in regard to relationships between parents and their children has shifted from the concept of parental power of the parents to one of parental responsibility and children's rights'

However, if religious upbringing comes under scrutiny in law, for example in divorce and remarriage guardian and custodial cases, or in placement, adoption or fostering matters, although the child may be consulted on the matter, especially if older, the court may well have a predisposition to take the side of the parent, especially if the child is not independently represented by counsel. Ahdar (2002, p 100) comments that, 'the common law has always displayed a marked deference to parents.' The assumption is that parents should make all the significant choices on matters affecting their children and hence the law should give them the liberty to do so.

Parents are held to be 'better' at deciding on important issues for their children, and guiding them in their moral beliefs, on the basis that they are older, more mature, more rational and more worldly wise. They are hence afforded power and authority over their

children based on these supposed attributes. This power and authority are taken so seriously, that the United States has not ratified the Convention on Children's Rights out of fear that it will undermine parental authority (Steiner, 2000, p 519).

Yet these parents may have criminal records, be drunkards, be having affairs, be wasting the family financial resources on gambling and drugs...the litany of examples as to why all parents are not worthy to bring a moral emphasis to bear in their child's life and make critical decisions on his or her behalf, without necessarily even consulting their child, needs to be debated openly. The state needs to end the hypocrisy evident in this convenient façade of parental invincibility, and take greater responsibility for the realisation of children's rights. The convenient distinction made by society generally, is that moral beliefs are indistinguishable from religious beliefs, needs to be disaggregated. There are many moral persons who are not particularly religious, and vice versa.

This must however be counterbalanced by the fact that children are not adults yet, that they may make choices that harm them and foreclose their right to an open future, such as contracting AIDS, dying of a drug overdose, or being convicted of a criminal offence, such as rape. Similarly, children may change their religion and in so doing make themselves vulnerable to cynical manipulation by unscrupulous persons masquerading as holy persons. Some cults are noted for separating children from their families and then exploiting them for their own nefarious ends.

A child is vulnerable, especially when very young, and does not have the rationality, insight, understanding, experience, perspective and judgement to recognise or avoid making a choice that is detrimental to them. However, this does not mandate controlling a child in all matters, in deciding for him or her, and thereby discounting the child. The answer lies in parents establishing a communicative relationship and discussing matters and their consequences with their child. In so doing, trust will be built and the situation will not deteriorate into a 'them versus us' scenario, or result in choices which are unconsulted between the parent and the child, and which hence may result in injudicious choices. It requires enlightened parenting to establish such a delicate balance and it is

predicated on maintaining communication, building trust and respecting a child as a person in his or her own right.

Parents and faith communities are likely to exert subtle, and sometimes less than subtle, pressure on a child to remain in the faith fold. In the Muslim community, to change one's faith is considered an apostasy. Churches have co-opted the concept of the family as their prerogative (although the family unit predates the origin of the faith, such as with the case of the birth of Christ) and so sayings such as 'The family that prays together stays together' become part of the process of co-opting children into the family faith.

It is held to be 'natural' that parents want the best for their children. In so doing parents will usually have:

'a positive desire to influence the course of a child's life, to guide the child from infancy to maturity, a desire to mould it, to shape its life, to fix its basic values and broad attitudes, to lay the foundations of its lifestyle, its priorities, its most general beliefs and convictions, and in general to determine, to whatever degree is reasonable and possible, the kind of person the child will become.' (Page, 1984, p 195).

The underlining is this author's emphasis, to show the use of controlling and deciding words used by parents. This kind of language is an anathema when talking of children's rights, but many parents would uncritically subscribe to it. Enlightened parenting is often better when parents influence by example, rather than by attempting to control the development of the child.

The problem with these goals, for parents to guide their child and create him or her in their own image and according to their most cherished values and ideals, by imposing their own attitudes and values on the child, is that the child is brought up as a clone of his or her parents, an object of the extension of their megalomaniac ego, to use power to control their child's development.

The rationale for such beliefs is vested in 'difference perceptions'. Qvortrup (in Smith, 2000, p 68) reminds that:

'Children are seen as having 'to mature' before they obtain freedom to act on behalf of themselves...protection (of children) may be suggested even when it is not strictly necessary for the sake of the children, but rather works to protect adults or adult social orders against disturbance from the presence of children. This is exactly the point at which protection threatens to slide into unwarranted dominance'

Parents should not be dogmatic, inflexible and intolerant in dealing with their children. Nor should they be selfish despots and see their children as instruments for achieving their own frustrated or egotistical desires.

The real problems children face in attempting to assert their individual and unique religious beliefs, are church pressures on both the child and on the parents, the latter being left feeling that they have not done their duty and have let their church down, if their child leaves the fold. There is also the powerless position of children in asserting their beliefs, with no recourse or avenue of appeal, if their parents thwart their beliefs.

## 5.5 WHY CHILDREN SHOULD BE PERMITTED TO CHOOSE THEIR OWN RELIGION?

The thesis being presented in this study is that children should have rights, as persons of equal moral dignity, and their rights should be optimised to the greatest extent possible, by their parents in the home. The arguments have not been a variation of child power, nor a hands-off approach and abandoning children to their own vulnerabilities. The arguments presented have been from a principled position, testing what enlightened parents could do when faced with certain options in raising their child and how parents

can assist their children to be rights' recipients, in the best sense of the word for them. A consideration of a child's right to have freedom of religion will be reviewed in the light of the approach taken in this study.

Parents should socialise, but not indoctrinate their children. Where does the difference lie? Socialisation is a largely informal process in the family, of teaching the child, through relationships, to adjust to living in his or her society, resulting in the child increasingly becoming a functional member of his or her community (Pratt, 1966, p 299). In similar effect, R S Peters described educating the child as a process of initiation (1972, p 46).

It should be noted that the process of socialisation does not aim at turning out standardised citizens or parental clones. In society, there exist a wide variety of persons, each with their unique views and values, who retain the right to be their own person and to become their own person. So it should be with raising children. Mill (in Samek, 1982, p 783) claimed that:

‘...only when a person is left to think and choose on his own will he develop. To conform to custom merely as custom does not educate or develop him in any of the qualities, which are the distinctive endowment of a human being. The individual must be allowed to exercise his own judgement because choice is the indispensable condition for the making of a person.’

The individual, to be a person, must set his or her own goals in his or her life, based on the affirmation of his or her own values, and be allowed to develop his or her own sense of himself or herself and be permitted (encouraged) to aspire to these goals. Personhood cannot be imposed. It develops from a young age, based on life experiences and the choices made by the child.

Indoctrination on the other hand has certain manifestations that set it apart as a social process. Indoctrination is an attempt to pass on a worldview, belief, faith or perception,

and to seek conviction for it, rather than an understanding of it. The attempt at conviction is aimed at closing off any alternatives for the child's knowledge or understanding, by the parents (in this instance) curtailing the child's exposure exclusively to their own religious and moral views. The parents in indoctrinating attempt to be the primary/exclusive influence on the child in this regard (Ladd, 1996, p 166). Indoctrinaire parents are convinced that their role is to determine the beliefs of the adult that their child will become.

The result is that the child has 'the truth' so ingrained in his or her psyche, that he or she has no freedom of choice, because he or she does not 'know' to any extent what the alternatives are. In fact, the alternatives are very often held out to be misguided, dangerous, lacking in any veracity or simply wrong. A good example would be the fundamentalist teaching of the origin of man in creation and the decrying of any evolutionary possibility (or vice versa for that matter). The line is drawn and stubbornly defended in the faith (including scientific faith) and in the home.

In the process of indoctrinating, no possibility of pluralism is permitted, no adequate justification is give for the favoured point of view, or against any contrary point of view, which violates the standard criteria for finding 'the truth' or 'the best belief'. By excluding facts or evidence, it precludes the possibility of changing one's belief, or even testing one's belief. Snook (1972, p 13) quotes Fitzpatrick's assertion:

'Indoctrination, however, is fundamentally and essentially undemocratic. It intends to anticipate choice. It inherently uses the individual as a means to an end, and this danger is present wherever any type of authoritarianism prevails.'

If parents resist their child's wish to follow their own religious beliefs, or in any unreasonable decision they make to manipulate, mould or control their children, certain reasons may be given to rationalise their role as a 'good and loving and understanding' parent:

- Because it does not accord with our family beliefs
- Because it threatens my authority/power as a parent and is likely to undermine my role and authority in the family
- Because it is inconvenient for members of the family to go to different churches on a Sunday
- Because my child must learn discipline and obey – when he or she is old enough he or she can decide for himself or herself
- He or she will thank me for making the decision I have made not to permit him or her to change religion
- Because I love her or him
- Because I am an adult and his or her parent and I know that I am right and hence what is best for my child and family
- I am simply doing what all parents would do/what my parents did
- It is my duty/responsibility to decide as I have
- My community/church expect me to proceed as I have
- I insist that my child will continue to follow my religion as long as he remains in my control and under my roof

The list of rationalisations is endless, but each one has the effect of discounting the child's right to make reasonable decisions as to how to live.



## 5.6 THE ENLIGHTENED PARENT AND THE CHILD'S RIGHT TO A CHOICE OF RELIGION

Haydon (1993 p 215) stresses the need to recognise that children have rights of their own, which may potentially conflict with their parents' rights. In matters of religious beliefs, a parent should acknowledge that the child has rights that are not overridden by parents, religious organisations, communities or the state, because no one has the right to control the life of another person. The sentiment expressed by the Roman Catholics in their Declaration of Religious Freedom (*Dignitas Humanae Personae*) that 'It is one of the major tenets of Roman Catholic doctrine that man's response to God in faith must be free' should be applied to children as well (Ahdar, 2002, p 100).

Parents need to become more respectful of their children as persons in their own right. The plea is for a positive benevolence and compassion towards their children on the part of parents. Much is made in our modern societies for the need for tolerance between nations, peoples, communities, and individuals. This includes an acceptance of the extraordinary diversity of ideas, opinions and beliefs held by others. There should be an acknowledgement of the right of each person or group to be respected for their religious beliefs and this should extend to children, even in the home, perhaps especially in the home.

Enlightened parents will recognise, and act upon, a fundamental respect for the personhood and dignity inherent in their child from birth. Zick (2004, p 252) expressed the idea that 'the essential core of personhood is the right to believe as we wish and to order our private thoughts as a fundamental right.' Parents do not, or should not, decide their children's political beliefs, so why should they try to circumscribe their religious beliefs?

Kierkegaard (Witte & v d Vyver, 1996, p 467) expressed a similar sentiment in more poetic terms: 'Man is himself primarily and genuinely in his free choice.' Sensitive

parents will realise that their child's relationship with God, no matter how immaturely formulated, is not something that can be dictated or coerced. For belief to be meaningful, it must be accepted willingly and voluntarily, as a personal commitment. Religious adherence simply cannot be dictated and religious conscience cannot be coerced.

There is no doubt that persons in a family subscribing to different beliefs and belonging to different faith communities is inconvenient. This is so if a mother and father subscribe to discrete religions, but an accommodation has to be found. Where a child holds to different beliefs to his or her parents, it is equally difficult, if not more so, as the child may not have the wherewithal to prosecute the belief independently of the family (e.g. transport) and may have to rely on the willing cooperation of one or both parents to give effect to his or her belief. It is also more likely that the child's wishes in this regard may be overridden in the interests of expediency, given the power and resource differential between a child and a parent (i.e. money, transport). Yet parents should not simply make an arbitrary and convenient (for them) decision in such a situation.

Religious choice is a consequence of our contemporary human rights world. The tension created by having different faiths within groupings, such as in a family, is an unavoidable consequence of pluralism in religious beliefs that arise in a postmodern society. The global world has tended to challenge the exclusive and mono faith communities. The answer is not to try to hark back to a previously idolised unitary religious dispensation, but to accommodate the differences and even to celebrate the diversity. This is the essence of democratic living and accords with a world based on peace, understanding and tolerance. In fact, freedom of belief and religion is quintessentially democratic and pluralism cannot be dissociated from the democratic society, much as conservative parents and dogmatic churches may abhor it. Religious choice is the hallmark of a democratic society.

## 5.7 CONCLUSION

It has been held that human rights apply to all persons equally and that rights can only be denied if justifiable and reasonable explanations hold sway. The choice of religion is, with very few exceptions, not a threat to the believer. It is perfectly acceptable for a child to claim the religion of his choice and to be given the opportunity to prosecute his or her faith.

In this chapter, a right to freedom of religion for the child has been shown to be based on sound human rights principles and practices, but it has also been demonstrated how a child is unlikely to realise this right in practice. The dangers of not allowing a child freedom of religion have been explicated, and the dangers of indoctrination and discounting the child as a person have been articulated.

This discussion provides the perfect backdrop for discussing the concept of an 'enlightened parent' in the chapter that follows.

## CHAPTER SIX

### FUTURE PERSPECTIVES ON CHILDREN'S RIGHTS IN THE HOME

'A shift in emphasis from protection to autonomy, from nurturance to self determination, from welfare to justice.' (Freeman & Veerman, 1992, p 3).

'Dignity is not thus an end in itself or even a means to an end. It is rather an expression of an attitude to life which we as humans should value when we see it in others as an expression which gives particular point and poignancy to the human condition.' (Feldman in Klug, 2000, p 101).

'...change(s) in public opinion which has come to place a high value on respect for individual fulfilment and free choice, on tolerance of diversity of styles in personal relationships and on concern for the well-being of all persons in society.' (Zuckerman in Van Wyk, 1994, p 504).

#### 6.1 INTRODUCTION

This research has demonstrated that children are entitled to rights as ontologically valued persons within a human rights culture. It has further established that these rights are often recognised in the breach thereof. It is averred that children's rights cannot be realistically achieved in many instances via legal channels. Yet, it is clear from this study, that something has to be done to enhance the realisation of rights for children in the private domain. This can realistically only be achieved by changing the attitudes of society and parents.

In order to bring about this change, the concept of an 'enlightened parent' is articulated. An insight is given as to what this means in practice by elucidating Rogers' conception of a fully functioning person and a person centred approach towards others, based on respect for persons.

The key values underpinning an 'enlightened parent' are tolerance and an ethic of care and concern. If parents treat their children in these ways, the result will be an empowered child, who develops into an autonomous adult.

As a way forward, suggestions are made on a possible advocacy campaign to promote attitude change and the emergence of enlightened parents and productive and supportive parent child relationships.

## 6.2 QUO VADIS CHILDREN'S RIGHTS?

If children are not accorded full rights by their parents in their home, they could be forgiven for asking pertinent, probing questions such as:

Is a child an incomplete person? Or is a child only permitted incomplete rights?

Is a child's dignity divisible into a reduced quantum (half a dignity)?

Is a child his or her own project as a person, or are children condemned to being their parent's project?

Is a child a person, with all that that entails, or is a child an object to be crafted and moulded according to a parent's template?

The central tenets of this treatise have been that children are worthy of respect and dignity, and that in the home parents are the ones who either promote or diminish the realisation of their children's rights. Rights, rather than being only legally enforced laws, should be a matter of education and children's rights advocacy, to achieve the realisation of moral rights and dignity for children. The achievement of children's rights has been expressed as an enlightened parental relationship with their child. We now need to consider this concept in more depth.

### 6.3 THE CONCEPT OF AN ENLIGHTENED PARENT

Traditionally, stereotypes have been isolated that perceive the male perceptual set as being founded on the values of authority, justice, autonomy and universalism (the modernist values). The female stereotype has been viewed as a perceptual set based on the values of love, caring, nurturance, dependence and particularism (the more postmodern values) (Tong, 1993, p 9). Whilst stereotypes and dichotomies conceal as much truth as they may reveal, they are a useful way of perceiving children's rights from a parental perspective.

An enlightened parent is one, of either gender, who can relate to his or her child according to these kinds of values, where appropriate. There are times when mothers have to be firm and in authority for the sake of their child; there are times when fathers have to be sensitive and supportive of their child's needs. Postmodern parents are not tied to gender stereotypes in archaic patterns of interacting with their children.

An enlightened parent is an empowering parent. Such a parent is not captivated by perceptions of what the child currently 'is', but what the child is 'becoming', and where the child needs to be when he or she becomes an adult. This means promoting the forward looking aspects of the child as he or she grows and develops, whilst removing unnecessary or harmful limits or circumstances that would hold the child back. It is akin

to raising a prize plant. Noxious circumstances are eradicated and nurturing conditions are provided. The plant is regular tended and given the opportunity to realise the potential that already exists inside its constitution. So it is with the enlightened raising of children.

#### 6.4 ROGERIAN VISION OF THE PERSON

Carl Rogers, an educator and a counsellor, developed a theory of human development that would permit persons to optimise their natural growth as persons. His ideas are contained in his seminal work, *Client-Centered Therapy*. For Rogers, the innermost core of human nature is essentially purposive, forward moving, constructive and quite trustworthy (Hjelle, 1981, p 403). Consequently, it is necessary for persons to be treated with respect and be allowed to develop in their own way.

Rogers postulated conditions for maximising the growth of the inherent potential of every human being. Although his therapy was, at a very simplistic level, to provide a therapeutic climate, which would permit persons to overcome past negative influences that had skewed or retarded their growth, his views may also form the basis for optimal human growth of the personality of all persons, especially children. The necessary conditions for optimal personal growth are:

1. Unconditional positive regard for the person
2. Conditions that promote acceptance and enhance the worth of the person
3. An acceptance of the other as he or she is

4. Respecting the right and the inherent potential of each person to self determination
  
5. Respect for the person as a unique and valued person

The family should be envisaged as providing these conditions and acting as a person (child) centred 'forming community'. Although the child should receive the necessary support, appropriate to his or her age and the circumstances in each instance, the emphasis should be to provide the wherewithal for the child to develop an internal locus of control<sup>21</sup>, resulting in a self reliant, a self responsible and a self determined person. The child needs an ethos of fundamental respect from his or her parents in the home in order for him or her to be free to determine his or her own personal behaviour and values.

Parents express fears that freedom will deteriorate into 'licence' and 'lawlessness'. According to Rogers, a responsible person acts within the context of respect for the dignity and worth of others. By treating a child in a responsible manner, they are experiencing and appreciating the need for them to act towards others, including their parents, in the same fashion, especially if parents give them opportunities to experience acting responsibly in appropriate circumstances according to their level of development at various stages in their childhood. The result should be more respectful children, rather than the less respectful children, such as those who may be encountered in schools and the wider society. It is the base laid by the parent that really counts in bringing up children to be responsible children and adults. In fact, children need only have one duty, and that should be to be taught to respect the rights of others.

---

<sup>21</sup> This concept implies that self evaluation and growth tend to be internally promoted and are not based predominantly on external value judgements by significant others. Of course, others are involved in our perceptions and feelings about ourselves. A locus of control is predicated on the degree of influence that obtains in each person's life, whether internally chosen or externally dictated.



## 6.5 TOLERATION

One of the cardinal values that promote the outcome of parents achieving rights for their children in practice, is toleration. Although tolerance is an ancient concept, it is a very postmodern virtue, in that it creates space for diversity and difference between persons and accommodates a plurality of opinion. It leads to peaceful coexistence, whether between nations, or cultures, or religions, or between generations in a home. It allows persons to live with others who have different beliefs and values, which is inevitable between succeeding generations to some extent or other in our contemporary society.

Toleration is a restraint or forbearance towards ideas, ways or customs that differ from our own. This can be a natural process within families and communities, where social change is rapid and influences may affect one generation, leaving the other generation behind. Westernisation and urbanisation can cause a massive disjunction between parents and their children. In a family where the parents are rural and uneducated, but the children are literate, numerate, technologically adept and culturally sophisticated, the old 'values' implicitly come to be questioned and perhaps rejected.

Toleration of individual diversity and pluralistic group positions, in preference to conformity and uniformity, is often rejected by establishment institutions, such as churches, and by parents who like to wield power and be in control, and wish to impose conformity and uniformity on all those around them. Klug (2000, p 200) alludes to the moral vision that is at the heart of modern human rights thinking, and rejects the attempts by persons who try to impose a world view by caricaturing rights as leading to individualism and license. In similar vein, he attests that the concept of inalienable rights is aimed precisely at distinguishing those rights that are essential for the furtherance of human dignity from those which are not:

'Far from the idea of fundamental human rights encouraging relativism, it defines a common norm. Far from promoting individualism, it suggests what the limits to

freedom might be and the obligations individuals...owe to other individuals. Far from weakening the bonds of communities, it sets down the notion of the common good in a democratic society.' (Klug, 2000, p197)

Toleration is a central value for maintaining peace in the world. It should also be promoted in the home to achieve the same end.

## 6.6 THE ETHIC OF CARE AND CONCERN

Enlightened parenting must stress the empathetic association between parents and their children, promoting a sense of being responsible, caring and showing concern for their children's well being as persons. It requires being sympathetic to their children's status as emerging personalities and should evince a deep seated concern for them. Qualities associated with the enlightened parent are sympathy, compassion, discernment, love, trustworthiness and faithfulness.

McGillivray (1997, p 237) has tabulated the continuum of children's participation with their parents, in making decisions that affect their young lives. At the non participation level, parents may manipulate matters to achieve their own desired ends, or pretend to be collaborative via putting a front on their decision, making it out to be the child's decision, or resorting to tokenism (pretending that the child has been an agent in the matter, when in fact he or she has not influenced the decision in any real sense). All of these will amount to a voice for the child, but no real choice. All of these discount the child and his or her rights. At the next levels of collaboration, a child becomes more involved and is informed in the decision making process, and consulted before an adult (parent) makes the choice for them. At the highest levels of child participation, the child makes the choice, with adult supervision or adult support, in a process of shared decision-making. This is not child licence and parents absconding from their responsibilities, so feared by

authoritarian parents who wish to maintain their power and control. It has been succinctly stated:

‘...a democratic family is characterized by mutual respect, sharing, integrity, autonomy and equality in the sense that each member, while not identical, has equal value as a human being. In the adult-child relationship the integrity of each person and their mutual respect must be constant, while the degree of actual autonomy or freedom of action is limited and changes over time, partly because of consideration of the other person, partly due to the developmental stages and capacities of the members. Developing a healthy balance between the consideration of the needs of its members is one of the goals of democratic family functioning.’ (Flekkoy, 1997, p 61).

A useful way of considering children’s rights is via Maslow’s construct of the hierarchy of needs. Maslow (in Hjelle & Ziegler, 1981, p 368 - 374) postulated five essential needs to achieve or aspire to, each requiring the lower needs to be adequately fulfilled, before the upper person needs could reasonably be expected to be achieved. The lower needs, the physiological and safety needs, would equate to the protection and provision that parents ensure for their children. However, the three critical personal needs, for love/belonging, for self esteem and for self actualisation are implicitly realised by providing the child with his rights, based on his or her dignity, self respect and freedom to be fully human. The result would be a child who develops self-esteem, self-confidence and a sense of inner competence. The child who is stifled by his or her parent, who is given protection and provision, but no sense of real participation, would be equivalent to raising a pet in a humane way, in effect.

The African Charter on the Rights and Welfare of the Child refers to the education of the child for the promotion and development the child’s personality, respect for human rights and fundamental freedoms, and preparation for a responsible life in a free society in the spirit of understanding, tolerance, dialogue, mutual respect and friendship (article 11). The parents’ role in bringing up their child should replicate these ideals in the home.

Witte & v d Vyver (1996, p 502) remind that there is one humanity with a rich variety of individual lives, traditions, communities and religions that ought not to be violated and which can encompass difference within unity. Care and concern for a child require an acknowledgement of these truths by parents.

## 6.7 CHILDREN'S RIGHTS ARE A PRODUCT OF PARENTS' PERCEPTION OF THEIR CHILDREN

It has become evident in this study that children's rights in the family are not so much a matter of children's rights per se, but ways in which parents view their children and their rights. Rights for children are realised in loving and caring relationships that parents create and nourish in dealing with their child. Rights in this scenario are best seen as a realisation of various values, such as love, friendship, compassion, altruism, benevolence, kindness and consideration. A number of commentators have alluded to this kind of perception of children's rights:

Perry (in Eekelaar, 2001, p 191) clearly states the notion in defining children's rights as claims that are invariably about what one is due as a human being.

Olsen (in Brannen & O'Brien 1996 p 34) refers to rights that promote the ability of children to form relationships of trust, meaning, and affection with people in their everyday lives and their broader community.

Freeman & Veerman (1992 p 37) refer to the recognition of the moral integrity of children to be treated as persons who are entitled to equal concern and respect.

McGillivray (1994, p 249) sums it up by holding that rights as shared human standards are about the decent treatment of people and must in the end govern the parameters of childhood as well.

The sterile debate on children's duties contra their rights, of an emphasis on protection over self-determination, becomes passé. McGillivray (1994, p 244) reminds that stressing responsibility over rights is unjustifiable. Freeman (2002, p 73) speaks of the possible abuse of concepts, citing the example that the concept of duty can be used by the powerful to control the weak.

What enlightened parents owe their children is a childhood that realises the finest aspirations for persons as moral beings. Providing rights for their children is a way of parents achieving this aspiration.

## 6.8 THE WAY FORWARD

In this study, the deficiency in realising children's rights has been highlighted as being their relative lack of rights as children in the home. The role of parents has been considered against the background of the fundamental values contained in the human rights oeuvre. The meaning of these values was considered in relation to children. Two exemplars were used to highlight the application of children's rights by parents in the home, concerning corporal punishment and freedom of religion. Finally, the concept of an enlightened and empowering parent was used to pull the threads of the argument together, so as to build an understanding of how good parenting can result in realistic rights for children, as an integral part of their education in the home.

However, the realisation of children's rights in the home in practice will require a more fundamental advocacy before an impetus can be given to the cause of children's rights in the private sphere. This is especially so given the traditions that have to be changed and

the entrenched interests that resist such change. Change is more difficult if it is perceived threatening to some particular cherished cause or traditional power base, or an anathema to authoritarian parents.

What should be done? A number of interventions are required to promote children's rights in the family. Possible suggestions are:

1. Further research on what rights for children in the home means.
2. Popularising the tenets of children's rights via a media campaign and educational interventions with parents.
3. Advocacy with resistant parental or societal groups, entering into debate and trying to engage with them, in order to try to influence their perceptions and understanding of children's rights.
4. Advocacy with the state power structures, to place children's rights concerns at the heart of the human rights efforts in the country.
5. Legal cases should be undertaken to achieve significant progress in public understanding and awareness of the critical issues and key areas, such as that which resulted from the Gillick case in England.
6. Where appropriate, instituting legislation to promote children's rights in the private sphere.

The above campaign would be established on the basis of the considerable success already achieved in children's rights in the public domain and in a related fashion. The detail of what is envisaged would need to emerge as a result of scholarly consideration by

enlightened persons and would build on the considerable achievements in establishing children's rights to date.

## 6.9 CONCLUSION

This final substantive chapter has brought together the appeal for children to be accorded their rights as persons, given the dearth of literature on promoting children's ontological rights based on axiological concerns.

It has proposed a way forward to promote and realise children's rights via an advocacy campaign based on the concept of an 'enlightened parent'. It has also established a foundation on which future research into principled children's rights can be prosecuted.

## CHAPTER SEVEN

### CONCLUDING SUMMARY

As was indicated at the beginning of this study<sup>22</sup>, where there is research on children's rights, it seldom gets to the heart of personal, ontological, and moral rights for children. This research has embarked on addressing this deficit in a sustained and detailed manner.

In the first chapter, the position of children's rights, with especial reference to the South African situation, was considered. In the eyes of the state, as contained in the Bill of Rights in the Constitution and reflected in laws and policies, children have an advanced level of rights on paper. In terms of implementation, it was noted that there is a considerable gap between principle and practice, but that the state is trying to do its best to bring the theory and the realisation of children's rights closer together.

However, children live the bulk of their lives in the private domain, in particular in the home with their all-powerful parents. The state neutralises the rights of children by providing rights in law for parents to raise their children as they see fit, with no monitoring or accountability structures, save when they overstep the considerable latitude allowed to them by society, and treat their children in a manner that permits criminal or civil charges. This is with the presumption that these incidents are actually discovered and acted upon.

The Constitution clearly states that the provisions of the Bill of Rights apply to all citizens. In fact, many of the fundamental rights are non derogable, including dignity in its entirety. Where rights are diminished, the Bill of Rights requires that the diminution must be curtailed according to the specific need in the specific circumstances and that the curtailing of a right must be justified and reasonable. Furthermore, the rights clauses

---

<sup>22</sup> This was highlighted in the summary on page 7.



permit the possibility of the horizontal application of the rights values, such as between a parent and a child.

In terms of the parent's role of protection and provision, children are possibly adequately catered for in terms of the requirements of the law. The contention in this study is that children generally speaking do not realise their aspirational rights in the private domain, the rights that permit and promote the realisation of their personhood and personal development, whether in theory or practice. In particular, children are often not accorded their rights by their parents in their homes.

In pursuance of this thesis, the status of children was interrogated and the traditional paternalistic role of parents was explicated. Chapter two uncovers the deficiencies in the role of parents in treating their children with respect according to their rights. This is so because of the historical nature of the parent child relationship. It may also be a product of not knowing what an optimal relationship with their child could be.

Initiatives to promote children's rights, including in the home, were considered. The so-called children's liberation movement and other societal interventions, such as in law, were considered, on the basis of international perspectives. These drives are resulting in changes in the perception of children, which in turn are promoting their participation as moral equals in society, and hence the rights they can claim. However, there is a long way to go to achieving children's rights deserts.

Chapter three is a pivotal chapter. It contains the arguments from first principle, based on the values contained in the human rights oeuvre, which form the basis for children having full rights. These philosophical underpinnings are viewed through the portal of the ontological status of the child as a person, and what it means to be a person, who is valued and worthy of enlightened treatment. The cardinal conception is respect for person, which is held to apply equally to children as well as adults. It is personhood, which creates the premier and most fundamental of the human rights values, namely dignity. Children have an absolute right to be treated with dignity.

If children have personhood, which is worthy of respect and assures that their dignity should be held intact, then it is obvious that children should be treated equally to the way adults are treated, from a moral perspective. The only debate is how to acknowledge these rights of children to be equal in their freedom and their autonomy. Naturally, children are not adults and require protection and provision, but these concerns of parents do not gainsay children their rights to be their own person in their parents' eyes.

In order to explicate the deficiencies in parents according children their rights, and as a template as to what it can mean in practice for children to receive their due rights treatment from their parents, two exemplars were chosen to elucidate the principled arguments and possible practices that parents could adopt in ensuring that their children realise their rights.

The first exemplar was a consideration of ensuring that children do not receive corporal punishment from their parents in their homes, as happens under the Bill of Rights for their parents. There appear to be no rational arguments why children may be beaten, but not adults, except considerations of tradition and parental power. It is high time that these phenomenon were countered and children took their rightful place in a humane and civilised society based on human rights and respect for everyone equally. All that needs to happen is for the horizontal application of human rights, as envisaged under the Bill of Rights, to be given effect and for legislation that favours parents' 'rights' to be bullies, to be countered by the actualising of the human rights values for children in the home.

The second exemplar also highlights the potential deficits in parenting vis-à-vis children's rights and demonstrates how a human rights regime could, or should, be established by parents in the home. The consideration centred on the right of a child to freedom of religion. There are strong parental imperatives to maintaining a child in the family faith, based on powerful parent emotions. Parents usually have the power to impose their egotistical wishes on their children in this regard. However, there may be compelling, or even predispositional, reasons why it may be reasonable for a child to follow his or her own faith in contradistinction to his or her parents' faith beliefs, and

children should have the right to follow their feelings in this regard. It is seldom a terrain of protection or parents knowing best, unless the proposed change in religious belief involves manipulation of the child. Indeed, the parents' faith may be decidedly unwholesome for the child and changing religions may well be considered mandatory for the child's protection.

Religious parents, sometimes arising out of a misguided, but sincere and devout consideration, may feel that they have the right, if not the obligation, to indoctrinate their child into their faith and ways of worship. Children's rights dissipate in the face of the parents' rights and the parents' power differential means that their wishes predominate and their children have no contrary power and hence no rights in effect. Enlightened parents, on the other hand, consider their children's wishes and assist them to achieve their own ends.

Having raised the problems and articulated the principles that should obtain in dealing with children's rights, the question arises as to what can realistically be done to promote the realisation of effective rights for children in the home. Not every standoff between parents and their children, which has a rights overtone, can be settled by going to court. What is needed is for parents to be sensitive to their child's needs and to respect their child sufficiently to provide a home in which realistic child's rights can prevail. It would require education and sensitising parents, in an attempt to bring about attitudinal change in the way that parents perceive and treat their child.

The concept of an 'enlightened parent' is proposed. If the child's best interests are to be served, then parents are important in bringing a rights regime to fruition in the home. Parents should provide the atmosphere that allows a child to develop towards adulthood. Central to empowering the child, is permitting the child opportunities to participate, to explore options, to decide on a choice between options, and to be safe in feeling accepted and loved. The Rogerian view of personhood provides a good template for sound parenting, being based on respect and regard for the other.

What is needed is a family atmosphere of tolerance, with parental powers only coming into play when it is necessary to do so. The 'feminist' philosophers, as in the seminal work by Gilligan<sup>23</sup>, stress the ethic of care and concern. Women's ethics is seen as relational and so it is suited to illuminating a parent child relationship, as contained in an 'enlightened parent' conception.

Articulating what is needed is one level. Realising it in practice is another. So guidelines are given briefly as to how the 'enlightened parent' concept could be propagated and children's rights promoted via an advocacy campaign to engender parental attitude change in dealing with their children.

---

<sup>23</sup> Refer to C.Gilligan. 1982. *In a Different Voice: Psychological Theory and Women's Development*. Cambridge, Harvard University Press.

## BIBLIOGRAPHY

### 8.1 BOOKS AND JOURNALS

- Ahdar, R. 2002. The Child's Right to a Godly Future. *The International Journal of Human Rights*, 10 (89).
- Alaimo, K & Klug, B. (editors). 2002. *Children as Equals: Exploring the Rights of the Child*. Lanham, University Press of America.
- Alves, J A L. 2000. The Declaration of Human Rights in Postmodernity. *Human Rights Quarterly*, 22:2 (478).
- Andre, C & Velasquez, M. Undated. Children's Rights. Internet.
- Ammicht-Quinn, R *et alia*. (editors). 2003. *The Discourse of Human Dignity*. London, SCM Press.
- Archard, D. 1993. Do Parents own their Children? *The International Journal of Children's Rights*, 1 (293).
- Barnes, R. 1992. *Hitting People is Wrong – and Children are People Too*. London, Epoch Worldwide.
- Bartlett, K T. 1988. Re-Expressing Parenthood. *The Yale Law Journal*, 98 (293).
- Bates, F. 1978. Child Law and Religious Extremists: Some Recent Developments. *Ottawa Law Review*, 10 (299).

- Benn S I & Peters, R S. 1971. *Social Principles and the Democratic State*. London, George Allen & Unwin.
- Boy, A V & Pine, G J. 1982. *Client-Centered Counseling: A Renewal*. Boston, Allyn & Bacon.
- Brannen, J & O'Brien, M. 1996. *Children in Families: Research and Policy*. London, Falmer Press.
- Breen, C. 2006. *Age Discrimination and Children's Rights: Ensuring Equality and Acknowledging Difference*. Leiden, Martinus Nijhof Publishers.
- Brennan, S & Noggle, R. 1997. The Moral Status of Children: Children's Rights, Parents' Rights and Family Justice. *Social Theory and Practice*, 23: 1 (1).
- Burman, S. (editor). 2003. *The Fate of the Child: Legal Decisions on Children in the New South Africa*. Lansdowne, Juta Law.
- Chadwick, R. (editor). 1998. *Encyclopaedia of Applied Ethics*. London, Academic Press.
- Chaskalson, A. 2000. Human Dignity as a Foundational Value of our Constitutional Order. *South African Journal of Human Rights*, 16 (193).
- Childress, J F & Macquarrie, J. (editors). 1986. *The Westminster Dictionary of Christian Ethics*. Philadelphia, The Westminster Press.
- Davel, C J. (editor). 2000. *Introduction to Child Law in South Africa*, Lansdowne, Juta & Company.
- Davis, D. *et alia*. 1997. *Fundamental Rights in the Constitution: Commentary and Cases*. Kenwyn, Juta & Co.

De Kock, P D & de Kock, J. 1999. Society, Human Rights and Corporal Punishment: Quo Vadimus? *Obiter*, 1999 (133).

Devenish, G E. 1999. *A Commentary on the South African Bill of Rights*. Durban, Butterworth Publishers.

De Waal, J. *et alia*. 2003. *The Bill of Human Rights Handbook*. Lansdowne, Juta & Co.

Douzinas, C. 2002. *The End of Human Rights*. Oxford, Hart Publishing.

Eberle, E J. 2002. *Dignity and Liberty: Constitutional Visions in Germany and the United States*. Westpoint, Praeger Publishers.

Eekelaar, J. 1986. The Emergence of Children's Rights. *Oxford Journal of Legal Studies*, 6 (161).

Eekelaar, J. 2002. Personal Rights and Human Rights. *Human Rights Law Review*, 2 (181).

Fairchild, H P. (editor). 1966. *Dictionary of Sociology*. New Jersey, Littlefield, Adams & Co.

Feldman, D. 2002. *Civil Liberties and Human Rights in England and Wales*. Oxford, Oxford University Press.

Fineman, M A. 1999. What Place for Family Privacy? *The George Washington Law Review*, 67 (1207).

Flekkoy, M G & Kaufman, N H. 1997. *The Participation Rights of the Child: Rights and Responsibilities in Family and Society*. London, Jessica Kingsley Publishers.

Fisher, D. 1997. Parental Rights and the Right to Intimate Association. *Hastings Law Journal*, 48 (399).

Forsyth, C J. & Schiller, J E. (editors). 1979. *Human Rights: The Cape Town Conference*. Cape Town, Juta & Company.

Fortin, J. 2001. Children's Rights and the Use of Physical Force. *Child and Family Law Quarterly*, 13:2 (243).

Fredman, S & Spencer, S. (editors). 2003. *Age as an Equality Issue*. Oxford, Hart Publishing.

Freeman, M D A. 1980. The Rights of Children in the International Year of the Child. *Current Legal Problems*, 33 (1).

Freeman, M D A. 1983. *The Rights and Wrongs of Children*. London, Francis Pinter Publishers.

Freeman, M. (editor). 1996. *Divorce: Where Next?* Dartmouth, Aldershot.

Freeman, M. 2002. *Human Rights: An Interdisciplinary Approach*. Cambridge, Polity Press.

Freeman, M. 2004. The Problem of Secularism in Human Rights Theory. *Human Rights Quarterly*, 26 (375).

Freeman, M & Veerman, P. (editors). 1992. *The Ideologies of Children's Rights*. Dordrecht, Martinus Nijhof Publishers.



Hastings, A. *et alia.* (editors). 2000. *The Oxford Companion to Christian Thought*. Oxford, Oxford University Press.

Haydon, G. 1993. Moral Education and the Child's Right to an Open Future. *The International Journal of Children's Rights*, 1 (213).

Higginbotham, S. 1997. Mom, Do I Have to go to Church?: The Noncustodial Parent's Obligation to Carry out the Custodial Parent's Religious Plans. *Family Law Quarterly*, 31:3 (585).

Hjelle, L A & Ziegler, D J. 1981. *Personality Theories: Basic Assumptions, Research, and Applications*. Kogakusha, Mc Graw-Hill.

Jagger, A M & Young, I M. (editors). 2000. *A Companion to Feminist Philosophy*. Oxford, Blackwell.

John, M. 2003. *Children's Rights and Power: Charging Up for a New Century*. London, Jessica Kingsley Publishers.

Klug, F. 2000. *Values for a Godless Age: The Story of the United Kingdom's New Bill of Human Rights*. London, Penguin Books.

Kretzmer, D & Klein, E. (editors). 2002. *The Concept of Human Dignity in Human Rights Discourse*. Kluwer Law International, The Hague.

Ladd, R E . 1996. *Children's Rights Re-visioned: Philosophical Readings*. Belmont, Wadsworth Publishing Company.

Landa, S. 1990-1. Children and Cults: A Practical Guide. *Journal of Family Law*, 29 (591).

Martin, S R. 1996. A Child's Right to be Gay: Addressing the Emotional Maltreatment of Queer Youth. *Hastings Law Journal*, 48 (167).

McGillivray, A. 2004. Child Physical Assault: Law, Equality and Intervention. *Manitoba Law Journal*, 30:2 (133).

McGillivray, A. 1994. Why Children Do Have Equal Rights: in Reply to Laura Purdy. *The International Journal of Children's Rights*, 2 (243).

McGillivray, A. (editor). 1997. *Governing Childhood*. Aldershot, Dartmouth Publishing Company.

Moelis, C S. 1988. Banning Corporal Punishment: A Crucial Step Toward Preventing Child Abuse. *Children Legal Rights Journal*, 9 (2).

Montgomery, J. 1988. Children as Property. *The Modern Law Review*, 51 (323).

Morris, B. 1994. *Anthropology of the Self: The Individual in Cultural Perspective*. London, Pluto Press.

O'Neill, O & Ruddick, W. (editors). 1979. *Having Children: Philosophical and Legal Reflections on Parenthood*. New York, Oxford University Press.

Page, E. 1984. Parental Rights. *Journal of Applied Philosophy*, 1:2 (187).

Peters, R S. 1972. *Ethics and Education*. London, George Allen & Unwin.

Phillips, B & Alderson, P. 2003. Beyond 'Anti-smacking': Challenging Violence and Coercion in Parent-Child Relations. *The International Journal of Children's Rights*, 115 (175).

Pollard, D. 2003. Banning Child Corporal Punishment. *Tulane Law Review*, 77:3 (575).

Purdy, L. M. 1992. *In Their Best Interests? The Case Against Equal Rights for Children*. Ithaca, Cornell University Press.

Reese, W. L. 1996. *Dictionary of Philosophy and Religion: Eastern and Western Thought*. New Jersey, Humanities Press.

Robinson, J. A. 1997. *The Law of Children and Young Persons in South Africa*. Durban, Butterworths Publishers.

Rogers, C. 1965. *Client-Centered Therapy: Its Current Practice, Implications, and Theory*. Boston, Houghton Mifflin Company.

Routledge, 2000. *Concise Routledge Encyclopaedia of Philosophy*. London, Routledge.

Samek, R. A. 1982. Untrenching Fundamental Rights. *Mc Gill Law Journal*, 27 (755).

Shutte, A. 2001. *Ubuntu: An Ethic for a New South Africa*. Pietermaritzburg, Cluster Publications.

Smith, A. B. et alia. 2000. *Advocating for Children: International Perspectives on Children's Rights*. Dunedin, University of Otago Press.

Snook, I. A. (editor). 1972. *Concepts of Indoctrination: Philosophical Essays*. London, Routledge & Kegan Paul.

Spiegelberg, H. 1971. Human Dignity: A Challenge to Contemporary Philosophy. *The Philosophy Forum*, 9:1 (39).

Stenberg, M. 1995-6. Free Exercise of Religion: The Conflict Between a Parent's Rights and a Minor Child's Right in Determining the Religion of the Child. *Journal of Family Law*, 34 (219).

Steiner, H J & Alston, P. 2000. *International Human Rights in Context: Law, Politics, Morals*. Oxford, Oxford University Press.

Taylor, P M. 2005. *Freedom of Religion: UN and European Human Rights Law and Practice*. Cambridge, Cambridge University Press.

Tong, R. 1993. *Feminine and Feminist Ethics*. Belmont, Wadsworth Publishing Company.

Vandenberg, D. 1983. *Human Rights in Education*. New York, Philosophical Library.

Veerman, P E. 1992. *The Rights of the Child and the Changing Image of Childhood*. Dordrecht, Martinus Nijhoff Publishers.

Witte, J & v d Vyver, J D . (editors). 1996. *Religious Human Rights in Global Perspective: Religious Perspectives*. The Hague, Martinus Nijhoff Publishers.

Woodhouse, B B. 1992. 'Who Owns the Child?: Meyer and Pierce and the Child as Property'. *William and Mary Law Review*, 33:4 (995).

Woodhouse, B B. 1999. The Dark Side to Family Privacy. *The George Washington Law Review*, 67 (1247).

Zick, T. 2004. Statehood as the New Personhood: The Discovery of Fundamental 'States Rights'. *William and Mary Law Review*, 46:127 (213).

## 8.2 CONVENTIONS, BILLS AND ACTS

The United Nations Universal Declaration on Human Rights (1948).

The United Nations International Covenant on Civil and Political Rights (1966).

United Nations International Year of the Child (1979)

The United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion and Belief (1981).

Child Custody and Rights of Access Act. 1983. Finland.

Children's and Parents Code. 1983. Sweden.

The Organisation of African Unity African Charter on Human and People's Rights (1986).

The United Nations Convention on the Rights of the Child (1990).

The United Nations Declaration of Family Rights (1994).

RSA Constitution of the Republic of South Africa, (Act 108 of 1996).

Children's Act, 38 of 2005.

Children's Amendment Bill: Government Gazette No. 29150 of 23 August 2006.

### 8.3 CASES

Re Gault 387 U.S. 1; 18 L. Ed. 2d 527; 87 S. Ct. 1428 (1967).

Tinker *et al.* v Des Moines Independent Community School District *et al.* No. 21  
Supreme Court of the United States 393 U.S. 503 (1969).

Planned Parenthood of Central Missouri v Danforth. 428. U.S. 52 (1976).

Gillick v West Norfolk and Wisbech Area Health Authority (1986) AC 112. House of  
Lords.

Wisconsin v Yoder 406 U.S. (1972) Supreme Court of the United States.

### ABBREVIATIONS

OAU            Organisation of African Unity

RSA            Republic of South Africa

SACE          South African Council for Educators