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**Reconciling Normative Dissonance in Canada and New Zealand:
Comparing the Judicial and Political Paths to Children's Rights Implementation**

by

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1. Introduction

When Canada and New Zealand ratified the *Convention on the Rights of the Child*¹, the criminal law in each state included almost identical statutory defences to assault, open to parents who had used “corrective” force on their child that was “reasonable under the circumstances”. Since then, there has been a significant divergence between these two states, in both their legal approach to the physical punishment of children and in the extent to which the issue is a topic of domestic political debate.

In Canada, the initiation of a *Charter* challenge to the reasonable corrective force defence allowed the federal government to shift its responsibility for the difficult issue to the judiciary. When the case culminated in the Supreme Court’s 2004 decision in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*², which upheld the defence while simultaneously restricting its application, the decision was perceived as a judicial endorsement of physical punishment and the reasonable corrective force defence. This effectively put a halt to public debate on the issue and to any efforts at legislative reform, while providing Canada with a useful rhetorical tool to deflect pressure from the international human rights community.³

In contrast, New Zealand’s legislature repealed its reasonable corrective force defence in June 2007. The new law remains a highly controversial and divisive subject in New Zealand – it was the subject of a citizen initiated referendum in August 2009 – but political leaders have expressed their continued support.

¹ 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990) [CRC].

² [2004] 1 S.C.R. 76 [*Canadian Foundation* (S.C.C.)].

³ This is not to question the judgment or intentions of the individuals involved in the *Canadian Foundation* litigation; the author would like to emphasize that the conclusions in this paper could only have been made with the benefit of hindsight.

This divergence between Canada and New Zealand is puzzling, since the two states are similar in many ways. Due to their common British colonial history, they share many of the same social values, political norms, and legal concepts regarding the roles of families, parents, and children in society. In both states, there is a deeply-embedded societal norm that the state should avoid interfering with “parental autonomy”: “a right possessed by caretakers and enabling them to make significant choices on behalf of the children under their care.”⁴ There is also a long history of social norms in both states encouraging the physical punishment of children by their parents.⁵

The legal systems in Canada and New Zealand take a similar approach to international law. International treaties can only play a role in their domestic law through legislative enactment or as a persuasive source of interpretive norms.⁶ After ratifying the *CRC*, the two states came under similar pressures – from the Committee and from other international human rights organizations – to remove their defences for reasonable corrective force.

This paper will identify the differences in Canada and New Zealand’s legal structures, political cultures, and government institutions that can explain why two states with so much in common have taken such divergent approaches. The second section will describe in detail the nature of the divergence between Canada and New Zealand. In the third section, it will be argued

⁴ David Archard, *Children: Rights and Childhood*, 2d ed. (New York: Routledge, 2004) at 142.

⁵ This paper will use the terms “corporal punishment” and “physical punishment,” interchangeably. In all cases, they refer to “any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light.” (Committee on the Rights of the Child, *General Comment No. 8*, CRC/C/GC/8 (2006), re-issued 2 March 2007 at para. 11 [*General Comment No. 8*]) The term “parents” will be used, although the analysis will be equally applicable to those who are not a child’s biological parents, but who are the legally recognized custodial parents.

⁶ Hugh M. Kindred and Phillip M. Saunders, general eds., *International Law: Chiefly as Interpreted and Applied in Canada*, 7th ed. (Toronto: Emond Montgomery, 2006) at 184-185; Standing Senate Committee on Human Rights, “Children: The Silenced Citizens” (Ottawa: April 2007) at 8-9 [Senate Committee, “Silenced Citizens”]; Claire Breen (2002), “The Corporal Punishment of Children in New Zealand: The Case for Abolition,” *New Zealand Law Review* 359 at 365 [Breen, “Case”].

that this divergence has occurred in the context of a shared “normative dissonance”: between deeply-embedded domestic norms emphasizing parental autonomy and the appropriateness of physical punishment, and emerging international norms emphasizing children’s rights and prohibiting the physical punishment of children.

The fourth section and the Conclusion will locate the primary cause for the divergence between these two states in the differential capacities of the political and judicial processes to facilitate the reconciliation of normative dissonance. By recounting the dramatically different domestic stories of Canada and New Zealand between 1989 and the present, it will be argued that the critical factor contributing to the different outcomes in these two states has been the presence or absence of a constitutional bill of rights. The presence of the *Charter of Rights and Freedoms* in Canadian law, while doubtlessly positive in many other ways, had the unfortunate consequence in this case of encouraging advocates to effectively take their issue out of the political sphere, years before there could have been sufficient popular support for repeal. The absence of societal support, together with recent decisions that had given constitutional recognition to the importance of parental autonomy and family integrity, made the majority in *Canadian Foundation* feel obliged to strike an uneasy compromise between children’s rights and the perceived interests of parents.

In New Zealand, where there is no constitutionalized bill of rights, the only option for advocates was to effect political change. Forced to engage in grassroots political advocacy, the children’s activists and the government’s independent Children’s Commissioner translated their rights claims into arguments that would appeal to parents’ interests. Against the backdrop of a societal movement away from non-interventionist policies, their arguments eventually found a political environment that was receptive to them. The nature of political contestation allowed for

a form of change that would have been less possible in constitutional litigation: a gradual process of reconciliation between two discourses and many perspectives, a debate that could include parties with seemingly irresolvable positions and over time find a compromise that was responsive to public demands.

2. A divergence in the law and domestic political debate concerning the physical punishment of children

a. Canada: a judicially narrowed defence for “reasonable corrective force” that has put a halt to public debate

Since its initial enactment in 1892, Canada’s *Criminal Code* has contained a provision justifying the use by parents of “reasonable corrective force” on their children.⁷ According to what is now s. 43, “every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.”⁸ Throughout much of its history, this defence has been applied on a largely *ad hoc* basis, with relatively little guidance from higher courts, in a way that often seemed to be driven by trial judge’s personal childhood experiences.⁹

⁷ Anne McGillivray & Joan E. Durrant, “Child Corporal Punishment: Violence, Law, and Rights,” in Ramona Alaggia & Cathy Vine, eds., *Cruel But Not Unusual: Violence in Canadian Families* (Waterloo: Wilfrid Laurier University Press, 2006) 177 at 183.

⁸ *Criminal Code*, R.S.C. 1985, c. C-46, s. 43.

⁹ Anne McGillivray (1997), “‘He’ll Learn it on his Body’: Disciplining Childhood in Canadian Law,” (1997) 5 *The International Journal of Children’s Rights* 193 at 226-227; Joan E. Durrant, “Corporal Punishment: A Violation of the Rights of the Child,” in R. Brian Howe and Katherine Covell, eds., *Children’s Rights in Canada: A Question of Commitment* (Waterloo: Wilfrid Laurier UP, 2007) 99 at 101-102 [Durrant, “Violation”]; Sharon D. Greene, “The Unconstitutionality of Section 43 of the Criminal Code: Children’s Right to be Protected from Physical Assault, Part I” (1999) 41 *Criminal Law Quarterly* 288 at 302-309; *Canadian Foundation* (S.C.C.), *supra* note 2 at paras. 44 and 181-183.

A constitutional challenge to s.43 was initiated in 1998 by the Canadian Foundation for Children, Youth & the Law (“CFCYL”), a non-profit children’s and children’s rights advocacy organization that had been granted public interest standing to bring the claim.¹⁰ The beginning of the constitutional challenge largely took repeal off the domestic political agenda, and was used by the Canadian government to respond to – and avoid compliance with – demands from the international children’s rights community that it legislatively repeal the defence.¹¹

The Supreme Court’s 2004 decision in *Canadian Foundation* is now the leading case on the reasonable corrective force defence. The applicants’ first claim before the Supreme Court was that s.43 violates s.7 of the *Charter*. The Attorney General conceded that the reasonable corrective force defence constituted a potential threat to children’s security of the person.¹² The CFCYL argued that this was not in accordance with three asserted principles of fundamental justice: “(1) the principle that the child must be afforded independent procedural rights; (2) the principle that legislation affecting children must be in their best interests; and (3) the principle that criminal legislation must not be vague or overbroad.”¹³ The CFCYL also claimed that s.43 violated the right under s. 12 of the *Charter* “not to be subjected to any cruel and unusual treatment or punishment”, and the s. 15 right to equality.

¹⁰ *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, (2000) 146 C.C.C. (3d) 362 at para. 10 (Ont. S.C.J.) [*Canadian Foundation* (Ont. S.C.J.)]; Durrant, “Violation,” *supra* note 9 at 103; Katherine Covell & R. Brian Howe, *The Challenge of Children’s Rights for Canada* (Waterloo: Wilfrid Laurier University Press, 2001) at 73.

¹¹ McGillivray & Durrant, *supra* note 7 at 191 (In 1999, Canada told the Committee on the Rights of the Child that “the government has been seeking to reinforce and clarify protection under the Criminal Code,” by funding the CFCYL “to apply to a Canadian court for a determination as to whether s.43 of the Criminal Code infringes children’s constitutional rights.”); Committee on the Rights of the Child, *Summary Record of the 895th Meeting*, CRC/C/SR.895 (25 September 2003) at para. 54 (A Canadian representative, in response to criticism of Canada’s legislative inaction, told the Committee that “the Ontario Supreme Court of Justice had upheld the constitutionality of section 43 of the Criminal Code and had ruled that the provision was consistent with Canada’s obligations under the Convention.”).

¹² *Canadian Foundation* (Ont. S.C.J.), *supra* note 10 at para. 52.

¹³ *Canadian Foundation* (S.C.C.), *supra* note 2 at para. 4.

Chief Justice McLachlin's majority decision upheld the constitutionality of s.43, but also significantly circumscribed its application, placing limitations on who can invoke the defence, on the individuals who can lawfully be subject to corrective force, and on the kinds of force that can ever be considered reasonable under the circumstances.

On the s.7 claim, the Court did not even recognize that the first two principles asserted by the CFCYL were principles of fundamental justice. The Court decided that even if s. 7 guarantees procedural rights to child victims of an offence, "the child's interests are represented at trial by the Crown."¹⁴ In response to the second asserted principle, it was held that although the best interests of the child is a "recognized legal principle," it is not a principle of fundamental justice. The Court pointed to Art. 3 *CRC*, in which the best interests of the child are "a primary consideration," but not *the* primary consideration. Since it can be "subordinated to other concerns in appropriate contexts," and can be imprecise, the majority reasoned that the principle cannot be "vital or fundamental to our societal notion of justice."¹⁵

The decision then turned to the vagueness issue. Before determining whether the law "delineates a risk zone for criminal sanction" in a way sufficient to provide guidance to citizens and police officers, the Court embarked on a comprehensive reinterpretation of the s.43 defence. Rather than assessing past patterns in the interpretation and application of the law, the majority relied on statutory interpretation – aided by international human rights norms, "social consensus," and expert testimony – to read into the phrase "reasonable corrective force" a set of limitations to the defence's application.¹⁶

¹⁴ *Ibid.* at para. 6.

¹⁵ *Ibid.* at paras. 7, 10-12.

¹⁶ *Ibid.* at paras. 23-40.

According to the majority's decision, these limitations can be summarized as restricting the defence to "only minor corrective force of a transitory and trifling nature."¹⁷ First, the Court held that the phrase "corrective purpose" implied two limitations: the force must have been intended to educate or correct, and the child must have been capable of being educated or corrected.¹⁸ Expert testimony yielded rules relating to the reasonableness of the force: the defence cannot be used for assaults of children under two or over twelve years of age, for assaults involving objects such as rulers or belts, or for assaults that included "slaps or blows to the head."¹⁹ Third, social consensus was used to eliminate s.43's legal protections for teachers.²⁰

Finally, Chief Justice McLachlin referred to international human rights law for the notion that "physical correction that either harms or degrades a child is unreasonable."²¹ Her decision makes reference to three provisions in the *CRC*: Art. 19(1), which obligates States Parties to "protect the child from all forms of physical or mental violence"; Art. 37(a), which provides that "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment"; and the affirmation in Art. 5 of parental "responsibilities, rights and duties" to provide "appropriate direction and guidance." The decision also notes that the *CRC* does not explicitly prohibit physical punishment by parents, and mentions the Human Rights Committee's failure to make a statement regarding the legality of "parental use of mild corporal punishment" under the *International Covenant on Civil and Political Rights*.²² It concludes that international human rights law makes a distinction between mild, corrective, parental corporal punishment of children, and "cruel, inhuman or degrading treatment or punishment." In her opinion, only the

¹⁷ *Ibid.* at para. 40.

¹⁸ *Ibid.* at paras. 23-25.

¹⁹ *Ibid.* at para. 37.

²⁰ *Ibid.* at para. 39.

²¹ *Ibid.* at para. 31.

²² 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976, accession by Canada 19 May 1976).

latter is prohibited.²³ It will be argued below that this portrayal of international human rights law as it stood in 2004 was not entirely accurate.

Once s.43 had been restricted to this extent, the majority held that it had a “solid core of meaning,” and was therefore not impermissibly vague.²⁴ The overbreadth argument was also preemptively addressed by the decision’s re-interpretation, and was quickly dispatched.²⁵

The applicants’ claim under s.12 of the *Charter* was rejected not only because s.43 does not involve direct state infliction of force, but also because the defence as interpreted did not authorize force rising to the “cruel or unusual” level.²⁶ Finally, the majority held that there was no violation of s.15 equality rights, since the reasonable corrective force defence represents an accommodation to children’s unique needs, capacities, and circumstances.²⁷ While children need to be protected from psychological and physical harm, well-tailored legislation must balance this with their need “for guidance and discipline” within a “stable and secure family.” The majority decided that s.43 successfully balances these concerns.²⁸

The effect of the Court’s decision in *Canadian Foundation* has been to inhibit the efforts of those advocating for reform, by providing what has been perceived as an independent, authoritative endorsement of “reasonable” physical punishment. This endorsement has affected public and judicial attitudes towards physical punishment, has allowed governments to avoid domestic reform efforts, and has been used to deflect criticism in the international sphere.

²³ *Canadian Foundation* (S.C.C.), *supra* note 2 at paras. 31-33.

²⁴ *Ibid.* at para. 40.

²⁵ *Ibid.* at paras. 45-46

²⁶ *Ibid.* at paras. 47-49.

²⁷ The court adopted this conclusion from the perspective of “the reasonable person acting on behalf of a child, who seriously considers and values the child’s views and developmental needs” who also does his or her “best to take into account the subjective viewpoint of the child”: *Ibid.* at para. 53.

²⁸ *Ibid.* at paras. 58-60.

The decision in *Canadian Foundation* has inhibited domestic debate on the issue. The fact that s.43 was constitutionally upheld, but nevertheless circumscribed, is seen in the child welfare sector as difficult to explain to parents.²⁹ There is anecdotal evidence that, even though the judgment placed limits on the defence, it was perceived by the public as a judicial endorsement of the corporal punishment of children, or even as a grant of permission.³⁰

Chief Justice McLachlin's rules have been interpreted by lower courts in ways much less limiting than the majority in *Canadian Foundation* seems to have intended. Judges have begun to distinguish between "corporal punishment" and "discipline," and other types of non-consensual force such as "minor corrective force of a transitory and trifling nature" or "corrective restraint." Courts have used this distinction to apply the s.43 defence to assaults on teenagers, and charges involving blows or slaps to the head.³¹

Legislative efforts to reform s. 43 have not made any progress since 2004. The Senate's Standing Committee on Human Rights completed a major report entitled *Silenced Citizens* in April 2007, in which it reviewed the status of children in Canada. The report, invoking "widespread consensus in the children's rights community," called for the government to move towards repeal. It also called for increased efforts to educate parents on the risks of physical punishment, "to foster a societal movement against corporal punishment."³² Attempts by Senators to reform s.43 through private member's bills have not been taken up by the government.³³

²⁹ Marvin M. Bernstein, "The Decision of the Supreme Court of Canada Upholding the Constitutionality of Section 43 of the Criminal Code of Canada: What this Decision Means to the Child Welfare Sector" (2005) 4 *Envision: The Manitoba Journal of Child Welfare* 66.

³⁰ Joan E. Durrant, Nadine Sigvaldason & Lisa Bednar (2008), "What did the Canadian Public Learn from the 2004 Supreme Court Decision on Physical Punishment?" 16 *International Journal of Children's Rights* 229 at 242-243.

³¹ *R. v. Swan*, 2008 CarswellOnt 1384 (Ont. SCJ); *R. v. D.K.*, [2004] O.J. No. 4676 (S.C.J.).

³² Senate Committee, "Silenced Citizens," *supra* note 6 at 66-69.

³³ Durrant, "Violation," *supra* note 9 at 107.

The Court's decision has been used by Canada internationally to justify its decision not to repeal s.43. In 2005, Canada told the Independent Expert for the UN Study on Violence Against Children that "the Government does not support the "spanking" of children but neither does it condone the criminalization of Canadian parents for disciplinary conduct that is undertaken in a reasonable way that takes into account the needs and best interests of children." Canada invoked *Canadian Foundation* to emphasize the narrow nature of the s.43 defence.³⁴

In its most recent periodic report to the Committee on the Rights of the Child, submitted on 20 November 2009, Canada took a similar approach. The report explains that the Supreme Court's decision "set out guidelines that allow only minor corrective force of a transitory and trifling nature to be used", that the Court considered Canada's obligations under the *CRC* in reaching its decision, that the government supports efforts to educate parents about disciplinary alternatives to physical punishment, and that repeal of s.43 would "risk breaking up families in a way that would be detrimental to children."³⁵

b. New Zealand: a qualified yet controversial legislative repeal of the reasonable corrective force defence

New Zealand has followed a dramatically different path. Just like Canada, New Zealand's *Crimes Act* had featured since its initial codification a defence for the use of "reasonable corrective force" by parents.³⁶ Under s. 59(1), "every parent or person in place of a parent of a

³⁴ *Canada's Response to the UN Questionnaire on Violence Against Children* (10 September 2004), online: Office of the UNHCHR, < <http://www2.ohchr.org/english/bodies/crc/study.htm>>.

³⁵ Committee on the Rights of the Child, *Third and Fourth Reports of Canada: Covering the Period January 1998 – December 2007* (20 November 2009), CRC/C/CAN/3-4 at paras. 63-64, online: Office of the UNHCHR, <<http://www2.ohchr.org/english/bodies/crc/future.htm>>.

³⁶ Sally Maclean, "Child Cruelty or Reasonable Punishment? A Case Study of the Operation of the Law and the Courts 1883-1903," (2006) 40 *New Zealand Journal of History* 7 at 7 and 11.

child is justified in using force by way of correction towards the child, if the force used is reasonable in the circumstances.”³⁷

New Zealand’s legal approach diverged from Canada on 16 May 2007, when the Parliament overwhelmingly passed an opposition Member’s bill reforming s.59. The new provision explicitly abolishes the “reasonable corrective force defence” at statute and at common law, making any parental use of corrective force on children subject to criminal prosecution.³⁸ It qualifies this reform in two important ways, each of which attempts to explicitly preserve a lawful zone of parental authority. First, the new s.59 provides a justificatory defence for parents who use reasonable levels of force on their children for *non-corrective* purposes:

(a) preventing or minimising harm to the child or another person; or (b) preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or (c) preventing the child from engaging or continuing to engage in inoffensive or disruptive behaviour; or (d) performing the daily tasks that are incidental to good care and parenting.³⁹

Second, the law affirms the existence of police prosecutorial discretion “where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution.”⁴⁰

The reforms have proven extremely controversial in the subsequent years. A poll conducted immediately after the law was passed found that only 44% of the public was in support of the law, and 53% were opposed.⁴¹ Public attitudes seem to be changing, but quite gradually, partially because the government was slow to publicize the meaning of the reforms. In June 2008, a survey concluded that opposition to the reforms seemed to be steadily weakening, along with public support for physical discipline in general. Over 90% of those polled were

³⁷ *Crimes Act 1961* (N.Z.), 1961/43, s. 59(1).

³⁸ *Crimes (Substituted Section 59) Amendment Act 2007* (N.Z.), 2007/271-3, s.5 and 5(2).

³⁹ *Ibid.*, s.5(1)

⁴⁰ *Ibid.*, s.5(4).

⁴¹ Beth Wood *et al.*, *Unreasonable Force* (Wellington: Save the Children NZ, 2008) at 140, online: Save the Children NZ, <www.savethechildren.org.nz/new_zealand/nz_programme/referendum_09.html>.

aware of the changes, and over 80% were aware of the prohibition on corrective force, as well as the provisos regarding police discretion and force for certain purposes. Only 43% of adults “firmly supported” the law, but only 28% were firmly opposed; the remainder were neutral or unsure.⁴²

Opponents to the repeal are attempting to reverse it. Through a petition, they forced a mail-in referendum in July and August 2009 on the question: “Should a smack as part of good parental correction be a criminal offence in New Zealand?” Although the citizen initiated referendum was non-binding on the government⁴³, it was extremely divisive. The Leader of the Opposition chose not to vote due to objections to the phrasing of the question; the Prime Minister called the question “ridiculous” and “too ambiguous to draw any conclusions from”, stating that “he would not change the law unless he saw evidence it was not working as intended.”⁴⁴ Many other supporters of the 2007 reforms also chose not to cast a ballot.⁴⁵ Out of the 56.09% of eligible voters who cast a ballot, 87.40% voted “No”⁴⁶, a vote that has been portrayed by the “No” campaign as indicating opposition to the reforms.

The government announced its intention to nevertheless keep the law as it currently stands, while undertaking a review of the law’s impact and ensuring that police and social

⁴² Office of the Children’s Commissioner, “One Year On: Public Attitudes and New Zealand’s Child Discipline Law” (14 November 2008) at 1-8, online: Office of the Children’s Commissioner, <<http://www.occ.org.nz/>> [“One Year On”].

⁴³ *Ibid.* at 1 and 3.

⁴⁴ New Zealand Press Association, “Key, Goff won’t vote on smacking referendum” *New Zealand Herald* (16 June 2009), online: <http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=10578819&pnum=1>; Claire Trevett, “Key sees merit in Greens’ referendum bill” *New Zealand Herald* (23 June 2009), online: <http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=10580151>.

⁴⁵ EPOCH New Zealand, “Physical punishment of children and the child discipline law”, online: <http://epochnz.org.nz/index.php?option=com_content&task=view&id=92&Itemid=22>.

⁴⁶ New Zealand Ministry of Justice, “Final Result by Electorate for the Citizens Initiated Referendum 2009 on the question ‘Should a smack a part of good parental correction be a criminal offence in New Zealand?’” (25 August 2009), online: <http://electionresults.govt.nz/2009_citizens_referendum/2009_referendum_results.pdf>.

services received clear procedural guidelines.⁴⁷ The debate on the issue is by no means settled, however, and the passion of many opponents appears to have been inflamed by the government's response to the referendum. Opponents to the reform continue to organize public demonstrations – including one of New Zealand's largest demonstrations in 30 years.⁴⁸ They are also working towards another citizen initiated referendum.⁴⁹

Just days after the referendum results were announced, another opposition MP's bill was randomly drawn from the ballot of private member's bills. The proposed reform to s.59, which had been put forward by John Boscawen, sought to reverse the repeal of the reasonable corrective force defence.⁵⁰ The success of Boscawen's bill would have required the support of either the governing (moderate right wing) National party, or a coalition with the other non-governing parties. After all of these other parties appeared likely to oppose the bill, Boscawen decided to withdraw it indefinitely. He has embarked on a series of public meetings to build public support and put pressure on the government.⁵¹

The government's independent review of the law was released in December of 2009. Among its authors was a prominent opponent of the reform. The report came to conclusions similar to that of many other reviews of the law, finding that police discretion was being properly

⁴⁷ Simon Collins, "Smacking referendum: PM pledges new approach" *New Zealand Herald* (22 August 2009), online: <http://www.nzherald.co.nz/the-smacking-debate/news/article.cfm?c_id=1501165&objectid=10592463>; Audrey Young, "PM: Smacking law review gives parents 'comfort'" *New Zealand Herald* (25 August 2009), online: <http://www.nzherald.co.nz/the-smacking-debate/news/article.cfm?c_id=1501165&objectid=10592989>.

⁴⁸ "One arrest as thousands join 'March for Democracy'" *New Zealand Herald* (21 November 2009), online: <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10610750&pnum=1> (between 4000 and 5000 individuals participated).

⁴⁹ New Zealand Press Association, "Pro-smacking lobbyist wants another referendum" *3 News* (15 September 2009), online: <<http://www.3news.co.nz/Pro-smacking-lobbyist-wants-another-referendum/tabid/419/articleID/121212/Default.aspx>>.

⁵⁰ Audrey Young, "Key scuttles move to change smacking law" *New Zealand Herald* (27 August 2009), online: <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10593435>.

⁵¹ Audrey Young, "Smacking debate won't be going away in hurry" *New Zealand Herald* (21 September 2009), online: <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10598624>; New Zealand Press Association, "Boscawen's bill faces heavy defeat" *3 News* (27 August 2009), online: <<http://www.3news.co.nz/Boscawens-bill-faces-heavy-defeat/tabid/419/articleID/118423/Default.aspx>>.

exercised in cases of “light smacking”, and that the new law had not resulted in a significant increase in prosecutions of parents.⁵² In response to the report, the Prime Minister said that it had confirmed for him that the law was having its intended effect, and further reforms would not be necessary: “Lightly smacking a child will be in the course of parenting for some parents and I think that’s acceptable.”⁵³ His government is implementing the report’s recommendations to increase transparency in the law’s application and make information more available for parents on their legal responsibilities and rights.⁵⁴

3. The emergence of a normative dissonance

The divergence between Canada and New Zealand – in their legal approaches to the physical punishment of children, and in the extent to which the issue is a matter of domestic political debate – has taken place in the context of a shared “normative dissonance”. In a similar way for both states, an incompatibility has emerged in recent decades between historically-entrenched societal values and the ideas and norms of the emerging international children’s rights community. Understanding the nature of this dissonance is essential to understanding why institutions in Canada and New Zealand responded to it in such different ways.

The dissonance has emerged with respect to two issues. First, a dissonance has formed with respect to the appropriate relationship between children, parents, and the state: the

⁵² Howard Broad, Peter Hughes & Nigel Latta, “Review of New Zealand Police and Child, Youth and Family Policies and Procedures relating to the Crimes (Substituted Section 59) Amendment Act” (1 December 2009) at 3 and 14, online: < <https://www.msd.govt.nz/documents/about-msd-and-our-work/newsroom/media-releases/news/2009/s59-report.pdf>>; see also “One Year On”, *supra* note 42 at 11; Ministry of Social Development, “Report to the Minister for Social Development and Employment,” (November 2009), online: <<http://www.beehive.govt.nz/sites/all/files/20091110%20CE%20Monitoring%20Report%20on%20s59.pdf>>.

⁵³ “Smacking law appropriate as it, says Key” *New Zealand Herald* (7 December 2009), online: <http://www.nzherald.co.nz/the-smacking-debate/news/article.cfm?c_id=1501165&objectid=10614013>.

⁵⁴ John Hartevelt, “‘Anti-smacking’ law: know your rights” (7 December 2009), online: Stuff.co.nz, <<http://www.stuff.co.nz/national/politics/3135138/Anti-smacking-law-New-guidelines>>; Broad, Hughes & Latta, *supra* note 52 at 3-4.

traditional emphasis on parental autonomy in the raising of children has been challenged by the notion that children are independent rights-bearers with respect to the state. Second, a dissonance has formed with respect to the appropriateness of the physical punishment of children: domestic values encouraging its use have been challenged by the development of a prohibition at international human rights law.

This section will discuss how the normative dissonance emerged. It will first describe the deep historical roots in Canada and New Zealand of parental autonomy and the use of physical punishment, before turning to the more recent development of the dissonant norms in the international children's rights community.

a. Traditional societal norms encouraging physical punishment and respect for family autonomy

(i) The historical origins: Proverbs, patria potestas, and their doctrinal descendants

The value of parental autonomy in Western cultures, and the related legal and social acceptance of the physical punishment of children, originated in Roman law and was reinforced by the influence of Christianity. Since recognition and support for these traditions was crucial to the consolidation of sovereigns' authority in the sixteenth and seventeenth centuries, parental autonomy in child-rearing became a fundamental conceptual basis for the modern sovereign state.

Early Roman law equated children with slaves; both were objects owned by the *pater familias* and therefore subject to his absolute authority. This authority, or *patria potestas*,

included unlimited powers of physical punishment, selling and even execution of children.⁵⁵

Eventually, concerns about extreme instances of physical punishment led to some minimal limitations on the permissible scope of physical punishment. Roman law came to deny “the right to inflict extremely severe castigation”, and exceeding this limitation was a crime.⁵⁶ This was the historical origin of the modern reasonable corrective force defence.

During the middle ages, religious and political institutions encouraged the physical punishment of children, particularly of boys, within their nuclear family.⁵⁷ Religious support was often based in the Book of Proverbs, which contains many passages encouraging the use of corrective force on children, framing it as an act of love that saves them from their natural state of sinfulness.⁵⁸ Both Augustine⁵⁹ and Aquinas⁶⁰ were of similar opinion.

English and continental law incorporated the Roman jurisprudence on severe physical punishment, but the common law transformed the Romans’ negative limitation of parental authority – intended to protect children by creating a criminal offence – into a measure positively protecting parents from criminal liability.⁶¹ Bracton’s 1250 treatment of English common law provided that whippings “are not punishable if imposed by a master or parent (unless they are immoderate) since they are taken to be inflicted to correct not injure.”⁶²

⁵⁵ McGillivray & Durrant, *supra* note 7 at 178; McGillivray, *supra* note 9 at 200.

⁵⁶ Code of Justinian Book IX, in S.P. Scott, *ed.*, *The Civil Law* (Cincinnati: Central Trust, 1932), cited in McGillivray, *ibid.* at 201; Wood *et al.*, *supra* note 41 at 70.

⁵⁷ C. John Sommerville, *The Rise and Fall of Childhood* (New York: Vintage Books, 1990) at 77, see also 70-77.

⁵⁸ Philip Greven, *Spare the Child: The Religious Roots of Punishment and the Psychological Impact of Physical Abuse* (New York: Alfred A. Knopf, 1991) at 46-49. (Proverbs 23: 13-14: “Withhold not correction from the child: for if thou beatest him with the rod, he shall not die. Thou shalt beat him with the rod, and shalt deliver his soul from hell.”).

⁵⁹ Breen, “Case,” *supra* note 6 at 361 (“such discipline is for the profit of the one being disciplined so that he is readjusted to the peace from which he had departed”)

⁶⁰ *Ibid.* at 362 (children, as property of their father, were subject to a unique, “paternal” conception of justice.)

⁶¹ McGillivray, *supra* note 9 at 202; McGillivray & Durrant, “Violation,” *supra* note 7 at 179-180 (This statement of the common law was “virtually unchanged” from the commentary of Roman scholars on Valentinian and Valens’ 365 declaration prohibiting extremely severe castigation).

⁶² McGillivray, *ibid.*

The tumultuous period of the 1400s to the mid-1600s – one which saw the Renaissance, the Protestant Reformation, and constant warfare – lent a new significance and intensity to social norms promoting physical punishment. The underlying concern for inculcating obedience and respect that had traditionally motivated the use of physical punishment had been heightened by social instability⁶³; reformers became increasingly concerned for the spiritual welfare and good character of their children, as they sought to preserve the permanence of their religious institutions in an uncertain social order.⁶⁴

For sovereigns struggling to legitimate their power, the Roman patriarchal model served a political purpose. Sovereigns actively sought to reinforce strict notions of respect for paternal authority within the private nuclear family, in order to instill values of obedience that would be transferred to the sovereign in adulthood, and to cultivate support among the growing male middle class.⁶⁵ As sovereigns consolidated their power, they continued to respect the power of the father within his own family, and indeed relied on the family to raise its children. There were almost no state-provided social institutions for children; the common law imposed on parents a duty to maintain and educate their children.⁶⁶ The nuclear family was thereby established as the basic social unit of society, represented by the father, who could within his own family exercise many of the powers of the state, including physical punishment for undesirable conduct.

These fundamental norms emphasizing patriarchal autonomy and authority were reflected in Blackstone's 1770 *Commentaries on the Laws of England and Scotland*, which took the common law even further away from the original criminal prohibition in Roman law. In

⁶³ M.D.A. Freeman, *The Rights and Wrongs of Children* (London: Frances Pinter, 1983) at 13-14

⁶⁴ Sommerville, *supra* note 57 at 100-103; Freeman, *ibid.* at 13.

⁶⁵ McGillivray & Durrant, *supra* note 7 at 180.

⁶⁶ Joseph M. Hawes, *The Children's Rights Movement: A History of Advocacy and Protection* (Boston: Twayne Publishers, 1991) at 1-4.

Blackstone, “reasonable chastisement” became a power or even a right vested in parents, flowing from their duties to provide for and socialize their children. The father could “lawfully correct his child being under age, in a reasonable manner for this is for the benefit of his education.”⁶⁷

(ii) Colonization and the rise of child protection

These social and legal norms upholding the autonomy of the patriarchal family and encouraging the use of physical punishment were brought to North America, and later to New Zealand, by British colonizers and Christian missionaries. Evidence suggests that the Maori in what is now New Zealand did not customarily use force to discipline their children, until Europeans transferred their belief in the effectiveness and morality of corporal punishment.⁶⁸ More anecdotally, in what is now Canada the early 17th-century Jesuit Paul LeJeune called for Aboriginal children to be educated in residential schools, away from their parents, since “these Barbarians cannot bear to have their children punished ... not being able to refuse anything to a crying child.”⁶⁹

The conceptualization of children as the property of their father acquired central importance in the settler societies. Children were considered an economic asset, crucial to the functioning of family farms.⁷⁰ The perceived goal in child-rearing was to inculcate the values and work ethic required for future productivity: “children were a resistive, refractory ... but

⁶⁷ (1809), 15th ed., Book I paras. 452-3, cited in McGillivray, *supra* note 9 at 202.

⁶⁸ Wood *et al.*, *supra* note 41 at 21-22; Jacinta Ruru (2005), “Indigenous Peoples and Family Law: Issues in Aotearoa / New Zealand,” 19 *International Journal of Law, Policy and the Family* 327 at 338 (Children were not the property of their biological parents, but were community members held in trust for their extended family and tribe).

⁶⁹ Darlene Johnston, “Aboriginal Traditions of Tolerance and Reparation: Introducing Canadian Colonialism,” in Micheline Labelle, Rachad Antonius and Georges Leroux, eds., *Le devoir de mémoire et les politiques du pardon* (Québec: Presses de l’Université du Québec, 2005) 141 at 150-151.

⁷⁰ Standing Senate Committee on Human Rights, “Who’s in Charge Here? Effective Implementation of Canada’s International Obligations with Respect to the Rights of Children” (November 2005) at 22 [Senate Committee, “Who’s in Charge Here?”]; Covell & Howe, *supra* note 10 at 17.

nonetheless basically plastic raw material” out of which parents, with the support of religious institutions and schools, had a duty to “fashion moral, hard-working” adults.⁷¹ In both colonies there was a widespread social acceptance of – and probably even pressure to use - corporal punishment, endorsed legally by the reasonable corrective force defence at common law, and perpetuated by religious institutions.⁷² State intervention in family life was highly discouraged.⁷³

As they became increasingly urbanized and industrialized towards the end of the 1800s, Western societies constructed a new conception of childhood. There was a common fear that society was in a precipitous decline - that crime was rising, traditional morals were eroding, and the family was disintegrating.⁷⁴ Children came to be seen as vulnerable individuals, who not only needed protection from the dangers of everyday urban life, but also required nurturing to reach their full potential. Canada’s National Council of Women, in 1895, stated that children were not “plastic clay ... to mold and shape after a human pattern but a seed of divine life” for them “to nurture and tend.”⁷⁵

The ability of each family to succeed in this task with its own children was portrayed as a critical factor affecting the future survival and well-being of all of society. Parental authority thus became justified as a means for ensuring future social stability, rather than as a natural right

⁷¹ Neil Sutherland, *Children in English-Canadian Society: Framing the Twentieth-Century Consensus* (Waterloo: Wilfrid Laurier University Press, 2000) at 11 and 6-7 [Sutherland, *Framing*].

⁷² Maclean, *supra* note 36 at 7; Wood et al., *supra* note 41 at 23 and 32; Covell & Howe, *supra* note 10 at 17; Jane Ritchie & James Ritchie, *Spare the Rod* (Sydney, Australia: George Allen & Unwin, 1981) at 6-10.

⁷³ Covell and Howe, *ibid.*; Maclean, *ibid.* at 7; Emily Watt, “A History of Youth Justice in New Zealand,” online: Youth Court of New Zealand, <www.justice.govt.nz/youth.old/history/> (Consistent with these attitudes, colonial rulers in both Canada and New Zealand took a “social laissez-faire” approach to children. Before the final decades of the 19th century, there were neither special procedures for youth criminal justice, nor legislation or formal institutions providing for child welfare and protection).

⁷⁴ Hawes, *supra* note 66 at 11 and 37 (On the fears in the United States). One Canadian advocate linked rising crime levels “to the neglect of child-training in the homes of vice and drunkenness”, and called for society to improve conditions of child-rearing to “ensure for every child a fair chance to attain self-reliant and self-respecting citizenship”: Sutherland, *Framing*, *supra* note 71 at 17.

⁷⁵ Sutherland, *ibid.*; Maclean, *supra* note 25 at 7; Breen, *supra* note 5 at 91 (Although the emphasis on protection emerged in New Zealand at the same time, nurturing may only have gained prominence in the 1930s and 1940s).

that was an end in itself. The general assumption was that strict respect for parental autonomy was the best way to ensure the healthy nurturing of children, and therefore their future contribution to the state.

But the social stability rationale led state authorities to become more willing to intervene in extreme cases (either through the exercise of their *parens patriae* or statutory powers), when parents had clearly failed to meet their responsibilities to society.⁷⁶ The period between 1890 and 1910 saw, in both Canada and New Zealand, the enactment of the first statutes providing for child protection and juvenile justice, the formation of the first children's welfare agencies, and expansion of public education systems.⁷⁷ At the same time, however, physical punishment continued to play an important role in the nurturing of children. As discussed above, the first criminal law codifications – in Canada in 1892, and in New Zealand a year later – included the common law reasonable corrective force defence.⁷⁸ Physical punishment used in moderation remained an accepted part of child-rearing. In Canada, most parents “seemed to favour its use where absolutely necessary and as a last resort.”⁷⁹ The same was true in New Zealand.⁸⁰

There is some evidence that corporal punishment began to be discouraged by some Canadians during the inter-war years, and that its use in Canada declined somewhat after the Second World War. Even then, however, a majority of parents used physical discipline at times, and there would not be a “sharp decline” in its use and social appropriateness until the 1960s or

⁷⁶ Sutherland, *Framing*, *supra* note 23 at 13, 17-20, and 236-237; Covell and Howe, *supra* note 22 at 18; Maclean, *supra* note 24 at 7 and 11; Breen, *supra* note 5 at 91

⁷⁷ Sutherland, *ibid.* at 15 and 20-21; Covell and Howe, *ibid.*; McGillivray and Durant, *supra* note 8 at 183; Myriam S. Denov, “Children’s Rights of Rhetoric? Assessing Canada’s *Youth Criminal Justice Act* and its Compliance with the UN *Convention on the Rights of the Child*” (2004) 12 *International Journal of Children’s Rights* 1 at 3; Maclean, *ibid.*; Watt, *supra* note 25.

⁷⁸ Maclean, *ibid.*; McGillivray and Durrant, “Violation,” *ibid.*

⁷⁹ Sutherland, *supra* note 33 at 18.

⁸⁰ Maclean, *supra* note 46 at 7.

even later.⁸¹ Comparisons of anecdotal evidence should be undertaken with caution, but it seems that corporal punishment was even more common and positively-viewed in New Zealand. Not only was there widespread acceptance and use of physical discipline, but researchers observed strong social pressure to engage in the practice in the 1960s and 1970s.⁸²

(iii) The neoliberal emphasis on parental autonomy

Beginning in the 1980s, the political cultures of Canada and New Zealand went through an important shift that reinforced the traditional emphasis on parental autonomy. The economic turbulence of the 1970s contributed to the rise of neoliberalism, first in Britain and the United States, and later in Canada and New Zealand. Neoliberals' most visible policies of market deregulation and privatization of social services were driven by core values of government non-intervention and individual responsibility.⁸³

Applied to the family, this led to stronger support for the pre-existing norm of parental autonomy. This principle, which had been valued since the 1920s as a means to ensuring social stability, became once again an end in itself. Inherent to such a philosophy was a discomfort with – or even opposition to – the idea of children's rights, which was perceived as a mechanism for government interference in matters that could be dealt with more effectively by parents.⁸⁴ As

⁸¹ Sutherland, *ibid.* at 18 and 241; Neil Sutherland, *Growing Up: Childhood in English Canada from the Great War to the Age of Television* (Toronto: University of Toronto Press, 1997) at 84 and 87.

⁸² Ritchie & Ritchie, *supra* note 72 at 10 and 26-30; Wood *et al.*, *supra* note 41 at 130-133.

⁸³ Rianne Mahon, "Varieties of Liberalism: Canadian Social Policy from the 'Golden Age' to the Present," 42 *Social Policy & Administration* (2008) 342 at 348-349; Tony Judt, *Postwar: A History of Europe Since 1945* (Toronto: Penguin Books, 2005) at 535-537

⁸⁴ Covell and Howe, *supra* note 10 at 21; McGillivray, *supra* note 9 at 231; Mark Henaghan, "New Zealand and the United Nations Convention on the Rights of the Child: A Lack of Balance," in Michael Freeman, ed., *Children's Rights: A Comparative Perspective* (Brookfield, VT: Dartmouth, 1996) 165 at 167-169, 180; Alison J. Blaiklock *et al.*, "When the Invisible Hand Rocks the Cradle: New Zealand Children in a Time of Change," *Innocenti Working Paper No. 93* (Florence: UNICEF Innocenti Research Centre, 2002) at 10-12, online: UNICEF Innocenti Research Centre, <www.unicef-irc.org/cgi-bin/unicef/Lunga.sql?ProductID=334>; Bronwyn Dalley, *Family Matters: Child Welfare in Twentieth Century New Zealand* (Auckland: Auckland University Press, 1998) at 261.

summarized by Margaret Thatcher, neoliberals believed that “there is no such thing as Society. There are individual men and women, and there are families.”⁸⁵

Canada’s “neoliberal turn” began in 1984, with the election of Brian Mulroney’s Conservative government, and reached its height after 1993, in the early years of Jean Chrétien’s Liberal government. The shrinking of the welfare state never reached the extreme levels seen in the United Kingdom, the United States of America, or New Zealand. But the recession of the early 1990s and the government’s subsequent deficit reduction measures resulted in deep cuts in social spending, particularly in areas such as healthcare, unemployment insurance, and welfare. Reduced entitlements were portrayed as part of a return to parents’ traditional responsibility to provide for their own family.⁸⁶ Child protection policies also moved strongly towards a philosophy of “family preservation,” through minimal interference with parental autonomy.⁸⁷

In such an environment, it is not surprising that s.43 received support from legal institutions. A 1984 study by the Law Reform Commission of Canada recommended that the defence remain in the *Criminal Code* for parents. Reflecting the prevailing political and social norms, the study concluded that retaining s.43 for parents was the only way to avoid “running the risk of wheeling the engines of law enforcement into the privacy of the family home.”⁸⁸

That same year, the Supreme Court considered s.43 for the first time, in a pre-*Charter* case where the provision itself was not being challenged. In *Ogg-Moss v. R.*, Chief Justice Dickson expressed discomfort with the defence, since it deprives “a specific individual or group

⁸⁵Judt, *supra* note 83 at 535 [capitalization in original].

⁸⁶ Mahon, *supra* note 83 at 349-351.

⁸⁷ Nicholas Bala, “Child Welfare Law in Canada: An Introduction” in Nicholas Bala *et al.*, eds., *Canadian Child Welfare Law: Children, Families and the State*, 2nd ed. (Toronto: Thompson Educational Publishing, 2004) 1 at 7-8.

⁸⁸ Law Reform Commission of Canada, *Working Paper 38: Assault* (Ottawa, 1984) at 44-45. *See also* McGillivray, *supra* note 9 at 230-31 (A minority of the Commission called for repeal, for reasons of unconstitutionality).

of the equal protection we normally assume is offered by the criminal law.”⁸⁹ This discomfort did not prevent him from conceiving of it as both a right⁹⁰ and a power⁹¹ vesting in parents, however. The decision concludes that through s. 43, the *Criminal Code* normatively endorses the use of physical punishment: s. 43 is “a *justification*. It exculpates a parent ... who uses force in the correction of a child, because it considers such an action not a wrongful, but a *rightful* one.”⁹²

It also appears that corporal punishment continued to be widely accepted and used by the general public. Studies in the early 1990s showed that somewhere between 70-75% of Canadian parents had used physical discipline with their children.⁹³ Severe child abuse and sexual abuse was the focus of public attention during this period, “crowding out” any efforts to put corporal punishment on the agenda.⁹⁴

The neoliberal dismantling of New Zealand’s welfare state began in earnest in 1984, and was far more extreme than the Canadian experience. Market liberalization and cuts to the social welfare system had a highly negative effect on the well-being of families with children. Unemployment and inequality saw huge increases, as incomes and living standards for families with children dropped. A 1993 UNICEF report causally connected these reforms with New Zealand’s position at the time as the industrialized state with the highest youth suicide rate. “Family responsibility” was introduced as the core principle of child protection in 1989, allowing the government to reduce the level of support for families that came to the attention of child

⁸⁹ [1984] 2 S.C.R. 173 at 183 [*Ogg-Moss*]

⁹⁰ *Ibid.* at para. 28.

⁹¹ *Ibid.* at paras. 37 and 42.

⁹² *Ibid.* at para. 51 [emphasis in original].

⁹³ Covell & Howe, *supra* note 10 at 74-75; Greene, *supra* note 9 at 289.

⁹⁴ McGillivray, *supra* note 9 at 231.

services.⁹⁵ As they described the project, New Zealand governments sought to reconstruct what they called the “Core Family,” which would take on “‘collective responsibility’ for the social, emotional, and financial needs of its members, thereby permitting these persons to gain ‘self-reliance’ while ‘throw[ing] off the burden of welfare.’”⁹⁶

Although some judges in New Zealand in the 1980s expressed personal discomfort with the use of corporal punishment by parents, this does not seem to have affected their application of the law.⁹⁷ A small number of individuals and groups attempted to bring the issue to public attention throughout the decade, but government funding of NGOs was substantially reduced, public attention in this area was occupied by the problem of child abuse, and beliefs in family autonomy were too deeply-held.⁹⁸ By the end of the decade, there had been “remarkably little public discussion over the practice of parental physical discipline.”⁹⁹ A national survey in 1993 by the office of the Commissioner for Children revealed “a predominant attitude that it is acceptable to hit children”: 87% of non-rural New Zealanders over the age of 15 thought it “acceptable” for a parent to “smack” his or her child.¹⁰⁰

This history reveals that when the *CRC* entered into force there were important similarities between domestic norms in Canada and New Zealand. Within both states, the 1980s and early 1990s witnessed renewed support for family autonomy and government non-intervention, and continued acceptance of the physical punishment of children by the public, politicians, and the legal community. This was true to a greater extent in New Zealand.

⁹⁵ Henaghan, *supra* note 84 at 169; Ian Shirley *et al.*, “New Zealand” in Sheila B. Kamerman & Alfred J. Kahn, eds., *Family Change and Family Policies in Great Britain, Canada, New Zealand, and the United States* (Oxford: Clarendon Press, 1997) 207; Blaiklock *et al.*, *supra* note 84 at 49-51.

⁹⁶ Shirley *et al.*, *ibid.* at 235.

⁹⁷ Caldwell, *supra* note 35 at 376.

⁹⁸ Wood *et al.* at 34; Henaghan, *supra* note 45 at 179-180.

⁹⁹ J.L. Caldwell, “Parental Physical Punishment and the Law,” (1989) 13 *New Zealand Universities Law Review* 370 at 381.

¹⁰⁰ Henaghan, *supra* note 84 at 184-185.

b. Developing norms of international children's rights

For both societies, a dissonance would emerge between the deeply embedded domestic values outlined above and the norms that were developed within the international children's rights community. First, the very concept of children's rights sought to emphasize children's status as autonomous legal persons, and thereby constituted a challenge to the historically emphasized institution of the autonomous family. Second, the children's rights regime established by the *CRC* progressively developed a norm prohibiting the physical punishment of children, one that stood in direct opposition to values deeply entrenched in Canadian and New Zealand society.

(i) The rise of children's rights: a challenge to parental autonomy

Children's issues initially entered the international sphere after the First World War, largely advocated for by the labour movement and by individuals seeking to protect children displaced by conflict in Europe.¹⁰¹ In 1924, the League of Nations adopted the non-binding *Geneva Declaration of the Rights of the Child*.¹⁰² Although it used the language of rights, the 1924 *Declaration* is clearly rooted in the paternalistic "nurturing" paradigm that was prevalent in Western societies. It speaks of children not as legal subjects in their own right, but as the objects of family and state obligations to provide for their social, economic, and moral welfare.¹⁰³ The 1924 *Declaration* did, however, depart in at least one way from the "nurturing" approach. It

¹⁰¹ Freeman, *supra* note 63 at 19; A. Glenn Mower, Jr., *The Convention on the Rights of the Child: International Law Support for Children* (Westport, CT: Greenwood Press, 1997) at 12 (Beginning in 1919, the International Labour Organization began to address many issues surrounding child labour).

¹⁰² Adopted 26 Sept 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924) [1924 *Declaration*].

¹⁰³ Senate Committee, "Who's in charge here?", *supra* note 70 at 26; Deirdre Fottrell, "One Step Forward or Two Steps Sideways? Assessing the First Decade of the Convention on the Rights of the Child," in *Revisiting Children's Rights* (The Hague: Kluwer, 2000) 1 at 2; Claire Breen, "From Paternalism to (Partial) Autonomy: The Evolution of Children's Rights in New Zealand," (2006) 40 *New Zealand Journal of History* 91 at 94.

contains no suggestion that children's entitlements are only granted to ensure social stability; they are presented as natural entitlements, as ends rather than means.¹⁰⁴ This slight but important dissonance between domestic and international approaches would increase with the further development of international children's rights.

The League had intended to develop a binding "children's rights" instrument, but collapsed before this was possible.¹⁰⁵ After 1945, children's advocacy groups sought to have the world community expand upon and reaffirm the commitments of the 1924 *Declaration*. The result was the non-binding *Declaration of the Rights of the Child*, which was adopted by the UN General Assembly in 1959 in a unanimous consensus vote.¹⁰⁶

The 1959 *Declaration* certainly speaks the language of rights at times; it does recognize that children should be somehow included in the developing human rights regime, and contains principles that have become fundamental to children's rights. But the *Declaration* did not represent a substantive shift away from the paternalistic conception of children that was embodied in the 1924 *Declaration*. Its underlying theme is that "children need special protection and priority care"¹⁰⁷; ultimately, "the ten principles set out in it do not embrace children's liberties (or freedoms) at all."¹⁰⁸

It had been thought that work would soon begin on a binding convention for children's rights, but political tensions between the Western states and the Eastern bloc slowed overall progress in the human rights community, and put any convention that would require a

¹⁰⁴ The only textual indication of purpose is in the preamble: "mankind owes to the Child the best that it has to give."

¹⁰⁵ Mower, *supra* note 101 at 12.

¹⁰⁶ GA Res. 1386 (XIV), 14 UN GAOR, Supp. No. 16, U.N. Doc. A/4354 at 19 (1959) [1959 *Declaration*].

¹⁰⁷ Sharon Detrick, ed., *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Boston: Martinus Nijhoff Publishers, 1992) at 19.

¹⁰⁸ Freeman, *supra* note 63 at 19.

combination of civil and political with economic and social rights low on the priority list.¹⁰⁹ As a result, it took 20 years for drafting to begin on a binding successor to the 1959 *Declaration*.

The 1970s were a critical decade for children's rights, marked by a growing movement, originating in the United States, to recognize children as autonomous individuals worthy of equal legal status. According to the "child liberationists", just as slavery and the patriarchal marriage had come to be seen as oppressive institutions, so too should the differential treatment of children. The liberationists sought recognition of the child's autonomy and capacity for self-determination, as well as the development of "a separate and particular canon of rights for children which reflected their needs and concerns."¹¹⁰

Their ideas had a global influence, sparking a more moderate movement to empower children as autonomous holders of rights, rather than as beneficiaries of protective charity. By the end of the decade there was widespread agreement between states that this would require a separate convention for children's rights.¹¹¹ In anticipation of the UN's 1979 Year of the Child, the Human Rights Commission established an open-ended working group for the purposes of drafting such a convention. The drafting process would not be completed until March 1989.¹¹²

The *Convention on the Rights of the Child* was adopted and opened for ratification in November 1989. Canada signed the *CRC* on 28 May 1990. That September, the *CRC* entered into force, and New Zealand signed the *CRC*. Canada ratified the *CRC* in December of 1991, while New Zealand became a State party in April of 1993.¹¹³

¹⁰⁹ Senate Committee, "Who's in Charge Here?", *supra* note 70 at 27; Fottrell, *supra* note 103 at 2; Issa G. Shivji, "Constructing a New Rights Regime: Promises, Problems and Prospects," (1999) 8 *Social & Legal Studies* 253 at 254 and 258.

¹¹⁰ Fottrell, *ibid.* at 2-3.

¹¹¹ *Ibid.* at 2-3.

¹¹² Senate Committee, "Who's in Charge Here?", *supra* note 70 at 28; Fottrell, *ibid.*; Breen, "Paternalism," *supra* note 103 at 94; Mower, *supra* note 101 at 15.

¹¹³ For treaty info see: United Nations Treaty Collection, online: <<http://treaties.un.org/>>

For the first time, both Canada and New Zealand were subject to binding obligations at international law to respect and ensure a comprehensive, detailed set of human rights specifically aimed at the needs of children. While the *CRC* emphasizes the importance of respecting the family unit's role in providing for the well-being and socialization of children,¹¹⁴ it also grants children a set of rights which must be protected by the state with the "best interests of the child" as a primary consideration. In this way, the rights of children can obligate the state to over-ride parents' or caregivers' wishes.¹¹⁵

The norms embedded in the *CRC* therefore represent a significant shift away from both the conception of children as beneficiaries of paternalistic protection, and the traditional emphasis on parental autonomy: "children are recognised in a major international covenant as moral and legal subjects possessed of fundamental entitlements. They are acknowledged as having agency and as having a voice that must be listened to."¹¹⁶ The child becomes "more than a member of an autonomous and private family; the Convention is clearly built upon the principle of children as independent individuals whose rights may transcend those of the family of which they are a part."¹¹⁷

This created the first aspect of normative dissonance for Canada and New Zealand, bringing their international obligations into tension with their deeply-embedded societal values of parental autonomy. Subsequent developments in the international children's rights

¹¹⁴ See e.g.: *CRC*, *supra* note 1 at Preamble and Arts. 3(2), 5, 7, 8, 9, 10, 18 (Under Art. 5, "States Parties shall respect the responsibilities, rights and duties of parents or ... legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.")

¹¹⁵ Stephen J. Toope, "The Convention on the Rights of the Child: Implications for Canada", in Michael Freeman, ed., *Children's Rights: A Comparative Perspective* (Brookfield USA: Dartmouth, 1996) 33 at 48-49. See also Covell & Howe, *supra* note 10 at 20-22.

¹¹⁶ Archard, *supra* note 4 at 58.

¹¹⁷ Joan E. Durrant, "Abolition of corporal punishment in Canada," (1994) 2 *The International Journal of Children's Rights* 129 at 129.

community, led by the Committee on the Rights of the Child, would give rise to the second aspect of the normative dissonance.

(ii) The development of the prohibition of physical punishment

The interpretive mechanisms of the Committee allowed it to progressively establish an obligation under the *CRC* to protect children from physical punishment in all contexts. Led by the Committee, the international children's rights community applied steadily increasing pressure on both Canada and New Zealand to fulfill this obligation by repealing their reasonable corrective force defences. It exerted this pressure through the political and legal instruments at its disposal: the Committee's reporting procedure and power to issue General Comments, the UN's creation of the Independent Expert for the UN Study on Violence Against Children, and the support of other human rights treaty bodies.

Ratification obligated Canada and New Zealand to engage in a periodic reporting process with the Committee on the Rights of the Child. The Committee is a non-political body composed of eighteen experts on children's rights. States Parties to the *CRC* are obligated to submit initial reports to the Committee within two years of ratification, outlining their progress towards implementation. They are then expected to submit periodic reports every five years. A panel of the Committee will review each report with representatives of the State Party, in a process known as "constructive dialogue." Out of this dialogue, the Committee will release Concluding Observations for each periodic report, evaluating States Parties' progress and identifying areas of improvement to be addressed before the next periodic report is due.¹¹⁸

¹¹⁸ See generally, on the reporting process: *CRC*, *supra* note 2, Arts. 43 and 44; Gerison Lansdown, "The reporting process under the Convention on the Rights of the Child," in Philip Alston & James Crawford, eds., *The Future of UN Human Rights Treaty Monitoring* (Cambridge UK: Cambridge University Press, 2000) 113; Susan H. Bitensky,

The Committee's views are formally non-binding, but the Committee is regarded as a pre-eminent "political, moral, and persuasive authority" on the interpretation of the *CRC*.¹¹⁹ This body of interpretation arises not only from the statements made in Concluding Observations, but also from the General Comments occasionally issued by the Committee. These General Comments provide clear statements, directed at all States Parties, of the Committee's interpretations of the *CRC*.

The *CRC* does not explicitly prohibit the physical punishment of children by their parents, and the *travaux préparatoires* contain no indication that the drafting parties even contemplated the issue.¹²⁰ The reservations entered by Canada and New Zealand at the time of ratification suggest that neither state considered its statutory criminal defence of reasonable chastisement to be relevant to its legal obligations under the *CRC*.

Soon after its formation, however, the Committee began to develop its interpretation that the *CRC* prohibits all forms of physical punishment. Its first remarks addressing corporal punishment came in October 1994: "Certain states have tried to distinguish between the correction of children and excessive violence. In reality the dividing line between the two is artificial ... If it is not permissible to beat an adult, why should it be permissible to do so to a child?"¹²¹

Corporal Punishment of Children: A Human Rights Violation (Ardsley, NY: Transnational Publishers, 2006 at 50-52 at 50-52; Senate Committee, "Silenced Citizens," *supra* note 6 at 34-35.

¹¹⁹ Bitensky, *ibid.* at 52; Senate Committee, "Silenced Citizens," *ibid.* at 35; Breen, "Paternalism," *supra* note 103 at 95 (Since "the Committee's views are strong indications of the obligations incurred by states", "rejection of the views of the Committee on the Rights of the Child would, therefore, be an indication of bad faith on the part of New Zealand.").

¹²⁰ *General Comment No. 8*, *supra* note 5 at para. 20.

¹²¹ *CRC/C/SR.176* (10 October 1994) at para. 47, cited in Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, fully revised ed. (New York: UNICEF, 2002) (From the Committee's concluding statement to its General Discussion on "The Role of the Family in the Promotion of the Rights of the Child").

This idea was given a firmer grounding in the text of the *CRC* several months later, in the Committee's consideration of the United Kingdom's initial report. The UK had argued that a reasonable chastisement defence was in compliance with Art. 19, if read in the context of the Art. 5 responsibility of parents to provide "appropriate direction and guidance" to their children.¹²² During constructive dialogue, one Committee member commented that "difficulties arose whenever a 'reasonable' level of corporal punishment was permitted ... the United Kingdom position represented a vestige of the outdated view that children were in a sense their parents' chattels."¹²³ The concluding observations of 15 February 1995 unambiguously stated that the reasonable chastisement defence was "incompatible" with Arts. 3, 19, and 37 *CRC*, since it represented "a serious violation of the dignity of the child." The Committee recommended prohibition of corporal punishment, and public education on preferred parenting techniques.¹²⁴

The Committee made largely the same recommendations to Canada later that year.¹²⁵ By the time of New Zealand's constructive dialogue, the Committee had indicated through its general reporting guidelines that corporal punishment of children, in all contexts, was a form of violence from which children were protected under Art. 19.¹²⁶ The concluding observations for

¹²² Committee on the Rights of the Child, *Initial reports of States parties due in 1994, Addendum: United Kingdom*, CRC/C/11/Add.1 at paras. 335-336, cited in Rachel Hodgkin & Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 2nd ed., CD-ROM (UNICEF, 2008) at 261 [Hodgkin and Newell, 2nd ed.].

¹²³ Committee on the Rights of the Child, *Summary Record of the 205th Meeting*, CRC/C/SR.205 (24 January 1995) at para. 63; cited in Hodgkin & Newell, [2nd ed.] *ibid*.

¹²⁴ *Concluding observations of the Committee on the Rights of the Child : United Kingdom of Great Britain and Northern Ireland*, CRC/C/15/Add.34 (15 February 1995) at paras. 16 and 31.

¹²⁵ *Concluding observations of the Committee on the Rights of the Child: Canada*, CRC/C/15/Add.37 (20 June 1995) at para.25.

¹²⁶ Committee on the Rights of the Child, *General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by States Parties Under Art. 44, Paragraph 1(b) of the Convention*, CRC/C/58 (20 November 1996) at para. 88.

New Zealand in January 1997 contained recommendations similar to those given to Canada and the UK.¹²⁷

In the subsequent years the international human rights community increasingly directed its attention to the issue of the physical punishment of children. Both the UN Committee on Economic, Social, and Cultural Rights¹²⁸ and the UN Special Rapporteur on Torture¹²⁹ called for the prohibition of the physical punishment of children. As a result of discussions at the Committee on the Rights of the Child, the Secretary General in 2003 appointed Professor Paulo Sérgio Pinheiro to be the Independent Expert for a UN Study on Violence Against Children.¹³⁰

Canada and New Zealand submitted their second periodic reports in 2003, and although neither had altered s.43 or s.59, respectively, the two States parties took significantly different positions on the issue in their reports to the Committee. Canada's second periodic report was submitted to the Committee in March 2003, three months before the *Canadian Foundation* case was heard at the Supreme Court. Canada emphasized its public education policies to prevent family violence, and the powers under child welfare legislation to intervene in cases of abuse. The report uses the ongoing constitutional challenge to sidestep the physical punishment issue, arguing that the government's funding of the Court Challenges program constituted government-NGO co-operation on the matter.¹³¹ In constructive dialogue, the Canadian representative took a

¹²⁷ *Concluding observations of the Committee on the Rights of the Child: New Zealand*, CRC/C/15/Add.71 (24 January 1997) at para. 29 [*First Concluding Observations: New Zealand*].

¹²⁸ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom*, E/C.12/1/Add.79 (5 June 2002) at para. 36 (Invoking individual dignity, Art. 10 *CESCR*, and the jurisprudence of the Committee on the Rights of the Child to recommend that the UK prohibit the physical punishment of children in families)

¹²⁹ Bitensky, *supra* note 118 at 61 (Reporting to the General Assembly in 2002).

¹³⁰ Hodgkin and Newell, 2nd ed., *supra* note 122 at 250.

¹³¹ Committee on the Rights of the Child, *Second periodic reports of States parties due in 1999: Canada*, CRC/C/83/Add.6 (12 March 2003) at paras. 200-202 [*Second Periodic Report: Canada*].

strong position that s.43 was in compliance with the *CRC*, since it preserved family stability through respect for parental autonomy.¹³²

The Committee's response to these arguments illustrates the dissonance that had emerged between domestic and international norms. One Committee member told the Canadian delegation that "many countries looked to Canada as an example in the field of child rights protection. Therefore, the problem of section 43 took on symbolic importance."¹³³ The Committee's concluding observations for Canada expressed "deep concern" about s.43, and clearly recommended repeal of the defence and explicit prohibition of the physical punishment of children.¹³⁴

Although New Zealand's second round of periodic reporting also demonstrates the normative dissonance, New Zealand seemed much more open to the Committee's ideas. The government defended the reasonable force defence, arguing that it did not sanction violence or abuse, and that there was sufficient protection for children through child welfare statutes. But it also expressed an intention to explore future legislative reform, once domestic debate on the issue was resolved.¹³⁵ The Committee, in its concluding observations, expressed "deep concern," and recommended prohibition of corporal punishment along with more education of parents.¹³⁶

¹³² Committee on the Rights of the Child, *supra* note 11 at para. 54 ("Canada believed that section 43 did not authorize or condone the abuse of children ...the Government considered that it was not in the best interests of the child, or Canadian society as a whole, to bring the full force of Canadian law to bear on parents for giving a mild non-injurious spanking to a child.")

¹³³ *Ibid.* at para. 58.

¹³⁴ Committee on the Rights of the Child, *Concluding Observations: Canada*, CRC/C/15/Add.215 (27 October 2003) at paras. 32-33 [*Second Concluding Observations, Canada*].

¹³⁵ Committee on the Rights of the Child, *Second periodic reports of States parties due in 2000: New Zealand*, CRC/C/93/Add.4, (12 March 2003) at paras. 79-81 [*New Zealand Second Periodic Report*]; *Summary Record of the 897th Meeting*, CRC/C/SR.897 (26 September 2003) at paras. 47 and 86.

¹³⁶ *Concluding Observations of the Committee on the Rights of the Child: New Zealand*, CRC/C/15/Add.216 (3 October 2003) at paras. 29-30 [*Second Concluding Observations: New Zealand*].

In 2004 and 2005, pressure from intergovernmental organizations continued.¹³⁷ The Independent Expert gave strong indications that corporal punishment within the family would be targeted by his report.¹³⁸ At a UN event in New York in October 2005, Professor Pinheiro said that “we cannot demonstrate a serious commitment to violence prevention and child protection while states continue to authorize corporal punishment in the home.”¹³⁹

The UN human rights treaty bodies’ developing jurisprudence and growing political momentum on the issue in the international community combined in 2006, to produce two documents that crystallized the prohibition at international human rights law of the physical punishment of children.

First, the Committee released *General Comment No. 8* in June of that year, “to highlight the obligation of all States parties to move quickly to prohibit and eliminate corporal punishment and *all other* cruel or degrading forms of punishment of children.”¹⁴⁰ According to the Committee, the Art. 37 right to be protected from cruel, inhuman or degrading treatment or punishment is “complemented and extended” by the obligation under Art. 19 to protect children from all forms of physical or mental violence while in the care of their parents. The Committee’s view was that there could no longer be any ambiguity about the extent of the protection guaranteed by Arts. 19 and 37: “‘all forms of physical or mental violence’ does not leave any

¹³⁷ Committee Against Torture, *Conclusions and Recommendations (New Zealand)*, CAT/C/CR/32/4 (11 June 2004) at para. 6(e); Committee Against Torture, *Summary Record (Canada)*, CAT/C/SR.646/Add.1 (13 May 2005) at paras. 36-37.

¹³⁸ A questionnaire circulated by Professor Pinheiro to all state governments in early 2004 asked them to “indicate if corporal punishment of children, in any setting, including in the family, is explicitly prohibited in your legal system,” and “provide details of any legal defences available to those who administer corporal punishment to children, including in the family.”: “Response of the Government of New Zealand to the Questionnaire from the United Nations Independent Expert on Violence against children” (2004) at 3, online: Office of the UNHCHR, <<http://www2.ohchr.org/english/bodies/crc/study.htm>> [“New Zealand’s Response”].

¹³⁹ Peter Newell and Beth Wood, “Eliminating corporal punishment – a worthy aim for the current United Nations Secretary General’s Study on Violence Against Children,” (Paper presented at Blossoming of Our Children: 10th Australasian Conference on Child Abuse and Neglect, 14 February 2006), online: <<http://www.nzfvc.org.nz/acan/papers-presentations/day1.shtml>> at 4.

¹⁴⁰ *General Comment No. 8*, *supra* note 5 at para. 2 [emphasis added].

room for any level of legalized violence against children.”¹⁴¹ Punishment using even the lightest force cannot be justified as being in the Art. 3(1) “best interests of the child,” since corporal punishment will always infringe a child’s fundamental human dignity and physical integrity.¹⁴²

To secure the Art. 19 right, *General Comment No. 8* opines that states have an immediate obligation to take all appropriate legislative, administrative, social, and educational measures. According to the Committee, this includes the repeal of criminal defences for “‘reasonable’ or ‘moderate’ chastisement or correction,” even for parents.¹⁴³ It also requires, due to the deep cultural roots of corporal punishment, explicit prohibition of all forms of corporal punishment – although the Committee recognizes the necessarily role of the *de minimis* principle in avoiding frivolous prosecution. Parents should only be prosecuted when “necessary to protect the child” and “in the best interests of the child.”¹⁴⁴

The second major development in 2006 was the completion of Professor Pinheiro’s global study on violence against children, presented to the General Assembly and released world-wide in an extended *World Report on Violence Against Children*.¹⁴⁵ In its first sentence, the report establishes an absolute zero-tolerance stance on the commission of, and failure to prevent, all forms and levels of violence against children.¹⁴⁶ In his second overarching recommendation, Professor Pinheiro urges “states to prohibit all forms of violence against

¹⁴¹ *Ibid.* at paras. 18, 20. *See also* para. 21: “Once visible, it is clear that the practice directly conflicts with the equal and inalienable rights of children to respect for their human dignity and physical integrity.”

¹⁴² *Ibid.* at para. 26.

¹⁴³ *Ibid.* at para. 31

¹⁴⁴ *Ibid.* at para. 41, and paras. 34, 40. *See also*: Hodgkin and Newell, 2nd ed., *supra* note 122 at 262-263.

¹⁴⁵ *Report of the independent expert for the United Nations study on violence against children, A/61/299, 29 August 2006 [Report of the Independent Expert]*; Paulo Sérgio Pinheiro, *World Report on Violence Against Children*, United Nations: 2006, online: <<http://www.violencestudy.org/>>.

¹⁴⁶ *Report of the Independent Expert, ibid.* at para. 1: “No violence against children is justifiable; all violence against children is preventable.”

children, in all settings, including all corporal punishment.”¹⁴⁷ His hope is that “the Study should mark a turning point – an end to adult justification of violence against children, whether accepted as ‘tradition’ or disguised as ‘discipline’.”¹⁴⁸

From the time of its formation, the Committee gave explicit indications that it considered parental physical punishment – and reasonable corrective force defences such as those in the UK, Canada, and New Zealand – to be a violation of the *CRC*. In the sixteen years that elapsed between the entry into force of the *CRC* and the Committee’s release of *General Comment No. 8*, it became increasingly clear in the Committee’s jurisprudence that failing to repeal these defences represented serious failures to comply. With the support of other UN human rights treaty bodies and the work of the Independent Expert, Canada and New Zealand came under increasing pressure from the Committee to prohibit all forms of corporal punishment.

To varying degrees, the responses of both states to this pressure demonstrated the presence of a normative dissonance between the domestic and international spheres. Their common resistance to the recommendations – and then demands – of the international human rights community appears to have been based in their shared domestic legal traditions and social norms regarding parental autonomy and physical punishment. Yet, as was outlined above in Section 2 and as was evident during the second round of periodic reporting, Canada and New Zealand have in recent years diverged dramatically in their response to these demands.

4. Different mechanisms of reconciling the normative dissonance

This section and the Conclusion will argue that the divergence between Canada and New Zealand – with the perceived judicial endorsement of physical punishment in the former, and the

¹⁴⁷ *Ibid.* at para. 98.

¹⁴⁸ *Ibid.* at para. 2. See also Hodgkin and Newell, 2nd ed., *supra note* 122 at 250-253.

legislative repeal of the “reasonable corrective force” defence in the latter – can be explained by the different capacities of the judicial process and the legislative process to facilitate reconciliation between dissonant norms.

The efforts of children’s advocates in Canada and New Zealand to repeal their countries’ reasonable corrective force defences have focussed on different mechanisms for reform. In Canada, most efforts after 1995 were directed at a constitutional challenge to s.43. In New Zealand, however, this was not a possibility. The *New Zealand Bill of Rights*, passed as a statute of the New Zealand Parliament in 1990, functions as an interpretive guide and statement of legislative principles. It explicitly establishes that courts cannot invalidate or decline to apply statutes that are inconsistent with its provisions.¹⁴⁹ As a result, New Zealand’s activists have been forced to pursue grassroots political change.

Comparing the stories of Canada and New Zealand reveals that the process of adversarial constitutional litigation was not well suited to address in a lasting way the conflict between domestic and international norms. It did not require activists to build a social consensus on the appropriate balance between parental autonomy and children’s rights, or on the appropriateness of physical punishment. In *Canadian Foundation*, the Supreme Court was left with the task of finding some resolution between these norms, in a context where there was no socially-established middle ground. Leaving resolution of the normative dissonance to the judiciary forced the Supreme Court to engage in a creative reinterpretation of both Canadian law and international human rights jurisprudence, striking an awkward compromise between children’s rights and parental autonomy that has satisfied advocates of neither.

¹⁴⁹ *New Zealand Bill of Rights Act 1990*, 1990/109 at Sections 3-4 and 6-7; See also Henaghan, *supra* note 84 at 170-171.

In contrast, the political process in New Zealand has forced advocates to truly engage with those who do not agree with them. They have had to continually reframe their arguments in ways more persuasive to those who disagree with the idea of children's rights, and to reach pragmatic policy compromises with their opponents. In other words, grassroots legislative reform has facilitated a process whereby the normative dissonance described in this paper has gradually moved towards reconciliation – something that is not encouraged in the context of adversarial constitutional litigation. This difference between the two mechanisms for reform is perhaps the key factor explaining the divergence between Canada and New Zealand.

a. Canada: an awkward compromise between dissonant norms

Spurred on by the entry into force of the *CRC*, in the early 1990s Canadian child advocates intensified their efforts to repeal the reasonable corrective defence. The law had been under government review for over a decade: between 1976 and 1995, thirteen government or government-sponsored reports had recommended reforms or full abolition of s.43.¹⁵⁰ The activists' efforts, in the form of public awareness campaigns and private member's bills in the House of Commons and the Senate, were further motivated by a series of controversial cases in which parents were acquitted for seemingly severe uses of physical punishment.

By 1995, it became clear that there was no support for repeal among the public or any of the major political parties. The trial of David Peterson, who had been charged with assault for publicly spanking his daughter in a mall parking lot, attracted an extreme amount of media attention and controversy that year. After he was acquitted¹⁵¹, the public's consensus view was

¹⁵⁰ McGillivray, *supra* note 9 at 229; Durrant, "Violation," *supra* note 9 at 102.

¹⁵¹ *R. v. Peterson* (1995), 39 C.R. (4th) 329.

“that the real crime was that the spanking was so public.”¹⁵² At the time, polls of Canadian parents indicated that 70-75% of them had used corporal punishment on their children.¹⁵³

The day after the *Peterson* judgment, the Reform Party asked Justice Minister Allan Rock for his government’s position on s.43. Rock announced that the government would not amend or repeal s.43: “I think any time a parent behaves toward a child they should do so reasonably and that’s exactly what’s reflected in the Code.”¹⁵⁴ Shortly afterward, children’s activists turned to the judicial mechanism for reform, and funding was provided by the Court Challenges Program to initiate a constitutional challenge to s. 43. The CFCYL was brought in to provide organizational leadership¹⁵⁵, and the claim was heard by the Ontario Superior Court of Justice in December 1999.¹⁵⁶

The lower courts’ decisions, both of which upheld s.43, were marked by the tension between parental autonomy and children’s rights. An intervener on behalf of the government was the “Coalition for Family Autonomy” which argued that s.43 was necessary to avoid “unwarranted governmental intrusion deep into the family unit.”¹⁵⁷ Judge McCombs of the Superior Court agreed with the Attorney General that through the defence, Parliament intended to provide parents with a “protected sphere of authority within which to fulfill their responsibilities.”¹⁵⁸ In his opinion, fulfilling Canada’s obligations under the *CRC* requires the

¹⁵² Covell & Howe, *supra* note 10 at 74; *See also* McGillivray, *supra* note 9 at 197.

¹⁵³ Greene, *supra* note 9 at 289.

¹⁵⁴ McGillivray, *supra* note 9 at 228. Ten months earlier, Canada’s *First Periodic Report* had indicated that s.43 was still under review; two months earlier, Committee members had recommended repeal during constructive dialogue.

¹⁵⁵ Durrant, “Violation,” *supra* note 9 at 103; Covell & Howe, *supra* note 10 at 73; Cheryl Milne, staff counsel of the CFCYL and co-counsel for the applicant throughout the *Canadian Foundation* litigation (electronic correspondence with author: 24 April 2009)..

¹⁵⁶ *Canadian Foundation* (Ont. S.C.J.), *supra* note 10.

¹⁵⁷ *Ibid.* at paras. 33-34 (The Family Autonomy Coalition was a group of NGOs that included Focus on the Family, the Canadian Family Action Coalition, the Home School Legal Defence Association of Canada, and REAL Women of Canada: *Ibid.* at fn. 11).

¹⁵⁸ *Ibid.* at para. 47.

recognition of such a “protected sphere.”¹⁵⁹ The Court of Appeal came to a similar conclusion, holding that s.43’s purpose is to allow parents to “carry out their important responsibilities to train and nurture children without the harm that such sanctions would bring to them, to their tasks and to the families concerned.”¹⁶⁰

As the case worked its way to the Supreme Court, two jurisprudential trends built the foundation for the direct collision between parental autonomy and children’s rights that would define its 2004 decision in *Canadian Foundation*. First, parental interests gained increasing constitutional recognition through s.7 of the *Charter*, reflecting the non-interventionist ideas so prominent in the political culture. Second, the Court became more open to the use of international human rights law in the interpretation of the *Charter* and statutes.

In its 1993 decision in *Young v. Young*, the Court had emphasized that parental rights were granted to allow the fulfillment of parents’ responsibilities, and thus the scope of parental “rights” was defined by the best interests of the child.¹⁶¹ Two years later, though, the focus began to shift back towards the protection of parental autonomy, when the Court released its decision in *B.(R.) v. Children's Aid Society of Metropolitan Toronto*.¹⁶² The applicants had claimed an infringement of their s.7 liberty interest, as a result of a law that intruded on their “protected sphere of parental decision-making.” A plurality of four justices, led by Justice LaForest and including Justice McLachlin, concluded that there was indeed such a protected sphere. Referring to the contemporary movement in child protection towards minimal intervention as an example, the justices concluded that parental liberty represents “an individual interest of fundamental

¹⁵⁹ *Ibid.* at paras. 98-99.

¹⁶⁰ *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)* (2002), 207 D.L.R. (4th) 632 at para. 30 (Ont. C.A.).

¹⁶¹ *Young v. Young*, [1993] 4 S.C.R. 3 at 37-38 and 47, cited in

¹⁶² [1995] 1 S.C.R. 315 at 433 [*B. (R.)*] (Two parents of the Jehovah’s Witnesses faith challenged the constitutionality of a child protection statute. The state had taken custody of their baby and consented to blood transfusions which the parents had refused for religious reasons.).

importance to our society.”¹⁶³ This flowed from two principles: first, the presumption that parents are more likely to appreciate the best interests of their children, partially because the state is “ill-equipped” to do so; and second, the general fact that parents tend to have a deep personal investment in “fostering the growth of their own children.”¹⁶⁴

Some have gone so far as to conclude that *B.(R.)* “clearly enshrined” parental rights “in Canadian constitutional law as a quintessential aspect of individual freedom.”¹⁶⁵ This conclusion does not seem to be entirely justified. Justice Sopinka endorsed most of the plurality’s decision, but did not explicitly address the s.7 liberty issue. Three other justices, meanwhile, decided that liberty “may very well” include some form of parental decision-making, but this could not extend to a decision such as the one at issue, which “grossly invades the ‘best interests of the child’”.¹⁶⁶ Chief Justice Lamer was the only one to reject outright the idea of parental liberty.¹⁶⁷

The Court’s 1999 decision in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*¹⁶⁸ did little to clarify matters. A strong majority of the court established a new way in which parental interests are recognized constitutionally: state removal of a child from a parent’s custody engages the parent’s s.7 right to security of the person, since it can have a “serious and profound effect on a person’s psychological integrity.”¹⁶⁹ On the topic of the parental liberty interest, however, only three of the seven sitting justices held that it exists. The others chose not to endorse that separate set of reasons, possibly reluctant to engage the issue in a case where it was not necessary. Even in the majority decision in *G. (J.)*, however, there is strong

¹⁶³ *B. (R.)*, *ibid.* at 371-372

¹⁶⁴ *Ibid.* at 372; Katie Sykes, “Bambi Meets Godzilla: Children’s and Parents’ Rights in Canadian Foundation for Children, Youth and the Law v. Canada,” (2006) 51 *McGill Law Journal* 131 at 135.

¹⁶⁵ Sykes, *ibid.* at 136.

¹⁶⁶ *B.(R.)*, *supra* note 162 at 433.

¹⁶⁷ *Ibid.* at 330.

¹⁶⁸ [1999] 3 S.C.R. 46 [*G. (J.)*].

¹⁶⁹ *Ibid.* at paras. 60-61.

support for the notion that “parents have a vital interest in their relationship with their children,” as well as support for associated beliefs in the importance of family autonomy.¹⁷⁰

A majority of the Court took a similar approach the next year in *Winnipeg Child and Family Services v. K.L.W.*¹⁷¹ Even though the applicant had claimed that a child protection statute violated the parental liberty interest, the Court did not pursue this and instead based its decision on the infringement of security of the person. Once again, however, the Court emphasized the importance of the parental role in society.¹⁷²

From these three cases, it can be said that between 1995 and 2004 the Court was reluctant to fully recognize parental liberty as a constitutional right. It is also true, though, that the justices did identify the parental autonomy interest as an “important and fundamental” concept in Canadian society, and came to recognize non-intervention in the autonomous family as a social value.¹⁷³

The second jurisprudential development at the Supreme Court during this period was the increasing influence of international law in constitutional and statutory interpretation. In previous decades, Canadian courts had been extremely reluctant to import international norms into their interpretation of statute law, even when the legislation at issue was expressly intended to implement a treaty.¹⁷⁴ After courts started using international law in interpreting the *Charter*¹⁷⁵,

¹⁷⁰ *Bala*, *supra* note 87 at 5; *G. (J.)*, *ibid.* at paras. 61 and 67 (“The parental interest in raising and caring for a child is, as La Forest J. held in *B. (R.)* ... “an individual interest of fundamental importance in our society.” ... direct state interference with the parent-child relationship ... is a gross intrusion into a private and intimate sphere”)

¹⁷¹ [2000] 2 S.C.R. 519 [*K.L.W.*]

¹⁷² *Ibid.* at para. 72 (“The mutual bond of love and support between parents and their children is a crucial one and deserves great respect”).

¹⁷³ *B. (R.)*, *supra* note 162 at 330.

¹⁷⁴ *R. v. Sikyea* (1964), 49 W.W.R. 306 (S.C.C.); *Schavernoeh v. Foreign Claims Commission*, [1982] 1 S.C.R. 1092. Cited in Kindred and Saunders, *supra* note 5 at 221-222.

¹⁷⁵ *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at para. 59 (“The content of Canada’s international human rights obligations is, in my view, an important indicia of the meaning of ‘the full benefit of the *Charter*’s protection.”); *Slaight Communications inc. v. Davidson*, [1989] 1 S.C.R. 1038.

this approach began to extend to statutory interpretation in the 1990s.¹⁷⁶ The full extent of the *CRC*'s potential influence in Canadian domestic law was established in 1999 with the Supreme Court's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*.¹⁷⁷

In a decision released five months before *Canadian Foundation* would be heard at its court of first instance, the Court held that the "values reflected in" the *CRC*, and international human rights law in general, "may help inform the contextual approach to statutory interpretation" and the delineation of *Charter* rights. As much as is reasonable, legislation is to be interpreted so as to be in accordance with Canada's obligations at international law.¹⁷⁸

Interpreting the "compassionate and humanitarian" discretionary power of the *Immigration Act*,¹⁷⁹ a statute enacted before the *CRC* was ratified by Canada (and therefore not specifically intended to implement the *CRC*), the court nevertheless used the norms in the *CRC* to give content to the values that currently underlie the discretionary power. Based partially on the primary role of the best interests of the child in the *CRC*, Justice L'Heureux-Dubé concluded that any compassionate or humanitarian assessment must "give serious weight and consideration to the interests of the children."¹⁸⁰ The release of this decision played an important role in the *Canadian Foundation* applicants' belief that the text of the *CRC* and the Committee's jurisprudence could significantly impact Canadian courts' assessments of s.43.¹⁸¹

Together, these two trends brought the dissonance between domestic and international norms directly before the Court. The majority's unsuccessful attempt to strike a compromise

¹⁷⁶ Kindred and Saunders, *supra* note 6 at 222-225. See, e.g.: *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* (1998), 160 D.L.R. (4th) 193 (S.C.C.).

¹⁷⁷ [1999] 2 S.C.R. 817 [*Baker*].

¹⁷⁸ *Ibid.* at para. 70.

¹⁷⁹ R.S.C. 1985, c. I-2.

¹⁸⁰ *Baker*, *supra* note 177 at para. 65 and 69-71, see also Senate Committee, "Silenced Citizens," *supra* note 6 at 42-43.

¹⁸¹ Milne, *supra* note 155.

between these two disparate sets of norms – between parental autonomy and children’s rights – illustrates the weaknesses inherent in constitutional litigation when it is faced with such dissonance.

The Court’s decision does appear to have been trying to recognize and give some effect to children’s rights norms; the majority re-interpreted s.43 to the extent that much fewer uses of force seem (at least on paper) to fit within its limits. The majority’s efforts to justify its interpretation of s.43 using the international jurisprudence support this notion. But Chief Justice McLachlin’s conclusion that international human rights law only prohibits “cruel, inhuman or degrading treatment or punishment”, which can be distinguished from mild, corrective, parental physical punishment¹⁸², was an inaccurate portrayal of the state of international children’s rights law at the time of the decision.

As Justice Arbour points out in her forceful dissent, the majority’s reasons failed to consider the repeated statements of the Committee on the Rights of the Child that the *CRC* requires the prohibition of the physical punishment children. Justice Arbour makes reference to the Committee’s 1995 Concluding Observations for the UK, and the 1995 and 2003 Concluding Observations for Canada.¹⁸³ It is true that the latter set of Concluding Observations were released in October 2003, after the case had been heard but before the release of the decision. But the Committee’s Observations were “highly publicized,”¹⁸⁴ and it seems unlikely that one justice could have included them in her reasons without the knowledge of her colleagues. Even if Chief Justice McLachlin excluded these latter Observations from her decision due to evidentiary reasons, Canada’s obligation to repeal the defence had been reasonably clear for years: in

¹⁸² *Canadian Foundation* (S.C.C.), *supra* note 2 at paras. 31-33.

¹⁸³ *Ibid.* at paras. 186-188.

¹⁸⁴ Milne, *supra* note 155.

addition to the two sets of Concluding Observations from 1995 mentioned by Justice Arbour, the majority could also have referred to other sources discussed above in Section 3(b)(ii). These included the Committee’s 1997 Concluding Observations for New Zealand, as well as comments by the UN Special Rapporteur on Torture, whose 2002 report to the General Assembly directly contradicted the majority’s interpretation of international human rights law: the report states that “any form of corporal punishment of children [including parental punishment of children] is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.”¹⁸⁵

It seems likely that the majority decision’s (at best) selective reading of international human rights law was driven by the need to strike a balance between children’s rights and parental autonomy. Chief Justice McLachlin’s concern for parental autonomy is perhaps most visible with respect to the equality claim, where she holds that s. 43 is tailored to the specific needs and circumstances of children:

[W]ithout s.43, Canada’s broad assault law would criminalize force falling far short of what we think of as corporal punishment, like placing an unwilling child in a chair for a five-minute “time-out”. The decision not to criminalize such conduct is not grounded in devaluation of the child, but in a concern that to do so risks ruining lives and breaking up families.¹⁸⁶

Since “a stable and secure family” is essential to children’s healthy development, the intrusion of the “blunt instrument” of the criminal law into the family in cases of “minimal force of transient or trivial impact ... would harm children more than help them.”¹⁸⁷ Chief Justice McLachlin rejects the suggestion that prosecutorial discretion could satisfactorily address this concern, reasoning that “our goal should be the rule of law, not the rule of individual discretion.”¹⁸⁸

¹⁸⁵ Bitensky, *supra* note 118 at 61.

¹⁸⁶ *Canadian Foundation (S.C.C.)*, *supra* note 2 at para. 62.

¹⁸⁷ *Ibid.* at paras. 58-60.

¹⁸⁸ *Ibid.* at para. 63.

Seen in this light, the majority's extensive re-interpretation of s. 43 – which allowed the court to uphold the defence, while also restricting its application – appears to have been an attempt to appease advocates of both children's rights and parental autonomy. But Justice Arbour makes a persuasive argument that such an approach to the issue of vagueness was not within the appropriate boundaries of the judicial role. In Justice Arbour's opinion, to so aggressively and unilaterally limit the scope of a criminal defence, in the face of evidence that it had “demonstrably not succeeded” in avoiding vagueness in the past, was within “neither the historic nor the proper role of courts.”¹⁸⁹ The “constitutional imperative” for courts is to *narrow* the scope of criminal liability through the reading down of *offences*. To do the same to a *defence* is to *widen* the potential scope of liability, by reducing the likelihood of context-specific application of the defence.¹⁹⁰

In *Canadian Foundation*, the Court was faced with two dissonant sources of norms in Canadian law, and given the difficult task of satisfying two politically-opposed groups.¹⁹¹ The majority's decision attempts to import ideas from the international children's rights community, excluding many kinds of force from the definition of “reasonable”. On the other hand, though, the decision is mindful of the fact that parental autonomy is both a widespread societal norm and a constitutionally-recognized interest. The majority seems to have honestly believed that holding s.43 unconstitutional would have resulted in undesirable intrusions into a fundamentally private

¹⁸⁹ *Ibid.* at para. 135.

¹⁹⁰ *Ibid.* at para. 140. Chief Justice McLachlin's response to this appears to be that the Court is merely fulfilling its role as an appellate court to clarify statutory interpretation: *ibid.* at paras. 43-44. The extensive nature of her decision's re-interpretation, however, arguably crosses the line in an effort to render s.43 constitutional.

¹⁹¹ Sykes, *supra* note 164 at 133-134; Sanjeev Anand, “Reasonable Chastisement: A Critique of the Supreme Court's Decision in the ‘Spanking’ Case” (2004) 41 *Alberta Law Review* 871 at 871 (“In its ruling, the Court attempted to strike a balance between those who feel that the State has no business dictating child-rearing methods to parents through its use of the criminal law power and those who feel that s.43 sanctions violent child abuse”).

sphere, and triggered a political backlash against “activist judges.”¹⁹² Justice Arbour’s criticisms outline the majority’s tortured compromise: to aggressively narrow but uphold the defence, and to justify this through the distortion of international human rights law. The Court recognized parental autonomy, but simultaneously constrained it. Instead of reconciling in a satisfying way the values of children’s rights and parental autonomy, all that the Court could do when faced with an unresolved normative dissonance was awkwardly compromise both ideas.

b. New Zealand: gradual progress towards political reconciliation

New Zealand’s response to the dissonance between its domestic norms and its international obligations was quite different, resulting in a legislative repeal in 2007 that is still the subject of heated public debate. It will be argued below that this divergence can largely be attributed to unique features of the political process. The process of building of a social consensus forced children’s advocates in New Zealand (1) to build strong organizational networks, which could be mobilized once public opinion, political support, and the position of the international children’s rights community on the issue had crystallized; (2) to reframe their arguments away from children’s rights, and towards the perceived interests of parents and society; and (3) to truly address the concerns of their opponents through pragmatic policy compromises. These three aspects of the political process have allowed New Zealand to make gradual progress towards a true reconciliation of its normative dissonance.

In addition to the critical absence of a constitutionalized bill of rights, three other historical or institutional factors will be identified as important contributing causes to the divergence between Canada and New Zealand: the relative severity of New Zealand’s neoliberal

¹⁹² The majority rejected the possibility of relying on prosecutorial discretion: *Canadian Foundation* (S.C.C.), *supra* note 2 at para. 63.

reforms, and the accompanying political backlash beginning in 1999; the switch to a proportional representation system for Parliament in 1996, which required governments to work with smaller parties; and the establishment of a publicly-funded, independent Office of the Children's Commissioner, which consistently advocated for reform.

In the first decades of the movement for repeal, there was little support for reform among political leaders or the public; activists' efforts therefore focused on laying the groundwork for future change, through research and institution building. Some of the earliest entrepreneurs of the children's movement in New Zealand, and the issue of physical punishment in particular, were Jane and James Ritchie. They started their research into the prevalence of corporal punishment in the 1960s, and in the late 1970s began their efforts to repeal s.59 by lobbying politicians, writing books and articles, and presenting at conferences.¹⁹³ The tension between children's rights and societal norms of family autonomy was obvious from the start. In 1979, the Ritchies wrote to the Minister of Justice, asking him to consider the repeal of s.59. The Minister replied that the "reasonableness" requirement balances two important goals: it "protects children from excessive punishment without, in most cases, involving too close an intrusion by the state into the home."¹⁹⁴

Perhaps the most notable success of the early campaigners was the 1989 establishment of the Office of the Children's Commissioner ("the Commissioner"), which had been politically motivated by the government's need to make its aggressive reforms to child protection somewhat accountable, amid an ongoing public uproar about the death of a child known to social services.

¹⁹³ Wood *et al.*, *supra* note 41 at 33-34 and 108-109; Ritchie & Ritchie, *supra* note 72.

¹⁹⁴ Ritchie & Ritchie, *ibid.* at 127-128.

The Commissioner was statutorily mandated to protect “children’s welfare and best interests.”¹⁹⁵ Although there was no mention of children’s rights in his mandate, at least initially, the Commissioner would become an important institutional advocate for the *CRC*. The first Commissioner made his first public remarks calling for repeal of s.59 in 1992, even before New Zealand ratified the treaty. His opposition was grounded in and inspired by the norms of children’s rights embodied in the *CRC*, but he was also motivated by high levels of violence against children in New Zealand.¹⁹⁶

The conservative National government, however, remained influenced by neoliberal ideas of family autonomy. In 1994, the Minister of Youth Affairs indicated that the government believed s.59 to be in compliance with the *CRC*, reasoning from the idea that reasonable corrective force was not Art. 19 “abuse,” and that Art. 19 had to be read in context with the Art. 5 responsibility of parents to provide “appropriate direction and guidance.” After a tense public debate about whether physical punishment ought to be included as “violence” in a proposed statute addressing domestic abuse, the legislation was passed without any mention of parental discipline.¹⁹⁷

Beginning in 1995, however, the political environment began to move in a direction more favourable to advocates for repeal. New Zealand’s neoliberal turn slowed, as the negative effects of reforms to services directly affecting children became clear. The government launched an

¹⁹⁵ Wood *et al.*, *supra* note 41 at 63; Henaghan, *supra* note 84 at 170; Ian Hassall, “New Zealand: A Commissioner for Children,” in Malfrid Grude Flekkoy, *Models for Monitoring the Protection of Children’s Rights: Meeting Report (Florence, 27 November 1990 – 1 December 1990)* (Florence: UNICEF International Child Development Centre, 1990) 17 at 18, online: UN Bibliographic Information System, < <http://unbisnet.un.org>>.

¹⁹⁶ Wood *et al.*, *ibid.* at 112.

¹⁹⁷ Rex Adhar and James Allan, “Taking Smacking Seriously: The Case for Retaining the Legality of Parental Smacking in New Zealand” (2001) *New Zealand Law Review* 1 at 14 (The Commissioner led the campaign to include physical punishment).

initiative to provide parents with more support¹⁹⁸, an aspect of which was public education on violence against children, including the dangers of and alternatives to corporal punishment. The campaign began to educate parents about alternative child-rearing methods in 1998, stating that “it can lead to emotional and physical damage.” Children’s rights were mentioned, but they were not the focus.¹⁹⁹

Despite this slight shift, norms encouraging parental autonomy and the physical punishment of children were still dominant. The government’s educational efforts prompted an angry public response from some who believed that they represented a “cunning government ploy” to interfere with parental autonomy and shift public opinion towards repeal. Reverend Graham Capill, the leader of the Christian Heritage Party, said in 1998 that repealing s.59 would “dictate to parents how they should train their children, and the Government has no right to do that.”²⁰⁰ Although the *CRC* had some impact on the judiciary – one judge went so far as to comment that the *CRC* reflected “the generally accepted standards of society in this country.”²⁰¹ – judges’ interpretations of the treaty’s norms were often filtered through the domestic tradition of parental autonomy. Family law in New Zealand continued to be based on the idea that parents have a “right to control the upbringing of their children,” one with accompanying responsibilities for the care of their children. Although the *CRC* has been used by judges to evaluate parents’ fulfillment of these responsibilities, “the child’s autonomy was considered but not given weight,” the state’s responsibilities with respect to children were not explicitly considered, and “parental responsibility was prioritized.”²⁰²

¹⁹⁸ Blaiklock, *supra* note 84 at 11, 14, and 52.

¹⁹⁹ Adhar and Allan, *supra* note 197 at 10.

²⁰⁰ *Ibid.* at 11.

²⁰¹ Henaghan, *supra* note 84 at 173.

²⁰² *Ibid.* at 171 and 173; Wood *et al.*, *supra* note 41 at 58.

The Committee on the Rights of the Child's first concluding observations for New Zealand were released in January 1997. Even though the government at the time chose not to follow the Committee's recommendation to review legislative reform of s. 59²⁰³, the concluding observations did serve as an impetus to domestic advocates. Inspired by the work of global children's rights activists, EPOCH New Zealand was formed in 1997 with the intention to pursue repeal of s.59. The next year, they began to build a coalition of non-governmental organizations supporting repeal. The network allowed EPOCH to demonstrate wide support for its cause, and build connections between advocates. In this latter function, their activities were made easier by the small size of New Zealand, in area and population.²⁰⁴ Over the next several years, advocacy groups such as EPOCH, UNICEF New Zealand, and Save the Children New Zealand did much to promote repeal to the public, through education campaigns and conferences. In this activity, they were assisted by the media, which was turning its attention with increasing frequency to prominent cases of child abuse and homicide.²⁰⁵ By 2001, even supporters of s.59 acknowledged that "there has been a groundswell of support for abolition from academic and various child-oriented organisations," although the public was still not generally in favour of repeal.²⁰⁶

In the late 1990s, New Zealand's political culture changed in a way that would be crucial to the children's rights movement, taking a decisive shift away from the neoliberal ideology that had characterized governance in the past 15 years. The National government was replaced in the November 1999 election by a more left-wing Labour-Alliance coalition, which promised to

²⁰³ Wood *et al.*, *supra* note 41 at 171 (Reverend Capill threatened that "any politician who wants" to "take that right away" is "buying a big fight and it may cost them their office at the next election.")

²⁰⁴ *Ibid.* at 37-38 and 115.

²⁰⁵ *Ibid.* at 38-42, 114-118.

²⁰⁶ Adhar and Allan, *supra* note 197 at 8.

move away from the economic policies of the recent past, and give more support to economic and social programs, particularly for families.²⁰⁷

Since advocates for repeal had already built strong organizational networks, they were able to capitalize on what was for them a much friendlier political environment. This government was far more concerned about New Zealand's compliance with the Committee's recommendations, and the issues raised by advocates. Shortly after the election, the new Commissioner referred to the example of European countries that had outlawed corporal punishment, and called for repeal. Within its first months, the government confidentially requested from its civil servants a review of other country's policies regarding physical punishment.²⁰⁸ Beginning in August 2001, opposition Members of Parliament began submitting Member's Bills that proposed either repeal or amendments to delineate more specifically a zone of acceptable hitting.²⁰⁹

The Minister of Justice published a study in November of that year which indicated little support for repeal among the public. It concluded that fully 80% of New Zealand's adult population agreed that the law should allow parents to "smack the child with an open hand if they are naughty." Three-quarters thought that a "smack" that left no mark was "acceptable," but most did not support any more severe uses of force.²¹⁰ The Cabinet commissioned another study, this one of the options for repeal or amendment. When this study concluded that "public education to lead attitudinal and behavioural change is required regardless of any decision

²⁰⁷ Blaiklock, *supra* note 84 at 14-15.

²⁰⁸ Wood *et al.*, *supra* note 41 at 171-172; Adhar and Allan, *supra* note 197 at 12.

²⁰⁹ Wood *et al.*, *ibid.* note 41 at 39-40.

²¹⁰ Sue Carswell, *Survey on Public Attitudes Towards the Physical Discipline of Children* (Wellington: Ministry of Justice, 2001) at xii-xv, online: Ministry of Justice, <www.justice.govt.nz/pubs/reports/2001/children/index.html>.

concerning repeal of section 59,” the government announced that it would defer its decision on s.59 until 2005, and engage in public education and discussion in the meantime.²¹¹

In the meantime, the debate over s.59 intensified. October 2003 was a critical moment for the issue in New Zealand, as a confluence of events focused the attention of politicians, the media, and the public on the status of children in New Zealand. A well-publicized UNICEF report caused great alarm and debate when it concluded that New Zealand had an extremely high rate of child deaths from parental abuse, relative to comparable industrialized nations. At the same time, this was given concrete meaning by the recent deaths of several children at the hands of their parents. That month, these concerns were reinforced by the Committee’s release of its Second Concluding Observations, which once again recommended repeal of s.59. The public began to perceive a connection between child abuse and the reasonable corrective force defence, generating “intense media interest and continuing public outcries.”²¹²

In response, the government introduced legislation to increase the mandate of the Commissioner, who for the first time became specifically charged with overseeing and reporting on New Zealand’s implementation of the *CRC*. Sue Bradford, an opposition MP with the Green Party, introduced soon afterwards a Member’s Bill proposing repeal.²¹³ In the next 18 months, as advocacy groups and the government increased efforts to change public opinion regarding physical punishment, debate over the issue continued.

This debate was greatly intensified by a second confluence of events, between March and June 2005. In March, the New Zealand Human Rights Commission issued a report that contained an action plan for repeal. In the next two months, parents were acquitted in two assault cases

²¹¹ Wood *et al.*, *supra* note 41 at 40 and 173 (In May 2003 the Government directed NZ \$10 000 000 towards parental education on discipline methods: *Ibid.* at 41-42).

²¹² *Ibid.* at 24-25, 42, and 152.

²¹³ *Ibid.* at 63 and 176.

after arguing a s.59 defence, attracting “significant publicity” and “much public and media debate.”²¹⁴ Finally, on 9 June 2005, Bradford’s bill was randomly drawn from the ballot of member’s bills. The bill was simple: its purpose was “to abolish the use of reasonable force by parents as a justification for disciplining children,” and its only substantive clause provided for the absolute repeal of s.59.²¹⁵

During the consideration of Bradford’s bill, the political process required supporters to engage in two tactics that were crucial to their success: first, they were forced to actively reframe their arguments within traditional ideas about child protection; second, they had to participate in a dialogue with their opponents that produced pragmatic policy compromises.

After the bill’s first reading, the government announced that it would refer the bill to the Justice and Electoral Select Committee (JESC) for further review, since the JESC could provide “a forum for argument, a forum for listening to submissions from the community, a forum for examination” that would enable “a full range of options” to be “identified and carefully considered.” In September 2005, a national election returned the Labour party to government, but in a greatly reduced minority position. This increased its need to co-operate with opposition parties to pass legislation.²¹⁶

In May 2006, with the JESC’s public hearings due to start the next month, the Committee on the Rights of the Child released its *General Comment No. 8*, crystallizing the obligation at international law to prohibit the physical punishment of children by their parents. The document was distributed to all national-level politicians by UNICEF New Zealand.²¹⁷ Between June and

²¹⁴ *Ibid.* at 44.

²¹⁵ *Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill (Members Bill)*, cited in Wood *et al.*, *ibid.* at 246, see also 44 and 176.

²¹⁶ Wood *et al.*, *ibid.* at 176-177, see also 44-45.

²¹⁷ *Ibid.* at 45-46 and 178.

August, the JESC heard oral submissions from advocacy groups, the majority of which supported repeal, and from individuals, the majority of whom opposed it.²¹⁸ A Swedish advocate for the rights of parents was brought to New Zealand by a coalition of organizations that were opposed to the bill; she presented to the JESC a negative viewpoint on the effects of Sweden's 1979 prohibition of physical punishment. In addition to claims about resulting misbehaviour by unruly children, she asserted that prohibition had unnecessarily increased the state's interference in the family, by removing children from their homes.²¹⁹

Her appeal to deeply-held values of parental autonomy raised great concern among the public. A large part of New Zealand's population felt an "antipathy towards the notion of children having rights," which was regarded as a threat to the authoritative role of parents in the family.²²⁰ Some resented the idea that a foreign body could dictate how they raised their children. There was a widespread fear that repeal of s.59 would result in frequent, "needless" prosecutions of "good parents."²²¹ The media perpetuated this notion, portraying the debate as an adversarial, zero-sum contest between children's rights and parental authority.²²² A 2006 opinion poll by the Office of the Children's Commissioner found that only 37% of adults would support repeal if the bill was portrayed as limiting a pre-existing parental power. But 71% expressed agreement with the statement that "section 59 of the Crimes Act should be ended providing guidelines were developed to prevent prosecutions for mild slaps and smacking."²²³

Even though many of the activists were personally inspired by the international children rights movement, they realized that in their public arguments "it was important for advocates to

²¹⁸ *Ibid.* at 46 and 178 (The Independent Expert's report, released in August of that year, received limited attention in New Zealand: *Ibid.* at 67.)

²¹⁹ *Ibid.* at 46, 90 and 104-105.

²²⁰ *Ibid.* at 55-56.

²²¹ *Ibid.* at 29 and 57.

²²² *Ibid.* at 140-141.

²²³ *Ibid.* at 137.

emphasize the link between rights and positive outcomes, rather than relying on the entitlement argument alone”²²⁴ Advocates therefore focused on reframing the debate away from children’s rights, with their perceived threat to parental autonomy, and towards two arguments that based repeal in the perceived interests of parents and society: first, that prohibiting corrective force would prevent child abuse, and second, that corporal punishment was an ineffective disciplinary method that caused physical and psychological harm to children (and their relationships with their parents). The Children’s Commissioner published highly influential reports on alternative methods, and the current state of social science research into the dangers of physical punishment.²²⁵

The hearing process, and the public reaction to it, made it clear to JESC members that amendments to the bill were required to quell public fears of frequent arrests for “mild” force. Before sending the bill back to the House in November 2006, with the recommendation that it be passed, the JESC added the first qualification to the bill’s repeal, justifying the use of reasonable force for a specific set of non-corrective purposes. Advocacy groups secured and publicized an affirmation from the Commissioner of Police that police guidelines would allow officers to exercise discretion in enforcing any prohibition of physical punishment.²²⁶ These pragmatic responses to opponent’s concerns would be crucial to the eventual success of the bill.

But when the JESC’s version of the bill came to be considered by Parliament in February 2007, it was apparent that its revisions had not completely addressed public anxiety over prosecution for minor uses of forces. As polls had revealed, this would be necessary for gaining

²²⁴ *Ibid.* at 31 and 57.

²²⁵ *Ibid.* at 26 (One report was released in 2004, and another in March 2006. The 2004 report concluded that corporal punishment was a counter-productive disciplinary method: it “increased the likelihood of disruptive or bad behaviour.”).

²²⁶ *Ibid.* at 47.

public support. The leader of the opposition National Party, John Key, proposed an amendment that would maintain a defence for “transitory and trifling” corrective force. This was never formally introduced in Parliament, and through further debate in March and April it became clear that although the bill was still extremely controversial with the public, there was enough support in Parliament to pass it.²²⁷

The National Party continued to oppose the bill, though. Since the Party held at the time 48 out of the 122 seats in the House, its support would make the difference between a narrowly-supported statute, and a far more legitimate law passed by near-consensus. The Party’s opposition was also a rallying point for citizens who shared its concern about the criminalization of the mildest uses of force. As the bill was being debated, opinion polls indicated that a large majority of the public was not in favour.²²⁸ On 2 May 2007, Prime Minister Helen Clark, John Key, and Susan Bradford made the surprise announcement that they had reached a compromise. The National Party would support the bill, if it included a clause affirming the existence of police discretion in “inconsequential” cases.²²⁹ After such a clause was included, the bill was passed with near unanimous support. At its final reading, 113 MPs voted in favour, with only 8 opposed. The bill took effect on 21 June 2007.²³⁰

5. Conclusion

Canada and New Zealand are similar in some very important ways. They share a British colonial past, and because of this share a strong emphasis on parental autonomy. As a result of a rising emphasis on non-intervention in the 1980s, the children’s rights norms of the *CRC* at the

²²⁷ *Ibid.* at 179-182.

²²⁸ *Ibid.* at 147.

²²⁹ *Crimes Amendment Act 2007*, *supra* note 38, s.5(4).

²³⁰ Wood *et al.*, *supra* note 41 at 182-188.

time of ratification for both states were quite dissonant with their domestic social and political culture. Canada and New Zealand also came under the same pressure from the Committee and other international human rights organizations to repeal their reasonable corrective force defences and prohibit corporal punishment.

But only New Zealand actually followed these recommendations, enacting a legislative reform in 2007 that remains highly controversial. In Canada, a constitutional challenge resulted in a significantly narrowed but nonetheless upheld defence for reasonable corrective force; the Supreme Court's decision has functioned as a judicial endorsement of Canada's legislative inaction, largely taking reform off the political agenda. This paper has linked this divergence to differences in their legal structures, political cultures, and state institutions. Three reasons have been identified for why political contestation represented a more effective method to pursue implementation of this specific human rights obligation, which was characterized by its high level of dissonance with prevalent domestic norms.

First, grassroots political change requires activists to obtain popular support for their cause, by building a strong organizational framework and advocating for change. The fluid nature of political contestation – in which issues are not “settled” at a fixed date – then allows activists to wait for favourable events to intervene. In the case of New Zealand, these included UNICEF reports, Committee recommendations and jurisprudence, the public backlash against neoliberal reforms, and periodic media controversies triggered by instances of child abuse.

This can be contrasted with the inherent characteristics of constitutional litigation, and the *Canadian Foundation* claim in particular. The claim was initiated before there was any significant popular support for repeal, let alone progress towards reconciliation between parental autonomy and children's rights. The defined beginning and end points of litigation gave

Canadian advocates far less flexibility in adapting their efforts to respond to events. The CFCYL's claim had to be initiated at some point; it was their bad luck that the status of physical punishment at international children's rights law was crystallized only two years after the Supreme Court's judgement.

Second, political contestation required the adaptation of advocates' arguments. In seeking to build popular support, activists were forced to make their sometimes abstract rights claims relevant to their target audience, and to reframe their issue to be more compatible with domestic norms. In doing so, advocates' arguments moved away from a "rights for rights' sake" approach, and came to focus on the true interests and concerns that underlie these rights. In other words, the advocates' claims became more persuasive because they were forced to reconcile the dissonance between domestic and international norms. In this way, children's rights became a source of ideas and norms that New Zealanders could make their own.

The Supreme Court's "tortured compromise" in *Canadian Foundation* shows that an adversarial judicial process can be far less open to such a process of gradual give and take. The gradual reconciliation that occurred in New Zealand benefitted from the capacity of the political process to progress through trial and error, and broad-based societal participation. Canadian courts were understandably reluctant to attempt to establish through their reasons the kind of major shifts in social norms that have continued over decades of passionate, open debate in New Zealand. The awkward compromise of parental autonomy and children's rights in *Canadian Foundation* suggests that it was outside of its institutional capacities for the Supreme Court to reconcile such dissonant norms through a single *Charter* decision.

A third point about New Zealand's political process is that, while it may have seemed adversarial at times, it also has provided continual opportunities for advocates to listen to

feedback from the political leaders and the public. They responded with amendments to the bill that qualified the repeal of s.59, making it more acceptable to a wider base of citizens. Over time, the advocates have been able to resolve their differences with some of their opponents – to find policy solutions that address the perceived conflict between parental autonomy and children’s rights. Since the political process has no defined end point, debate has continued even after the reform to s.59, and supporters continue to make pragmatic policy compromises and adjustments in an attempt to address the concerns of opponents.

This has not been the outcome of the *Canadian Foundation* decision. The compromise about prosecutorial discretion that was essential to gaining public support in New Zealand was rejected by Canada’s Supreme Court, probably reflecting the more legalistic tendency of the judiciary.²³¹ Although the majority did attempt to strike a middle ground through its narrowing of the defence, the court’s decision has been perceived as the “final word” – a judicial endorsement of physical punishment that has put a halt to public debate that could bring reconciliation on the issue.

It is hoped that this comparison can be helpful to Canadian activists. The New Zealand example suggests that efforts by Canadian advocates to build public support by reframing the issue towards the ineffectiveness and dangers of corporal punishment are an excellent first step.²³² The next step is to make the issue even more relevant to the public. Especially in Canada, which typically has strong governing parties that are generally not open to private member’s bills, it is key to gain enough grassroots political support to command the attention of the major

²³¹ *Canadian Foundation* (S.C.C.), *supra* note 6 at para. 63 (“our goal should be the rule of law, not the rule of individual discretion”).

²³² J.E. Durrant, R. Ensom and the Coalition on Physical Punishment of Children and Youth, *Joint Statement on Physical Punishment of Children and Youth* (Ottawa: Coalition on Physical Punishment of Children and Youth, 2004), online: Children’s Hospital of Eastern Ontario, <http://www.cheo.on.ca/english/pdf/joint_statement_e.pdf> [*Joint Statement*].

parties. Education is critical. The Canadian public needs to hear about the dangers of corporal punishment and the existence of alternatives, as well as the continuing difficulties with s.43. Only when the concepts of international children's rights are translated into more directly relevant concerns will Canadians begin the gradual process of reconciling the dissonance between domestic and international norms.