Keynote Address
Sparing Parents Pain or Spoiling the Child by the Rod: Human Rights Arguments against Corporal Punishment[1]

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Introduction

Some years ago, media reports of Australian citizens sentenced to caning in Singapore and Malaysia were greeted with shock, horror and derision. A legal system purporting to impose such a sentence in the name of the law was labelled unmindful of the rule of law, or worse, uncivilised. Leading writers, editorials and columnists pronounced in unison. They spoke for the Australian public, claiming that Australian citizens should not be subjected to such a punishment, the regime under which they were sentenced was unacceptably 'primitive' and the Australian government should make immediate representations. 'Barbarity' was referred to and notions of 'inhumane' treatment were invoked. 'Cruel and unusual punishment' was the subtext of what was repeated as a litany.

Those under sentence were adults who had been convicted within legal systems not unlike our own. The condemnation of caning was universal irrespective of the crime it was for. Yet despite such unanimity on the unacceptability of caning adults convicted of criminal offences, this opposition is not generally matched when it comes to children. Those condemning caning for adults often display no opposition to caning of children. Indeed, many applaud it as a necessity, frequently asserting that as children they were subjected to such 'discipline', and that *they* suffered no harm from such treatment.

The infliction of corporal punishment is placed in a different category when those to whom it is applied are children. No doubt this disparity is influenced by and associated with the non-adult classification of a child. This 'less than human' classification of children is similar to the traditional classification of women who were once legally consigned to this same category of non-persons.

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Corporal Punishment Connections – International Developments

The United Nations Office of the High Commissioner for Human Rights in cooperation with the International Bar Association reports on advances in the way human rights law classes corporal punishment in relation to adults. Whipping, flogging, caning and their counterparts are condemned in criminal justice systems from Africa to the Caribbean.

In *Pryce v Jamaica* the United Nations Human Rights Committee said that whatever the nature and brutality of the crime committed, corporal punishment is cruel, inhuman and degrading treatment or punishment.[2] Therefore, a criminal sentence of whipping with a tamarind switch is a violation of Article 7 of the Covenant on Civil and Political Rights, which states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

In March 2005, the Inter-American Court of Human Rights found that corporal punishment by flogging 'constitutes a form of torture' and is, therefore, 'a violation per se of the right of any person submitted to such punishment to have his physical, mental and moral integrity respected'.[3] The court observed that the punishment of flogging with the cat-o'-nine-tails is 'by its very nature and intention inconsistent with the standards of humane treatment' subsisting under Articles 5.1 and 5.2 of the American Convention on Human Rights. The Court also emphasised that the obligation to abstain from imposing corporal punishment constituting cruel, inhuman or degrading treatment or punishment applies to States which are parties to the American Convention. The Court said:

> The very nature of this punishment reflects an institutionalization of violence, which, although permitted by the order, ordered by the State's judgments and carried out by its prison authorities, is a sanction incompatible with the Convention.[4]

The United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment acknowledged that 'for the first time', the Court has 'condemned ... judicially sanctioned corporal punishment'.[5]

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2 *Errol Pryce v Jamaica*, Office Records of the General Assembly Fifty-ninth Session, Supplement No. 40 (A/59/30), vol. II, annex IX, sect. B, Communication No. 793/1998 [6.2] UN Doc. CCPR/C/80/D/793/1998 (2004).

3 *Caesar v Trinidad and Tobago*, Inter-American Court of Human Rights Judgment of 11 March 2005, Series C, No 123.

4 *Caesar v Trinidad and Tobago* Inter-American Court of Human Rights, Judgment of 11 March 2005, Series C, No 123, [73].

5 UN Special Rapporteur, *Interim Report*, UN Doc A/60/316, [25].

The African Commission held similarly in *Curtis Francis Doobbler v Sudan*.[6] In this case, eight Sudanese students were sentenced to fines and/or lashes on the grounds that through their allegedly improper dress and immoral behaviour they had violated public order. According to the Court:

> There is no right for individuals, and particularly the Government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State-sponsored torture under the [African Charter on Human and Peoples' Rights, article 5] and contrary to the very nature of this human rights treaty.[7]

Yet these determinations had already been anticipated under the *Constitution* of the Republic of the Fiji Islands in its provision outlawing cruel and unusual punishment. After first deciding upon the position of adults convicted of crimes and sentenced to corporal punishment, the Fiji High Court went further, considering the rights of children not to be smacked or hit in the name of discipline.

Corporal Punishment Connections – Constitutional Rights in Fiji

In 2001 the High Court of Fiji entertained an appeal brought under the Fiji Islands Constitution against a penalty imposed upon an accused consisting of 5 years imprisonment and 6 strokes of corporal punishment.[8] At issue in *Ali v State*[9] was section 25 of the Constitution, which states:

> Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment.[10]

In an earlier decision, the High Court of Fiji considered this provision in *Sailasa Naba & Others v State* where detainees awaited trial for murder. The Court said:

> In interpreting these [Bill of Rights] provisions it is evident that they need to be considered within the evolving human rights jurisprudence both in Fiji and internationally. Section 3 and Chapter 4 of the Constitution mandates us to promote democratic values based on freedom and equality. In our interpretation of human rights we are obliged by the Constitution to

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6 *Curtis Francis Doebbler v Sudan*, Sixteenth Activity Report of the African Commission on Human and Peoples' Rights (2003), Annex VII, Communication No 236/2000.

7 Ibid.

8 *Ali v The State* [2001] FJHC 123 (21 March 2001).

9 Ibid.

10 Republic of the Fiji Islands, *Constitution Amendment Act* 1997.

> consider social and cultural developments, and developments in the understanding, promotion, and content of particular human rights.[11]

By reference to cases from Tanzania, Namibia and Zimbabwe, the Fiji High Court recognised that punishment of persons by State institutions that may have been condoned in the past may be offensive in the present day,[12] and:

> ... a penalty that was permissible at one time in our nation's history is not necessarily permissible today. What might not have been regarded as inhuman and degrading decades ago may be revolting to the new sensitivities which emerge as civilisation advances.[13]

The Fiji High Court then listed the offences which could be met with caning. There was no consistency, nor was there an obvious pattern or plan as to why some offences should carry the cane while others should not. When mandated, said the Court, the imposition of caning appeared to be entirely dependent on the individual discretion of Magistrates. The penalty was discretionary and, hence, based upon subjective value judgments. Additionally, it was not clear what sentencing objectives were being targeted, therefore according to traditional sentencing principles and objectives its imposition remains unsatisfactory.

The Court adopted what had been said in the Report of the Departmental Committee on Corporal Punishment, published in 1938 for the United Kingdom. The UK Committee said:

> There is some difficulty in finding any common principle underlying the various offences for which corporal punishment may be imposed under the existing law. These offences have been selected, not by the application of any principle or logic, but merely by historical accident, and in consequence the existing law is full of anomalies.[14]

It is a punishment, the UK Report concluded, 'which is uncertain in point of severity, which inflicts an ignominious and indelible disgrace on the offender, and tends, we believe, to render him callous, and greatly to obstruct his return to any honest course of life.'[15]

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[11] *Sailasa Naba & Others v The State* [2001] FJHC 127 (4 July 2001).

[12] *Muhozya v The Attorney General: Judgment of the High Court of Tanzania (DSM),* Civil Case No 206 of 1993; Unreported, 3.

[13] *A Juvenile v The State* [1989] LRC (Const) 774.

[14] *Report of the Departmental Committee on Corporal Punishment*, HMSO, London, UK, 1938, 92, cited in *Ali v The State* [2001] FJHC 123 (21 March 2001), 11.

[15] *Ali v The State* [2001] FJHC 123 (21 March 2001), 2.

The Fiji High Court cited with approval the Supreme Court of Namibia decision in *Ex parte Attorney General of Namibia; In re Corporal Punishment by Organs of State*,[16] decided in April 1991. The Namibian Supreme Court pointed out that where 'cruel and unusual punishment' is outlawed, seven different conditions are made illegal:

i. torture;
ii. cruel treatment;
iii. cruel punishment;
iv. inhuman treatment;
v. inhuman punishment;
vi. degrading treatment; and
vii. degrading punishment.

Thus, even if treatment meted out under penal statutes avoids classification as 'torture' or 'cruel' treatment or punishment, it would still be unlawful if what it authorizes is 'inhuman treatment or punishment' or 'degrading treatment or punishment'.[17] Abiding by the *Oxford English Dictionary* definitions of 'inhuman' and 'degrading', the Court held it was not difficult to conclude that corporal punishment is inhuman and degrading. Namely, 'inhuman' constitutes a 'destitution of natural kindness or pity, brutal, unfeeling, cruel, savage, barbarous' or 'degrading' – 'to lower in estimation, to bring into dishonour or contempt, and to lower in character or quality, to debate'.[18]

Adopting what was said in Namibia, the Fiji High Court confirmed the importance of articulating and identifying values according to 'contemporary norms, aspirations, expectations and sensitivities ... as expressed in ... national institutions and [the] Constitution, and further having regard to the emerging consensus of values in the civilized international community ...'[19] This, the Court went on to say, is 'not a static exercise,' but a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago, may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy.[20]

In Namibia, the Supreme Court found 'strong support for the view that the imposition of corporal punishment on adults by organs of the State is indeed degrading or inhuman and inconsistent with civilized values pertaining to the administration of justice and the punishment of

16 [1992] 7 LRC (Const) 515.

17 *Ex parte Attorney General of Namibia; In re Corporal Punishment by Organs of State* [1992] 7 LRC (Const) 515, cited in *Ali v The State* [2001] FJHC 123 (21 March 2001), 12.

18 *Ali v The State* [2001] FJHC 123 (21 March 2001), 13.

19 *State v Ncube* & Ors, 528, cited in *Ali v The State* [2001] FJHC 123 (21 March 2001).

20 *Ali v The State* [2001] FJHC 123 (21 March 2001).

offenders'.[21] Six principal considerations were identified as underpinning this conclusion:

i. Every human being has an inviolable dignity. A physical assault on her or him sanctified by the power and the authority of the State violates that dignity. Her or his status as a human being is invaded.

ii. The manner in which the corporal punishment is administered is attended by, and intended to be attended by, acute pain and physical suffering 'which strips a recipient of all dignity and self-respect'. It is contrary to the traditional humanity practiced by almost the whole of the civilized world, being incompatible with the evolving standards of decency.

iii. Assaults on a human being that are systematically planned, prescribed and executed by an organized society are inherently objectionable. They reduce organised society to the level of the offender, demeaning the society which permits it as much as the citizen who receives it.

iv. Corporal punishment is partly premised on irrationality, retribution and insensitivity. It makes no appeals to emotional sensitivity and the rational capacity of the persons sought to be punished.

v. Corporal punishment is inherently arbitrary and capable of abuse as it leaves the intensity and quality of the punishment subject to the temperament, personality and idiosyncrasies of the person executing the punishment.

vi. Corporal punishment is alienating and humiliating as it is usually inflicted by someone who has no emotional bonds with the person being punished.[22]

Here, the Court was referring to corporal punishment inflicted by the State upon persons convicted of crimes. Punishment was to follow only after a trial. Moreover, it would be imposed only after a series of specific events or specified processes to which the State must adhere. Hence, there must be a charge laid against the accused person, with a proper investigation having been carried out, and the rights of accused persons having been extended to them. There must be a trial, at which the accused was represented,[23] before a court bound by law to extend procedural

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[21] *Ex parte Attorney General of Namibia; In re Corporal Punishment by Organs of State* [1992] 7 LRC (Const) 515.

[22] Ibid, citing *Ali v The State* [2001] FJHC 123 (21 March 2001), 13-14.

[23] For Australia, see *Dietrich v R* [1992] HCA 57; *McInnis v R* [1979] HCA 65; for Fiji, see *Umesh Lal v The State* (2000) Crim Appeal No HAA 070 of 2000S.

Section 27(1)(c) of the Fiji Constitution provides that every person arrested or detained has the right:

> to consult with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of that right promptly and, if he or she does not

fairness. The accused person had a right to be heard (putting their side of the story, their own case), a right to be heard by an unbiased decision-maker (with no conflict of interest, personal stake or emotional engagement in the matters before the court, or in relation to the accused), and a right to have all relevant matters and no irrelevant matters taken into account. A decision with published reasons must follow. Only then could corporal punishment be imposed consistent with sentencing guidelines. Yet despite these constraints, the Court said such punishment – corporal punishment or flogging, thrashing, hitting, smacking or caning - was unconscionable, cruel and unusual, unjustified and inhuman.

This contrasts starkly with the position children face in flogging, thrashing, hitting, smacking or caning. For children faced with such 'discipline', none of these safeguards exist. The difference is located solely in the fact that a child is a child– and a parent is a parent or, for some societies (and once traditionally for all societies), a teacher. This, it is argued, makes all the difference. That a child is a child, and that the corporal punishment is inflicted by a parent, somehow means that the principles applicable to those convicted of crimes after due process, both procedural and substantive, do not apply. Where corporal punishment by teachers or within the school system is allowed, as it once was, the same followed: no application of principles governing the punishing of accused persons.

We are expected to accept, therefore, that the principle that every human being has an inviolable dignity is properly ruled out of order where the human being is a child – or a person under 18 years of age. According to this (lack of) principle, a physical assault on a girl or a boy inflicted by a parent and hence sanctified by the power and the authority of the State because the State does not make it unlawful, does not violate that dignity; the minor's status as a human being is not invaded.

Hence, section 50 of the *Criminal Code Act* 1924 (Tas) provides, in relation to domestic discipline, that it is lawful for a parent or a person in the place of a parent to use, by way of correction, any force towards a child in his or her care that is reasonable in the circumstances. As has been pointed out, this gives imprimatur to an 'inherent acceptance that if force is used against children it can be "reasonable" if it is used for "correction"':[24]

> The law gives no guidance on what type of 'force' is 'reasonable', so … a wide range of physically punitive measures taken against children … have

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have sufficient means to engage a legal practitioner and the interests of justice require legal representation to be available, to be given the services of a legal practitioner under a scheme for legal aid.

[24] Patmalar Ambikapathy, 'International No Smacking Day – Choose to Hug Not Hit' (2006) *Unpublished paper*, Tasmania, Australia, 4.

> variously been sought to be justified by parents who have harmed their children. Indeed many decisions made in [Australian] courts of law have allowed extraordinarily harsh forms of discipline against children. This concept of reasonable force also begs the question why any force against a child can be considered reasonable. Surely it is much more reasonable for the law to protect children from the excesses of parental power over them and not permit the use of force against children at all? Given their tender age, vulnerability to being damaged, and lack of adult maturity about moral wrong doing, should our role and the role of the law be instead to protect [children] from any form of violence?[25]

Rather than the law of domestic discipline protecting children from the harms recognised in the imposition of corporal punishment on adults, we are to accept that children can be subjected to corporal punishment intentionally administered by their parents and attended by, and intended to be attended by, acute pain and physical suffering, and that this does not strip the child of all dignity and self-respect. The infliction of corporal punishment is 'contrary to traditional humanity practiced by almost the whole of the civilized world, being incompatible with the evolving standards of decency' insofar as persons convicted of crimes are concerned. However, this does not apply to children whom their parents decide should have it inflicted – for transgressions determined upon by the parents, as they will.

We are supposed to accept that assaults on children in the name of discipline are unobjectionable through their being condoned by the law, and to reject the proposition that as a society we are reduced to the level of offenders who engage in assaults on others, when we fail to outlaw corporal punishment by parents on children – because they are their own. We are required to ignore the proposition that those who engage in such disciplining of children in the name of parental guidance are demeaned by their own conduct.

Whilst the law now accepts that corporal punishment of offenders convicted of crimes is at least partly premised on irrationality, retribution and insensitivity, contrarily we lived for a long time under laws rejecting the proposition that corporal punishment inflicted upon children by teachers was so premised. Most of us continue to live under laws rejecting the proposition that corporal punishment inflicted on children by their parents is irrational, retributive and insensitive. We live in a legal system which effectively condones a lack of emotional sensitivity and rational capacity in parents, because the law says that 'discipline' through corporal punishment – or smacking, hitting or caning – is not unlawful

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[25] Ibid.

where the victim is a child who is punished, just because it is the parent who punishes them.

In continuing to hold parental discipline involving thrashing or at least hitting and smacking is lawful, and that only in certain circumstances can it be held unlawful as being 'too harsh' or 'too unreasonable', we ignore that it is inherently arbitrary and capable of abuse. Its inherently arbitrary nature and openness to abuse arise directly out of both the nature of the punishment, and the child-parent relationship, together with the failure of the law to make explicit the unlawfulness of this form of 'discipline'. We are content to leave the intensity and quality of the punishment substantially subject to the temperament, personality and idiosyncrasies of the individual parent. A parent, simply by being a parent, can – when it comes to what we allow to be called discipline - do no wrong.

Through not making unlawful the smacking and hitting of children by their parents in the name of discipline, we ignore the alien and humiliating result of it being inflicted by the person or persons in whom the child's trust and love lies. Here, it is no stranger inflicting the punishment upon the child, but both an authority figure and a love figure. Where these emotional bonds exist, the law somehow sees the infliction of humiliation and hurt as acceptable, whilst simultaneously recoiling from the proposition that a relative stranger should inflict corporal punishment upon a person convicted of an offence.

Corporal Punishment Connections – Students' Constitutional Rights

In *Ali v State* the Fiji High Court went beyond the Constitutional rights of prisoners to look at the Constitutional rights of school students and children.[26] In the case of teachers, the High Court reviewed Ministry of Education guidelines, published in the *Education Gazette* in 1986, stating that it is all too common in schools to see children being subjected by teachers to petty assaults such as striking on the head or hands with a ruler, boxing of ears, hitting over the head with the hand and similar forms of cruelty. Habits such as these are seen as the hallmarks of an inefficient teacher. Many teachers seem to regard their pupils as inferior beings who have no rights save those allowed them by the teacher. Children are individual personalities as much as anyone else, even if they are still undeveloped, and should be treated with the same consideration and courtesy as adults.[27]

Despite recognition of at least some of these assaults as cruelty, the guidelines went on to accept corporal punishment as 'sometimes

[26] *Ali v The State* [2001] FJHC 123 (21 March 2001), 14-19.

[27] Ibid 14.

necessary' when governed by written rules. Despite recognising that teachers resorting to such assaults exhibited their inefficiency, the guidelines condoned this very same conduct on the part of head-teachers and principals, where it is limited to their hands (and canes). Even more ironically, none of the protections extended to offenders – persons convicted of crimes – were extended to students. There was no reference to such safeguards at all. Rather, the guidelines limited themselves to the types of conduct for which corporal punishment was to be an 'answer', whilst saying nothing of how the conduct might be determined to have occurred. The guidelines enjoined head-teachers and principals to 'satisfy' themselves that corporal punishment 'is really warranted before ... administer[ing] it'. How satisfaction was to be reached was not alluded to. Hence, students were left to the particular whims, sensitivities, humanity, sense of fairness, or lack thereof harboured by the particular head-teacher or principal. This meant every critique of corporal punishment as applied to offenders resided in the education system, in the absence of any of the safeguards.

Without providing any guidance upon what 'moderate' corporal punishment is – so again condoning and supporting idiosyncratic approaches, sensitivities or otherwise of head-teachers or principals, the guidelines said:

> Head-teachers/Principals may inflict moderate corporal punishment for gross misbehaviour such as bullying, stealing, lying and cheating. However, they are forbidden to punish children so severely that bodily harm is done. They are reminded that they are liable to be summoned before a magistrate and fined for inflicting unreasonably severe punishment on a pupil.[28]

This guideline is notable on several counts. The reminder that head-teachers and principals are 'forbidden to punish children so severely that bodily harm is done' echoes back to a time when judges held that a man was entitled to beat his wife – although not in a cruel or violent manner.[29] It is also ironic that should a head-teacher or principal be charged with having 'punished a child so severely' as to cause 'bodily harm', s/he would be extended the full protections of the criminal justice system – investigation, charge, trial with procedural fairness, determination and reasoned judgment. If 'bodily harm' was found proven, corporal punishment would not be the principal or head-teacher's lot. If it were, countries like Australia would rise up in righteous stupification at the 'uncivilised conduct' occurring in the justice system elsewhere in condoning such a sentence.

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[28] Ibid 15.

[29] Jocelynne A Scutt, *Even in the Best of Homes – Violence in the Family* (1990) chapter 1.

Corporal punishment should not, the guidelines continue, 'be given for any form of academic failure'.[30] The Ministry for Education provides a sensible rationale for this limitation. Yet no such limitation extends to parents who are seen by many as entitled to impose caning, hitting or smacking upon the child who fails an examination or even a test. Why no consideration to limiting the *parens patria* rule vis-à-vis principals and head-teachers in respect of academic performance to parents themselves? Where does the sense lie in this? Again, it constitutes proof that rationality and good sense do not apply to corporal punishment, as the Namibian Supreme Court observed.[31]

The guidelines further provided:

> Punishment for offences committed outside the school grounds should be given only in exceptional cases, [for example] bullying children of their own or another school, throwing stones at buses, houses and other properties, using abusive language, violence and any form of offensive behaviour.[32]

In such cases, the guidelines suggest that the head-teacher or principal 'may find it useful to discuss the matter with the child's parent before inflicting punishment'.[33] Some could find the notion of a head-teacher or principal and parent engaging in discussion of whether the one should smack, hit or cane – in other words, assault - the other's child alarming. It has something of the flavour of the critique meted out by the Supreme Court of Namibia as to the callous way the State has gone about making laws condoning caning. Yet even then, generally the State must at least air the laws publicly, through the Parliament, before promulgating them. No public airing or debate is required when parent and head-teacher or principal discuss whether the child of the one should be subjected to corporal punishment by the other.

In other ways the guidelines replicate the very problems identified in the criminal justice system - no discernable pattern or explanation is found as to why some offences warrant corporal punishment, whereas others do not. Nor does it suggest any pattern of predictability when corporal punishment may be imposed. Why does throwing stones at buses or houses attract corporal punishment, but no mention of stone throwing at other students or teachers is made? And what is 'abusive language' or 'offensive behaviour'? Courts notoriously have difficulty determining what constitute these offences as what it is, or what it isn't can vary

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[30] *Ali v The State* [2001] FJHC 123 (21 March 2001), 15.

[31] *Ex parte Attorney General of Namibia; In re Corporal Punishment by Organs of State* [1992] 7 LRC (Const) 515.

[32] *Ali v The State* [2001] FJHC 123 (21 March 2001), 15.

[33] Ibid.

considerably from Magistrate to Magistrate. A New South Wales Magistrate held that calling police 'pigs' or using particular four-letter words did not constitute offensive behaviour or offensive language. However, in response to her decision, radio airwaves churned with protest and complaint, the suggestion being that civilization was not just coming to an end, but was at an end.[34]

Observing that media reports made clear the failure of teachers to adhere to the guidelines, the Fiji High Court quoted from a Save the Children Fund report which found that class room violence is effectively condoned in that few parents complain about it. They themselves believe that this is a correct form of punishment, or they hold the teachers in too much respect to question their methods, or fear that by complaining they could make the situation worse for their child. Many children are too frightened of both the teachers and parents to report the abuse in the first place.[35]

Some parents did, nonetheless, protest against their children being 'disciplined' at school by this means, said the Fiji High Court. Noting that corporal punishment is a 'violent means of resolving conflict [or] tension', the Court said there is a need for alternative means to deal with discipline and conflict. This would be consistent with the United Nations Convention on the Rights of the Child and other United Nations treaties, conventions and international instruments. Thus, the Convention on the Rights of the Child says that State parties 'shall take all appropriate measures to ensure that school discipline is administered in a manner

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[34] More than once, NSW Magistrate Pat O'Shane has been criticised for her judicial stand on 'offensive language' albeit either her decisions have not been appealed, or where they are, have been upheld. See Philip Stewart, 'Is the Word "Fuck" Offensive', <http://www.notguilty.com.au/web/article_5271.htm> (accessed 20 September 2008), citing generally *Ball v McIntire* (1966) 9 FLR 237:

> Behaviour to be offensive ... must ... be such as is calculated to wound the feeling, arouse anger of resentment or disgust or outrage in the mind of the reasonable person ... Conduct which offends against the standards of good taste or good manners which is a breach of the rules of courtesy or runs contrary to accepted social rules may be ill-advised, hurtful, nor proper conduct ... I believe that a so-called reasonable man is reasonably tolerant and understanding and reasonably contemporary in his reactions ..." Citing also Anderson (Unreported, NSW Court of Criminal Appeal, 1995), where within the hearing of the public foyer, a police officer was said to have employed the word 'fuck' repeatedly, directed at another officer. The Court said: 'Undoubtedly the behaviour of the opponent (officer) was unchivalrous and unbecoming of the office he occupies. This is, however a long way from the language he allegedly used being offensive in any legal sense ... there was no evidence that persons in the public area were ever offended, nor that the public area was frequented by gentle old ladies or convent school girls. Bearing in mind that we are living in a post-Chatterly, post-Wolfenden age, taking into account all circumstances, and judging the matter from the point of view of reasonable contemporary standards, I cannot believe Sergeant Anderson's language was legally "offensive".

[35] *Ali v The State* [2001] FJHC 123 (21 March 2001), 15.

consistent with [the] child's human dignity and in conformity with the present Convention'.[36]

As to the Constitution and laws of Fiji, the court said that even if:

> ... the motive for corporal punishment in schools is to achieve some laudable objectives the punishment cannot be authorised by law. Means otherwise unauthorised by the law do not become authorised simply because they seek to achieve a permissible and perhaps even laudable objective.[37]

Further, children have rights no wit inferior to the rights of adults. Fiji has ratified the Convention on the Rights of the Child. The Fijian Constitution also guarantees fundamental rights to every person. Government is required to adhere to principles respecting the rights of all individuals, communities and groups. By their status as children, children need special protection. Our educational institutions should be sanctuaries of power and creative enrichment not places for fear, ill-treatment tampering with the human dignity of students.[38]

The Bill of Rights as Part 4 of the Fiji Constitution governs the laws of Fiji. Laws are required to be construed with whatever modifications and qualifications are necessary to bring them into conformity with the Constitution. Hence, if a law is inconsistent with the Bill of Rights provisions or any part of them, the law must be struck down to the extent of that inconsistency. Hence, the *Penal Code* (Cap 17) and *Criminal Procedure Code* (Cap 21) in incorporating corporal punishment into some of their provisions were struck down. Those parts no longer apply as the laws of Fiji and this is the same case with corporal punishment in schools.

The High Court of Fiji considered comments made by the Chief Justice of Zimbabwe in *A Juvenile's case* insofar as he said that in a system which has formal rules on corporal punishment drawn by a competent authority, the same considerations governing judicial corporal punishment must apply.[39] Because the Ministry of Education had published the guidelines which allowed some corporal punishment, the High Court was able, consistent with the application of the Constitution, to rule not only that corporal punishment in criminal matters was unlawful, but corporal punishment in schools, by whomever it was to be done or be authorised, was unlawful.

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[36] United Nations Convention on the Rights of the Child – incorporated into section 26 *Family Law Act* 2003 (Fiji).

[37] *Ali v The State* [2001] FJHC 123 (21 March 2001), 18.

[38] Ibid 18-19.

[39] Ibid 18, citing *A Juvenile v The State* [1989] LRC (Const) 774, 789.

Since then, too, Fiji has incorporated into the *Family Law Act 2003* explicit reference in to the United Nations Convention on the Rights of the Child,[40] incorporating a provision akin to that on 'cruel and unusual punishment' in the Covenant on Civil and Political Rights.[41]

An Inconsistent Pattern – Australia's 'Forward and Back' on Rights

Does *Ali v State* have any lessons or guidance for Australia? The Australian Constitution has no Bill of Rights and few human rights provisions. The right to trial by jury (which has been interpreted narrowly), the right to freedom of religion (also interpreted narrowly), rights of parliamentary democracy (interpreted variably), and freedom of movement are spelt out. The limited nature of these provisions stands in stark contrast with the position in all other common law countries. Australia is the exception. All other countries have Bills of Rights or Charters of Rights in their Constitutions, or basic legislation against which all other laws are to be measured and which is seen as a step on the path toward incorporating rights into those countries constitutions or fundamental laws.[42] Whilst we await the entrenchment of rights into the Australian Constitution, there are generally six ways in which Australia has dealt with this situation:

1. Referenda to incorporate individual provisions into the Constitution;
2. Reliance on the rights provisions included in the Constitution;
3. Reading provisions as human rights provisions which in the past were seen as relating only to commerce or other matters unrelated to what are conventionally seen as human rights;
4. Reliance on the foreign affairs or external affairs power to uphold the validity of legislation or provisions passed consistent with treaties, covenants or conventions on human rights into which Australia has entered;
5. Drawing upon implications of rights in the Constitution to support human rights progress;

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[40] Section 26 of the *Family Law Act* 2003 makes mandatory the responsibility of courts effecting the Act's provisions to take into account the Convention (and the Convention on the Elimination of All Forms of Discrimination Against Women).

[41] Article 37.

[42] For example Canadian Charter of Rights and Freedoms; Aotearoa/New Zealand *Bill of Rights Act* 1990 (NZ); the United Kingdom has been required to adjust its position in consequence of its membership of the European Union; see also 'Call to Adopt UK Bill of Rights', BBC News, http://news.bbc.co.uk/2/hi/uk_news/politics/7552015.stm (accessed 20 September 2008).

6. Reliance on equal opportunity or anti-discrimination laws at state and federal level, or state and territory human rights bills - a more recent development.

That Australians are 'reluctant' to address human rights in the context of Constitutional change through referenda is repeated often, yet does not fairly depict the Australian public's position. Answering 'yes' to federal responsibility for social security and welfare provision was a positive answer in one referendum. 'No' to the referendum to ban the Communist Party of Australia (CPA) was another positive answer in respect of human or civil rights. Hence, to say that Australians always vote 'no' as an indicator of our lack of will where human and civil rights are in issue is not particularly illuminating. At the same time, it is difficult, particularly on the record from 1996 to 2006, to envisage a referendum proposing to incorporate children's rights into the Australian Constitution. The bipartisan approach adopted by both major political parties in respect of the Convention on the Rights of the Child, namely that administrative decisions should not be required to be made with regard to it, also augers ill for such an approach. Nevertheless, the use of the foreign affairs power to support children's rights has some chance judicially – despite the conservatism of the High Court generally and as presently constituted. Not only is the signing and ratification of the Convention on the Rights of the Child relevant here; so too is that a number of states have introduced legislation consistent with it.[43] Discrimination legislation can be called upon, too, where 'age' is a basis upon which discrimination is made unlawful.[44]

Hence, if a child is identified as a troublemaker or a student to be punished by the school authorities, she or he can independently or through a parent or guardian seek to have the right to be heard and to a fair decision-making process through Equal Opportunity and Anti-Discrimination Commissions. The argument can be made by reference to both 'direct' discrimination provisions and 'indirect' discrimination provisions.

For 'direct' discrimination, the question is whether, if the child were an adult, a different process would have been employed. That is, if an adult is singled out as a troublemaker or person to be punished within the

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[43] For example, Tasmania, Queensland and NSW were first in establishing offices of the Commissioner for Children. Tasmania, in particular, has relatively forward-looking legislation passed so as to be consistent with the Convention on the Rights of the Child: *Children Young People and Their Families Act 1999* (Tas.); *Commission for Children and Young People and Child Guardian Act 2000* (Qld).

[44] Age discrimination legislation now exists both federally and in all Australian states and territories (apart from South Australia) – see for example *Anti-Discrimination Act 1998* (Tas.).

workplace or by the justice system, s/he will have a right to be heard, a right to an unbiased decision-maker, a right to have all relevant matters taken into account and a right to have no irrelevant considerations considered in the decision made. If the child has been denied these rights, then the child has been discriminated against on the ground of age.

In establishing 'indirect' discrimination, two questions arise: First, if both adults and children are denied the right to be heard, the right to an unbiased decision-maker and the right to have all relevant considerations taken into account, is there a differential impact upon the children and adults by reason of age? Secondly, is the rule or practice of treating adults and children alike in applying lack of due process standards or method of decision-making unreasonable?

The answer to the first question is 'yes'. There is a differential or disparate impact. An adult denied due process at least has a voice, or a means of gaining a voice through a union, a lawyer, or an advocate. However 'voiceless', however lacking in power, however poor, adults are better placed than children to protest about a denial of their rights. Children are less likely to have financial resources to obtain an advocate or lawyer; less likely to be able to speak up against authority; and less likely to find support. The answer to the second question is also 'yes'. What is reasonable about extending rights of due process to adults who are charged with offences or in the industrial context, yet denying due process to children said to have transgressed whether in school or in any other setting? Anti-discrimination and equal opportunity legislation thereby provides an avenue for effecting children's rights not to be denied due process, just as it can provide an avenue for children's rights in other ways.

In 2008 the Australian government was reported to have contemplated taking on responsibility for children's welfare rights.[45] Children's rights advocates are consequently attempting to ensure that any federal intervention properly affirms children's rights, rather than further limiting them or incorporating retrograde steps. If the Federal Government proceeds with its plan, then real possibilities need to be available to ensure the legislation is not only fair, but operates fairly, to advance children's rights in the recognition of children as human beings.

The High Court approach of reading rights into the Constitution, as exemplified in *Leeth*,[46] where Justices Deane, Toohey and Gaudron saw

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[45] Department of Families, Housing, Community Services and Indigenous Affairs, *Australia's Children – Safe and Well – A national framework for protecting Australia's children – A discussion paper for consultation*, Australian Government, Canberra, ACT, May 2008.

[46] *Leeth v Commonwealth* (1992) 174 CLR 455 (25 June 1992).

the right to equality necessarily enshrined within it, is far less likely to be adopted at present.[47] Since the high watermark of *Teoh's case* – where the High Court held that administrative decisions must be made bearing in mind the executive's commitment to the rights of children through signature to and affirmation of the Convention on the Rights of the Child,[48] many backward steps have been made. The decision of *Teoh* has since been undercut both by the High Court and successive federal governments of both political hues. Both have introduced legislation to overturn *Teoh*, albeit the legislation has never passed through Parliament due to proroguing before it went through the necessary stages.

High Court backtracking or failure to affirm human rights generally, and children's rights in particular, is evident not only in the reading down of *Teoh's case*. Federal human rights legislation, including the *Racial Discrimination Act* 1975 (Cth), the *Sex Discrimination Act* 1984 (Cth) and the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth), carry United Nations treaties as Schedules. The United Nations Convention on the Elimination of All Forms of Racial Discrimination is a Schedule to the *Racial Discrimination Act*, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women is a Schedule to the *Sex Discrimination Act*, and the United Nations Covenant on Civil and Political Rights and the Declaration on the Rights of the Child are Schedules to the *Human Rights and Equal Opportunity Commission Act*. Yet oddly, the High Court has held that these Schedules are not 'law' suggesting that their inclusion as Schedules does not mean that they have become Australian law, or a part of Australian law. This sits strangely with orthodox interpretation, and flies in the face of what is now common practice with amending legislation. The *Migration Act 1958* (Cth), for example, has been amended by legislation constituted by an Act carrying a few provisions only, referring to a Schedule by which the Act itself is amended. The High Court has not said that such a Schedule has no force of law – and rightly so, for the Schedule went through the federal Parliament as a part of the amending Act. Why, then should Schedules incorporating human rights and civil rights into federal law be said by the High Court not to be a part of Australia's law, or not to have the force and effect of Australian law is a mystery. That is, unless recognition is given to the conservative nature of the High Court in its composition and orthodoxy, and its general failure to affirm human rights and civil rights as a part of Australian law.[49]

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[47] Ibid [6]-[15] (Deane and Toohey JJ), [9]-[10], [17], [21]-[23] (Gaudron J).

[48] *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh ('Teoh's case)* (1995) 183 CLR 273 (7 April 1995); see also *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 49 FCR 409.

[49] See generally on 'backtracking' by the High Court, dissents of Kirby, J in various cases including *X v The Commonwealth* (1999) 200 CLR 177 (2 December 1999).

Children are unlikely to find a majority of the High Court upholding a right to equality of treatment in a child's right not to be smacked, hit or caned by guardians or parents, just as adults have a right not to be assaulted by anyone, including prison authorities. Yet the Declaration of the Rights of the Child is included as a Schedule to the *Human Rights and Equal Opportunity Act* and was the precursor to the Convention on the Rights of the Child. The United Nations Covenant on Civil and Political Rights – as noted, a Schedule to the *Human Rights and Equal Opportunity Commission Act* – carries comfort in the recognition that all human beings, whatever their age, have civil rights. Yet that comfort is undercut by the High Court's refusal to acknowledge Parliament's will in the deliberate inclusion of this and other United Nation's instruments into federal legislation in this way.

The Universal Declaration of Human Rights (also a Schedule) states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[50] This is incorporated into the United Nations Covenant on Civil and Political Rights, in Article 7. The United Nations Human Rights Committee said that the prohibition in Article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition must extend to corporal punishment including excessive chastisement ordered as punishment for a crime or an educative or disciplinary measure. It is appropriate to emphasise in this regard that Article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.

Article 37 of the Convention on the Rights of the Child, incorporated into Fiji law after the decision in *Ali v The State*[51] states that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. The Fiji High Court observed:

> It is quite clear that the common law rights of parents to discipline their children cannot be compared to disciplining of children by teachers. Teachers have no such rights. It is questionable whether parents can delegate such rights ... Even if the motive for corporal punishment in schools is to achieve some laudable objectives the punishment cannot be authorised by law. Means otherwise unauthorized by the law do not become authorised simply because they seek to achieve a permissible and perhaps even a laudable objective.[52]

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[50] Article 5.

[51] *Ali v The State* [2001] FJHC 123 (21 March 2001).

[52] Ibid 18, citing *Van Eck No and Van Rensburg No v Etna Stores* [1977] (2) SA 984, 996, 998; quoted in *Ex parte Attorney-General (Namibia)*, 532.

Although this statement might be taken as implying an immunity to parents in respect of 'discipline', it was observed that in taking into account s 25 of the *Constitution* as to 'cruel and degrading treatment', the Fiji Court of Appeal in *Umesh Kumar* expressed its doubts as to the constitutionality of 'any corporal punishment'.[53] The High Court in *Ali v The State* observed that s 21(3) of the *Constitution* subjects laws made, and administrative and judicial actions taken after its commencement, to Chapter 4 – Bill of Rights. Furthermore, s 195(3) provides that written laws 'are to be construed with such modification and qualifications as are necessary to bring them into conformity with the *Constitution*.[54]

Thus, a distinctive contrast between the position taken by the Australian High Court and the High Court of Fiji is evident due to the very different Constitutional position of these countries. In *Ali v. The State*, the High Court of Fiji affirmed that Article 5 of the Declaration on Human Rights and Article 7 of the United Nations Covenant on Civil and Political Rights are effectively replicated in s 25(1) of the Fiji *Constitution*.[55] Section 43(2) of the *Constitution* requires courts to interpret s 25(1) consonant with international human rights laws, saying as it does:

> In interpreting the provisions of the Chapter [on Human Rights], the Courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter.

Not only does Australia lack a Bill of Rights, but Australia has no Constitutional provision requiring courts to promote the values that underlie a democratic society based on freedom and equality. Nor does the Australian Constitution say courts must have regard to public international law applicable to the protection of human rights. Australians have had to rely upon the High Court's 'implied rights' principle for such protection.[56] Sometimes, the Australian High Court has implied rights to equality and other human or civil rights not spelt out in the Australian Constitution; and the Australian High Court has on occasion said that federal legislation is to be interpreted against the backdrop of international treaties, conventions and covenants, and is to be applied with regard to the standards of human and civil rights set in public international law. But the Australian High Court has hardly been consistent in this.

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[53] *Umesh Kumar v The State* (Crim Appeal No AAU0009 of 1197S).

[54] *Ali v The State* [2001] FJHC 123 (21 March 2001), 19.

[55] Ibid 18-19.

[56] As in *Leeth v The Commonwealth* (1992) 174 CLR 455. This is dependent upon the composition of the High Court at any particular time.

In *Kruger v. Commonwealth* it was said that there is no Constitutional doctrine of implied equality.[57] The systematic removal of Indigenous Australian children from their families under legislative imprimatur of successive governments, through state and federal government agencies and religious agencies, does not constitute genocide. Hence, persons classed as Aborigines and 'half-castes' within the meaning of the 1918 Northern Territory Ordinance governing them and thereby 'subjected in the Territory to the most acute interference with family relationships and freedom of movement and with the displacement of the ordinary incidents of guardianship in respect of infant children' were not entitled to recognition or redress on the principle of equality or non-discrimination. Albeit these laws had no reference to or impact upon persons other than Indigenous Australians (including so-called 'half castes') in their retributive and controlling exercise and provision, the High Court failed to acknowledge the discriminatory and racist expression and effect. Indigenous Australians had no rights akin to other persons and hence no legal rights of equality:

> The problem is in knowing what 'rights' are to be identified as constitutionally based and protected, albeit they are not stated in the text, and what methods are to be employed in discovering such 'rights'. Recognition is required of the limits imposed by the constitutional text, the importance of the democratic process and the wisdom of judicial restraint.[58]

Further:

> [t]he legislative power from which the authority to make these laws was derived was not limited by any doctrine of legal equality, implied as a matter of logical or practical necessity for the preservation of the integrity of the structure established by the Constitution.[59]

Finding New Direction - Educating Australia into Rights

In *Ex parte Attorney-General* the Supreme Court of Namibia said that the differences between adults and juveniles which appear from the relevant statutes and regulations with respect to the manner in which corporal punishment is administered, are insufficient to convert degrading or inhuman punishment for adults into punishment which is not degrading and inhuman in the case of juveniles. Such punishment remains an invasion on human dignity, and an unacceptable practice of inflicting deliberate pain and suffering 'degrading to both the punished alike'. Even in the case of juveniles it remains wide open to abuse and arbitrariness; it

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[57] *Kruger v Commonwealth* ('Stolen Generations case') (1997) 190 CLR 1.

[58] Ibid 156 (Gummow J).

[59] Ibid 155 (Gummow J).

is heavily loaded with retribution with scant appeal to the sensitivity and rational responses of the juvenile.[60]

Australian governments and institutions have taken a position of superiority as against Indigenous Australians and Indigenous Australian culture, tradition, government and institutions. Australian governments and institutions have taken a position of superiority as against countries and peoples who are 'not like us': that is, countries wherein the populous is not 'white' or predominantly 'white'; not Anglo or Anglo-Irish in origin and cultural traditions and ethos. Perhaps it is time we learned to be humble rather than arrogant, open to learning and understanding rather than seeking to impose our own views of what is 'right', when we have a limited knowledge of the realities of those countries above which we of Australia place ourselves in a position of superiority.

Children's rights are abused the world over. Children are denied dignity, humanity and status all over the world. No country is immune; no regime is above this derogation of human rights. Yet some countries at least, and some courts, are capable of setting down in real words, in real judgments, which have real impact and standing, that the rights of children not to be hit, smacked, caned or whipped are inviolable.

Children are human beings. Children have human rights. The right not to be subjected to corporal punishment by anyone, particularly those in positions of power and authority who should be capable of using their status to affirm, nurture and support the growth of sensitivity and humanity in children, including their own children. As was said by Fiji's High Court in *Ali v State* at the turn of this century, children have rights no wit inferior to the rights of adults.[61] Courts, government and the community have responsibilities to children. These responsibilities must be discharged in accordance with this principle.

Women and Imbeciles, Idiots and Children

In the nineteenth century, women's rights were denied by categorising women along with 'imbeciles, idiots and children'. On this basis, women were denied the right to vote, the right to own property, the right to guardianship of their children, the right to practice law or medicine, the right to attend university, the right to operate freely in the world as independent human beings – and the right not to be hit, smacked, caned, or whipped by their husbands – and even according to some authority, to be held against her will if she were 'on the stairs seeking to go out' to

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[60] *Ex parte Attorney-General*, 532, cited in *Ali v The State* [2001] FJHC 123 (21 March 2001), 18.

[61] Ibid 18.

spend 'her husband's wealth'.[62] We know that women remain shackled by laws, practices and perspectives that continue to deny women's full rights as independent persons with full entitlements. Although there have been advances in laws relating to the rights of persons with a disability, we know that persons with a disability remain discriminated against and denied the full panoply of human rights. Yet children – including female children and male children, children with a disability and children without – remain the last and final category still in that separate mansion which in the past housed 'Women and Imbeciles, Idiots and Children'. Childhood, now exploited by crass commercialism and consumerism remains the last frontier for recognition as 'human'.

If corporal punishment ever had utility, in the twenty-first century it is well and truly obsolete. The time for its abolition is now. Children must cease to be classified as non-humans and not be subjected to caning, whipping, hitting, thrashing or smacking by anyone, for any reason. Alternatives to so-called discipline through the rod and cane exist. Alternatives to parenting other than resort to hitting are available. Alternatives to smacking are ready for the taking by adults who recognise the humanity, the very humanness, of their 'own' children. Children are not for owning such as allows for or gives imprimatur to corporal punishment. An adult who destroys her or his own property is recognised by the law as transgressing. Why should children be excepted from similar recognition when adults transgress?

It is time for children to come into the light.

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[62] Jocelynne A Scutt, *Even in the Best of Homes – Violence in the Family* (1990).