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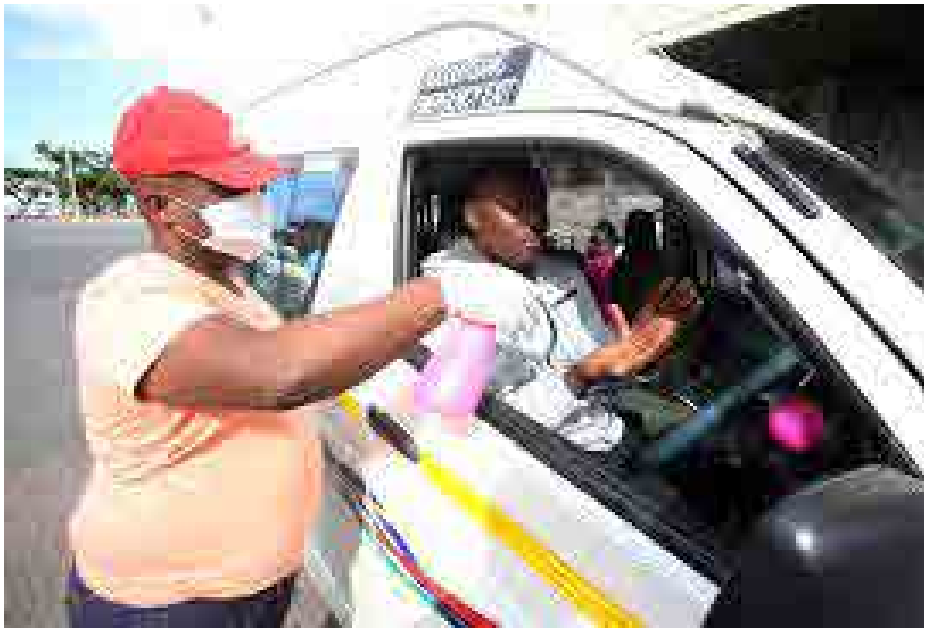
Special feature :
Staff experiences of COVID-19 and living under the lockdown.

My Lockdown Experience

By Sinothile Zondi, Durban intern

I live in Effigham, a suburb of Durban North, with my sister. We each have a young child. During the lockdown we have both been working from home. My suburb consists of mostly formal housing, with some shacks on the outskirts. Shack dwellers come into the suburb for shopping and work. There is quite a large population of foreign nationals who are entrepreneurs. Most of the locals are friendly towards them.

With the lockdown it was hard to shop as there are not many shops in the area. One day I was walking to buy bread and was stopped by a policeman who asked why I was walking so far from home. Generally to go shopping I have to take a taxi to central Durban which takes about 40 minutes or more. Last week I had to explain to a taxi driver that he was not allowed to carry a full load of passengers. There were 15 people in the taxi so I decided to get out. The passengers were wearing masks but the driver wore his around his neck. They only seem to put the mask on when they see the police. There was no sanitiser available when boarding the taxi and I used my own.



There is a clinic and a community feeding scheme at the library, which operates from a container. People go and collect bread and food. I have seen the council handing out food parcels. Once when I was going to buy bread during Level 5 they called informal residents to the container. No one wore masks and there were no hand sanitisers. Over 50 people were crowding around with their children and fighting over the food and it was chaos, with no social distancing being observed.

I feel unsafe in my community because of this behaviour. I try to go out as seldom as possible. I don't know if there are any infections in my community. Testing in the area has been announced but I don't know if any testing has been done.

The stores where we shop do observe the regulations. They provide sanitisers, keep numbers down and insist on people wearing masks. The local church has been handing out food parcels door to door which is very encouraging. There is a problem of hunger in the area but homelessness is not very obvious here. Most homeless people shelter in town. The problems are mostly in the informal settlements where there is a lack of water and formal toilets. ●

Guest Slot

Lebogang George

This month's guest is Lebogang George, a legal consultant specialising in Information, Communications and Technology (ICT) Law, IT Governance as well as Data Protection and Privacy Law. Her passion for Human Rights stems from her first job as a Legal Intern at ProBono.Org from 2011 to 2012.

Demystifying "Draconian, Irrational and Infringement of Privacy" **Laws**

Pandemics have a way of elevating economic inequalities and revealing the injustices occurring in marginalised communities. There is no doubt that what COVID-19 has revealed, amongst other things, is how it is disproportionately impacting disadvantaged communities. While laws and regulations are put in place to mitigate the damage that the pandemic will cause and to protect and save as many lives as possible, there are some laws and regulations that seem arbitrary, counterintuitive and even draconian. For the most part, these laws seem irrational and infringing on certain rights simply because they are not explained thoroughly, and information is not easily accessible and elucidated to those that it impacts the most. What this article hopes to achieve is to demystify the so-called "draconian, irrational and infringement of privacy" laws brought about as a reaction to the COVID-19 pandemic.

As the spread of COVID-19 became more rampant it was apparent that the Government had to act decisively in curbing the spread of the virus, especially in the more vulnerable and marginalised communities. Managing the spread of the virus and flattening the curve meant the introduction of contact tracing, another uncharted legal territory that had to be resorted to. In the amended Disaster Management Regulations gazetted in April 2020, contact tracing would be used to trace people who are known or reasonably suspected to have come into contact with anyone known or reasonably suspected to have contracted COVID-19. The Disaster Management Regulations would allow the Government to set up a COVID-19 tracing database which would assist the Department of Health to track persons who are reasonably suspected to have come into contact with Covid-19 infected persons. This meant that information such as identity numbers, passport numbers, full names, phone numbers, physical residential addresses, COVID-19 test results and full details of persons they had come into contact with would be needed and therefore collected. This also meant that Government would need to galvanise mobile networks to assist them as the use of cell phone data would be imperative in contact tracing. The sharing of location data would allow the location of data subjects to be traced, and electronic communication service providers would process collected data for the government to use for the purpose of tracking subjects to combat the spread of COVID-19.

It is important to note and reiterate that there are laws and regulations that have come into effect specifically to control and contain the spread of COVID-19. Where, on the face of it, it appears as if these laws exist to limit certain rights, such as the right to privacy and protection of personal information, what is key to also note and reiterate is that the apparent limitation is justified and these laws and regulations are by no means in contravention of any rights. In terms of section 36 (1) of the Constitution of the Republic of South Africa, No. 108 of 1996 the general requirement for the limitation of any right is that it may be limited only in terms of the law of general application *"to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom"*.

While prima facie it may seem as though contact tracing is in contravention of the Protection of Personal Information Act, No. 4 of 2013 known as POPIA, the Information Regulator, who is the

authority appointed to enforce and ensure compliance with POPIA once the Act becomes fully effective, issued a Guidance Note on 3 April 2020 to assure the public that contact tracing and the Disaster Management Regulations were not in conflict with POPIA and that public and private bodies, in the attempt to contain and reduce the spread of COVID-19, should be proactive in their compliance with POPIA when processing personal information of data subjects who have tested or are infected with COVID-19 or have been in contact with such data subjects.

Below are some salient questions and points with regards to contact tracing and POPIA.

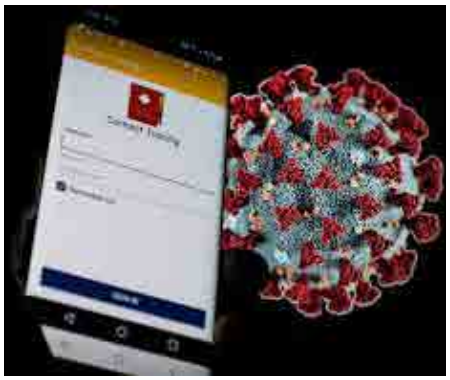
1) Your rights in terms of POPIA

The right of privacy is enshrined in the Constitution which expressly states that everyone has the right to privacy. POPIA is aimed at facilitating the protection of privacy. The lawful processing and collecting as well as sharing of personal information is regulated by POPIA and persons collecting, processing and sharing any personal information will need to seek consent first from the data subject i.e. the person to whom the personal information relates.

Sections 9 – 11 of POPIA go further to protect the data subject's rights by providing conditions for processing personal information, which are that it must be lawful, minimal - in that it must only be collected for the purpose it is supposed to serve - and the collection and processing of such personal information is justified and meets the objectives for which it was collected in the first place.

2) Have your rights changed due to COVID-19 and the Disaster Management Act Regulations?

This is important. The answer is, No. The Disaster Management Act regulations have not impacted on the privacy of the South African people, their rights have not been infringed or taken away. Where processing and collection of personal information is imposed by law and/or protects the legitimate interest of the data subject or where the processing and collection of



personal information is necessary for performance of a public law duty by a public body, or processing is necessary for pursuing legitimate interests, the collection and processing is lawful and justified. The objective of contact tracing is to prevent a serious and imminent threat to public safety and/or a public health, health of data subject or other individuals that the data subject has come into contact with. Contact tracing therefore passes the lawful, minimality, justification and legitimate test provided for in POPIA.

Consent is therefore not necessary where the collection of data and personal information is to detect, contain and prevent the spread of COVID-19, where the collection of personal information is done to exercise public duty to pursue a legitimate purpose – that of curbing the spread of COVID-19 and saving lives. Having said that, under the Guidance Note issued by the Information Regulator in April, consent in the context of COVID-19 cannot be withheld by a data subject.

3) The impact of contact tracing on your rights in terms of POPIA.

Covid-19 has not impacted on the rights of any individual in terms of POPIA. It has only limited them in a reasonable and justifiable manner. When personal information is collected from a data subject it must still meet the requirements of POPIA, in that it must be lawful, justifiable, reasonable, there is a legitimate interest, minimality, and the purpose has to be clearly specified. The collection of personal information is for purposes of contact tracing which tracing seeks to detect, contain and prevent the spread of COVID-19 as well as prevent deaths and save lives.

Personal information and data collection for purposes of contact tracing must not be retained longer than authorised to achieve the purpose of detecting, containing and preventing the spread of COVID-19 unless the information required is for historical, statistical or research purposes and adequate safeguards are in place. Further, destruction and deletion must be done in a manner that prevents reconstruction.

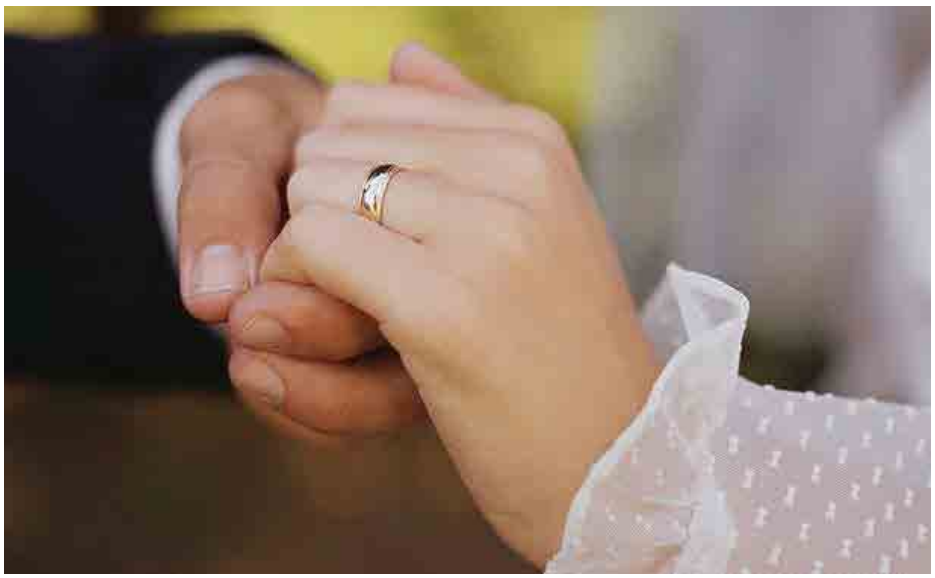
4) What are your personal information and data privacy rights post-level 4?

As the country cautiously enters into level 3 and more industries, churches and places of work reopen as well as schools, contact tracing will become more important and necessary. A reopening of most businesses means more interactions and increased movement, which is how the virus spreads. Contact tracing will be used to detect and record these movements. Employers will be allowed to request specific information on the health status of an employee in the context of COVID-19 as the movement of an employee under level 3 will no longer be limited to grocery stores for essentials but will be increased to churches and other places. In terms of the Guidance Note an employee can be forced to undergo testing, the data subject cannot refuse to give consent and a person who has tested positive has a duty to disclose his/her status for the safety of others and for the purpose of enabling the government to take appropriate measures to address, combat and prevent the spread COVID-19.

We are living in unprecedented times and every day we are entering into uncharted waters. There will be laws that are confusing, that look like they are designed to infringe on our rights to freedom and to privacy. It falls upon us as legal practitioners to demystify these laws and where in fact they infringe upon human rights or have the potential to infringe on human rights and/or on the rights to privacy, we must challenge them in a responsible manner, bearing in mind the balancing act between constitutional rights and saving and preserving life.●

Matrimonial Property Regimes and their Consequences

By Naeelah Williams, Staff Attorney, Cape Town



It is safe to say that all couples who are in the process of tying the knot hope from the outset that their journey to marriage will be as stress free and pleasurable as possible. Most couples however, still want personalised and detailed planning and co-ordination for their big day and the costs of the wedding can be exorbitant.

While this is a beautiful time in the couple's life, and a time for celebration, many couples disregard the importance of the matrimonial property regime that will govern their marriage.

An unfortunate reality is that many marriages in South Africa end in divorce. It is only at this stage that some couples question and attempt to dispute the matrimonial property regime governing their marriage, which becomes rather difficult.

There are three types of matrimonial property regimes in South Africa; namely, marriage in community of property; marriage out of community of property with the accrual; and marriage out of community of property without the accrual. These regimes are governed in terms of the Matrimonial Property Act 88 of 1984.

The most popular regime is marriage in community of property. The reason for this is due to the fact that it is the default regime and requires no antenuptial contract. The belief that couples will live happily ever after, in addition to the high costs associated with wedding ceremonies, often result in couples not wanting to incur the additional upfront costs of lawyers' fees in drawing up an antenuptial contract. This however, can result in unwanted ramifications in the long run. Being married in community of property results in, and is not limited to, one being jointly responsible for any debt incurred by one's spouse, which includes debt that was incurred before marriage. As a result, many regard the consequences of this regime rather steep.

Couples are however allowed to amend their matrimonial property regime to one of out of community of property. Section 21 (1) of the Matrimonial Property Act provides that a married couple may jointly apply to court to amend their current matrimonial property regime.

It is prudent to note at this point that there are quite a number of requirements that have to be met in order to amend a marital regime. This includes, amongst other things, sound reasons for the proposed change, notice of the intention to amend to be given to the Registrar of Deeds, which must be published in the Government Gazette and two local newspapers, a draft notarial contract to be submitted and proposed to register and to be annexed to the application, as well as confirmation that no other person will be prejudiced by the proposed change.

When a couple decides to separate and divorce, there are various issues to consider, especially when there are minor children involved. It is crucial for the couple to try and limit any adverse consequences the children may suffer as a result of the divorce. Further consideration will have to be given to maintenance of the children and spouses as well as the division of assets. It is always best to try to resolve any disputes that may arise during this hard time amicably. Reaching an amicable agreement or settlement results in the divorce being finalised speedily and without undue delay, thus saving on legal costs while limiting adverse effects on the children.

It is important to reiterate that it is of paramount importance that both parties to the marriage understand the implications and consequences of the type of matrimonial property regime they are entering into. Unfortunately, couples focus so much on the big day that they disregard the implications of neglecting to make a well-informed decision regarding the regime that will inevitably govern their marriage.●

Debunking the concept of sentencing in criminal proceedings

By Shadreck Masike, Legal Intern, Cape Town

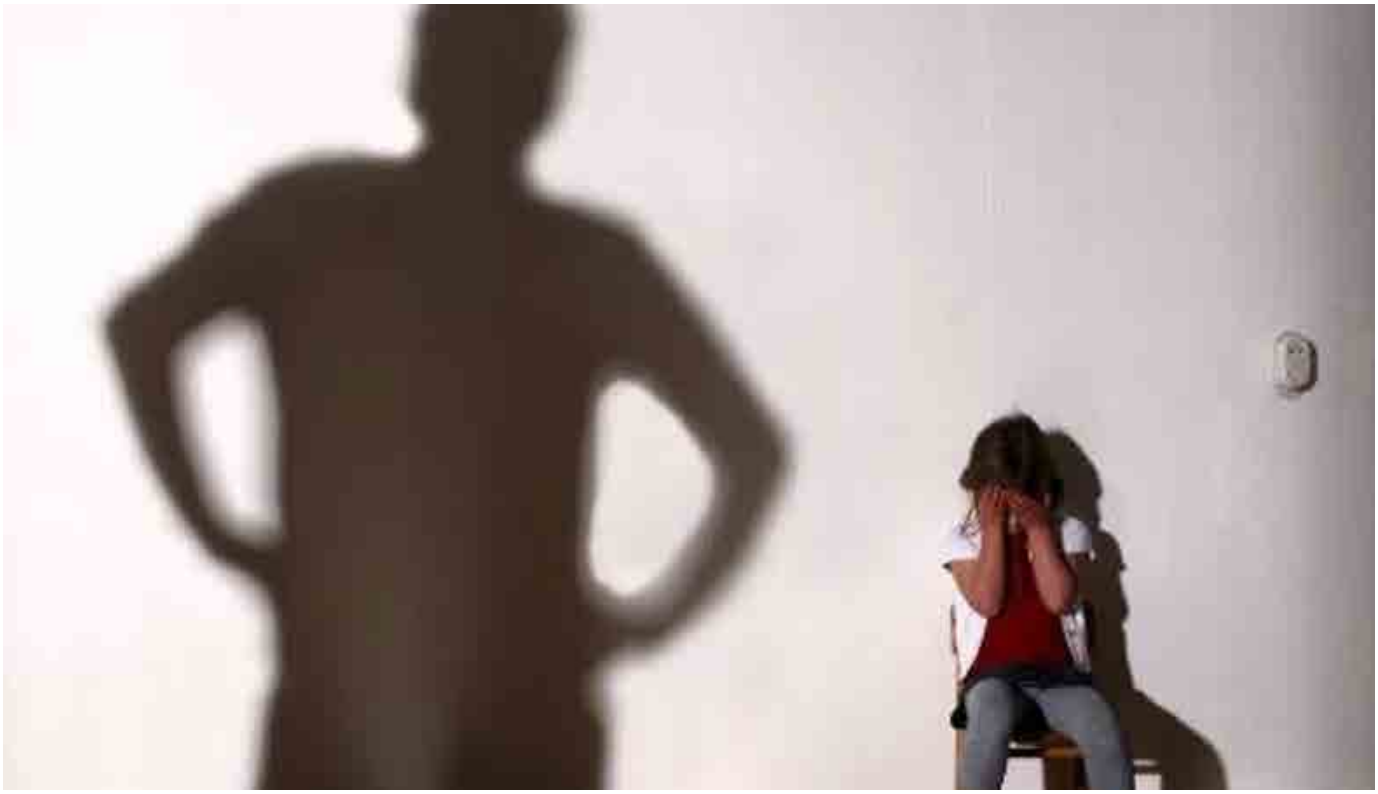
There is an underlying principle in criminal justice system jurisprudence in South Africa which entails that justice must not only be done, but also be seen to be done. This ought to be understood in the sense that justice must be seen to be done right from the arrest of an accused person up to the time of acquittal or, where the accused is found guilty, the sentencing of the convicted individual.

The sentencing stage of a convicted person normally attracts mixed reactions from members of society, and even the legal fraternity, on whether the sentence given is appropriate or not, or whether it justly compensates for the wrong that the offender has committed. This is especially true in serious crimes in which the community is effectively involved, such as murder, rape and armed robberies. The public often questions why offenders get different sentences for the same crimes, for example, one person may get 40 years behind bars for rape, while another gets 15 years for the same crime. In the innocent eyes of the ordinary man, justice would not have been done nor be seen to be done to both the victims and society at large. Is such difference in the treatment of offenders convicted of the same crime permitted? Well, yes, and for the following reasons:

Firstly, a judicial officer (a judge or a magistrate) has wide discretion when it comes to sentencing a convicted person, the only limitation being that such discretion must be exercised reasonably, rationally, judiciously and within the confines of the law. Once a judicial officer has such a wide discretion, then it is only natural that for one crime, Judge X will hand down a different sentence to Judge Y. However, the gap between the sentence must not be too wide since the presiding officers are bound by common law sentencing principles that must always be referred to before the sentence is passed. These principles can be summarised as "the sentence must be one that fits the criminal as well as the crime, is fair to society, and is blended with a measure of mercy according to the circumstances." According to this quotation, there are four things that should be looked at before a sentence is handed down, that is, (i) the crime (ii) the criminal (iii) the interests of the society and (iv) the circumstances. When these are looked at individually, the last principle would be to blend the result with a measure of mercy before handing down the sentence. As can be seen here, although the crime might be the same, the criminal will not be the same, the interests of the society might also be the same, but the circumstances of the crime will be different. What Judge X might consider to be merciful, is not what Judge Y considers to be so. The net effect is such that the sentence will be different.

Moreover, there are also legislative interventions when it comes to sentencing. More often than not, the statute which establishes a crime will specify that the offender shall be liable to pay a fine not exceeding a particular amount, or to imprisonment not exceeding a particular period. This means that a presiding officer will be left to exercise his/her discretion within the confines set out by legislation as above. In addition, there are also crimes that are considered so serious that the legislature provides mandatory minimum sentences in respect thereof. Presiding officers will also exercise their discretion to the extent that they do not impose lesser sentences than those stipulated. Be that as it may, it does not guarantee the same sentences for the same crimes for reasons already provided here.

In conclusion, people who commit the same crimes will generally receive different sentences owing to the fact that the court looks beyond the crime itself or the interests of society, but also looks at the offender and the circumstances surrounding the commission of the crime. With the latter, the court looks at whether there were aggravating circumstances (facts that favour a heavy sentence) or mitigating circumstances (facts that favour a lesser sentence), albeit in the context of a similar crime.●



Reasonable chastisement...is it really reasonable?

By Steven Miller (Volunteer Durban office, extern and final year law student, University of Michigan Law school. Steven came to SA for three months as part of one of his final year modules. Regrettably, he had to leave because of the COVID-19 pandemic and was unable to complete his stay with us.)

Last September, the Constitutional Court held that the common law defence of reasonable chastisement was inconsistent with the values of the Constitution. Without this defense, corporal punishment is indistinguishable from the legal definition of assault. This judgment thus effectively banned the practice of corporal punishment throughout South Africa, even in the home. While such a position is hardly radical given the growing consensus of international law, pediatric medicine, and the Court's own precedents, it once again places the Court squarely at odds with popular opinion in South Africa and raises serious questions about how such a judgement can be enforced.

A relevant case is where defendant YG invoked the defence of reasonable chastisement while appealing his conviction of assault to the High Court in Johannesburg. YG was convicted of assault in the Magistrate's court after he struck his son, ostensibly as punishment for watching pornography. At common law, a parent may "for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment, always however with the condition that it is moderate and reasonable." YG contended that since he was Muslim, and pornography was forbidden by his religion, he was within his rights to strike the boy to promote his moral development. The High Court found that YG's actions had far exceeded what was reasonable under the circumstances, so the defence was unavailable to him. However, the court then took the additional step of saying that even if the actions had been a proportional response to the child's misdeeds, YG would still be guilty of assault because the defence of reasonable chastisement was inconsistent with the Constitution.

On appeal, the Constitutional Court upheld the decision. Unlike the broad approach taken by the High Court however, the Constitutional Court focused its reasoning on s 12(1)(c) of the Constitution guaranteeing that everyone has a right to be "free from all forms of violence from both public and private sources," and the right to dignity under s 10. For its section 12 analysis, the court first acknowledged that since reasonable chastisement is an affirmative defence against a crime, a parent would only need to invoke it when

Reasonable chastisement...is it really reasonable?

their actions would otherwise constitute assault. Then it concluded that since such chastisement, by design, uses physical pain to encourage a child to modify his behavior, the assault would always be "violent" in nature, thus triggering the protections of s 12. The Court also concluded that corporal punishment violated children's rights to dignity under s 10 of the Constitution because of the intense feelings of shame and feeling of less-than-ness that comes with such chastisement. The Court then concluded that corporal punishment did not constitute a reasonable limitation of these rights under s 36 because of the availability of less restrictive means of punishment and the paramount importance of children's best interest.

This decision is unsurprising given the Court's prior precedents. In 1995 the court banned corporal punishment in state detention centres and in 2000, the Court upheld a statutory prohibition on corporal punishment in schools . It is however the first time the Court has extended such a prohibition into the home, something the Christian Education case explicitly declined to do. The judgment is also in line with a growing consensus in international law and pediatric medicine. Since Sweden first banned the practice in 1979, a growing number of countries have also decided to outlaw corporal punishment. Additionally, courts in Kenya, Namibia and Zimbabwe have all issued judgments limiting corporal punishment in various settings, so South Africa's decision is by no means an outlier. Various organisations, both legal and medical, have also discouraged the use of corporal punishment for years now, decrying it as both a violation of children's rights and an ineffective and often counterproductive method of instruction.

Be that as it may, this judgment still raises one large question for proponents of the ban – enforcement. Even ten years after Christian Education, almost half of all South African school children reported being subjected to corporal punishment in schools. And that's in a public sphere ostensibly subject to full public oversight. Globally, underreporting is one of the most serious challenges facing public officials tasked with addressing domestic violence, even in cases of partner abuse where the victim is a legal adult. Given their dependence on their caretakers, children will be even less likely to report incidents of corporal punishment. Perhaps as a way to make the judgment more palatable to parents concerned about criminal prosecution for striking their children, the court invoked the doctrine of de minimis non curat lex (the law does not concern itself with trifles) to suggest that some touching, while technically assault, is so trivial as not to warrant judicial intervention. Given the challenges inherent in enforcing this judgment, the court may be surprised at just how many incidents of corporal punishment count as trifles. While this judgment represents a win for proponents of abolishing corporal punishment, much assistance from parliament will be needed to implement the ruling. And with the plethora of crimes that law enforcement is engulfed with, it also begs the question whether this will be yet another ruling with no "teeth". ●

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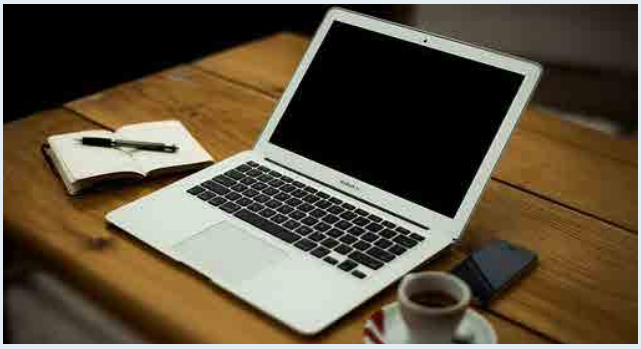

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The deadline for articles for the next issue will be **1 July 2020.**

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