

The Future of Corporal Punishment in the Family Home and Other Similar Settings in Zimbabwe

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[...] Recognising that the child occupies a unique and privileged position in the African society and that for the full harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding;

Recognising that the child, due to the needs of his physical and mental development, requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security [...].

Abstract

The central argument is that corporal punishment is irreconcilable with children's rights as enumerated in international, regional and national normative standards. The research takes a cue from tipping-point contemporary legal developments that have led to the abolition of the practice in criminal justice and education systems. Moreover, corporal punishment is a hard case since it implicates complex, convoluted, and polarised non-judicial considerations. Germane to the study is the instructive and progressive architecture of the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and the burgeoning constitutional provisions on children's rights under the 2013 Zimbabwean Constitution. In the main, the authors deploy a qualitative doctrinal research methodology to conclude that the prevalence of corporal punishment in the home, care facilities and other settings is incompatible with the tenor of the Constitution and international law.

1 Introduction

The advent of children's rights is revolutionary since it has ignited a broader paradigmatic social, economic, political and cultural shift. The jurisprudence in *S v. Ndlovu*, *S v. Banda*, *S v. Chakamoga*,² *Bhila v. The Master of the High Court and Others*,³ *Hale v. Hale*⁴ and several

¹ The authors are human rights professionals and researchers active in Zimbabwe.

² See *S v. Banda*, ZAFSHC 114, (2015); *S v. Chakamoga*, HH 47-16, (2016) The appellate court per Charehwa J, relying on S 81(3) of the 2013 Zimbabwean Constitution emphatically reasoned that: "More specifically, the specific obligation placed on the courts, and the High Court in particular, by s 81(3) made me consider that it may be high time that the courts has a serious relook at the sentencing regime for sexual offences so that the message is clearly sent that the courts, in the discharge of their protective mandate for young persons, find that it is totally unacceptable to sexually exploit young persons. This is especially pertinent for offences committed against those young victims aged between 12 and 16 who were directly or impliedly assumed to have "consented" to the sexual violations [...]".

³ See *Bhila v. The Master of the High Court and Others*, ZWHHC 549 (2015) . The case is the hallmark for the constitutionalisation of administration of estates and succession laws in Zimbabwe mainly via the equality provision (S 56).

⁴ See *Hale v. Hale*, HH 271-14 . The case fleshes the right to be heard and what breadth of the best interests of the child principle. Per Tsanga J, "In any event it would also seem to me that this issue regarding the children's schooling cannot be dealt with satisfactorily without hearing the views of the children themselves, especially the two older children who are already at the boarding school in question. I say this because a particularly noteworthy aspect of the new Constitution is that it grants both parents' and children rights... Yet all these rights that undoubtedly impact on parents now have to be balanced against those which our Constitution also gives to children. This is even more so where parents as in this case, are not in agreement as to what is the best interest for the child. Constitutionally, as of right, children are no more at the margins and periphery of decisions affecting them. They have effectively have a right to be part of those decisions" (pp.8-9) . Emphasis added.

investigations conducted by human rights bodies support this view.⁵ The premier human rights institution in Zimbabwe has acknowledged the existence and utility of children's rights in an open and democratic polity.⁶ Secondly, it notes that the Constitution "calls for a change of perspective as it describes children as holders of a range of human rights".⁷ Third, it ties the landmark constitutional developments to the broader global human rights movement. Fourth, it illuminates the view that children's rights impose obligations, both direct and indirect, on parents, the family and the State.⁷ Consequently, cognizant of these germane legal developments as pinnacled by the United Nations Convention on the Rights of the Child and the African Charter on the Welfare and Rights of the Child in Africa, we evaluate whether corporal punishment in the home, care institutions and other similar settings is compatible with the human-rights based approach in the burgeoning laws. The answer is arguably nonaffirmative. Nevertheless, we note the discernible contradictions and paradoxes involved in a subject such as the one under review in this study. In the foregoing, the definition of corporal or physical punishment is essential. The United Nations Committee on the Rights of the Child, which oversees the Convention on the Rights of the Child, has defined it as "any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light." According to the Committee, this mostly involves hitting smacking, slapping or spanking children with a hand or using tools such as whips, sticks, belts, shoes or wooden spoons. It can, however, also involve, kicking, shaking, scratching, pinching, biting, pulling hair, boxing ears, throwing children or forcing them to stay in uncomfortable positions as well as burning, scalding or forced ingestion. While the study does not rely on primary empirical data, it nevertheless analyses existing studies to better understand the current state of corporal punishment and the future of the practice.⁸

2 Background and Context

Globally, an estimated 732 million children, which translates to 1 in every 2 children between the ages of 6-17 years, live in countries in which corporal punishment is not fully prohibited.⁹ In 2021, studies by various scholars showed that Africa and Central America have a 70 per cent prevalence of corporal punishment in schools, while in the Eastern Mediterranean and South East Asian regions, the prevalence stood at 60 per cent. The lowest prevalence was found in the Western Pacific region where the lifetime and past year rates were 25 per cent.¹⁰ Those high rates are found in both secondary and primary schools. Globally, corporal punishment remains a controversial disciplinary method. Although such physical punishment is prohibited in many Western countries, it is still used in various parts of the world especially in the Global South. Historically, an increase in juvenile crime has been followed by calls for the reinstatement of corporal punishment in those regions where it had been prohibited. Opponents of corporal punishment, however, argue that it is inhumane and that juvenile corporal punishment risks reinforcing the delinquent behaviour of those who receive it.¹⁰ In Zimbabwe, corporal

⁵ For a ZHRC investigation pertaining to participation of children in political activities *see* ZHRC/CI/0069/17 and an investigation on barring learning from writing examinations *see* ZHRC/CI/226/2019.

⁶ *See* A. Moyo, *ZHRC Practitioners Training Manual on Constitutional Rights of Specific Groups of People* Vol. 2 (Zimbabwe Human Rights Commission, 2020) p. 43.

⁷ *Ibid.*

⁷ *Ibid.*

⁸ Pathshala, 'Research Methodology, Module IV: Socio-Legal Research' <epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/09._research_methodology/04._sociolegal_research/et/8151_et_et.pdf> (accessed 11 January 2023). pp.26-28.

⁹ World Health Organization, 'Corporal Punishment and Health', 2021, <who.int/news-room/factsheets/detail/corporal-punishment-and-health> (accessed 30 August 2022). ¹⁰ *Ibid.*

¹⁰ *Ibid.*

punishment remains legal although the contexts in which it is used have been limited. Corporal punishment is no longer allowed in schools as a method of discipline¹¹ and neither is its use in the criminal justice system.¹² The prohibition of corporal punishment in schools has been met with mixed reactions, for instance, with a student teachers' union calling for the return of corporal punishment in schools in order to stop increasing rates of teenage delinquency and crime.¹³

In the home and other similar private settings, where corporal punishment is still legally allowed, corporal punishment remains a point of contestation. While there is growing evidence that corporal punishment is harmful to the development of children, many parents and caregivers remain committed to the idea that it is necessary for the development of children. In the home, the distinction between private and public enables the subjugation of vulnerable groups, and children are treated with paternalism and subordination, thus limiting their enjoyment of their rights.¹⁴

2.1 Theoretical Underpinnings of Corporal Punishment

The logic behind children needing to be punished in order for them to develop into respectable adults is rooted in the punishment theory of deterrence. As a theoretical concept, deterrence was first articulated in the 17th and 18th centuries and is based on the idea of a rational person. Deterrence theory states that if punishment is well-suited for the harm that was done, then a rational person would weigh the potential benefits and losses before engaging in rule-breaking. If the loss or punishment is greater than the joy they gain from breaking the rule, then they would follow the classical deterrence theory which entails three concepts: severity, certainty and celerity or swiftness. If a punishment had all three components, then a person would likely not break the rules and would, therefore, be deterred from committing a similar offence in the future. Other people would also be deterred from offending in a similar manner when they witness the punishment as they would not want to suffer the same fate.¹⁵

Regarding corporal punishment, the pain and humiliation of the punishment was thought to be enough to prevent people from committing similar offences in the future. In fact, that is one of the main reasons given by parents for why they continue to use the practice: they want to correct their children and turn them into respectable, law-abiding adults.¹⁶ Even so, research on criminality, where deterrence has been tested, shows that deterrence is not effective in reducing

¹¹ Government of Zimbabwe, *Education Amendment Act [Chapter 25:04]*, 2020,

<

mopse.co.zw/sites/default/files/public/downloads/EDUCATION%20AMENDMENT%20ACT%2C%202019%20%5B%20Act%2015-2019%5D.pdf> (accessed 11 January 2023).

¹² *S v. Chokuramba*, CCZ 10/19 ZWCC 10 (2019).

¹³ T. Muchabaiwa, 'Student Teachers want corporal punishment back', *Newsday*, 2022, <newsday.co.zw/2022/04/student-teachers-want-corporal-punishment-back/> (accessed 11 January 2023).

¹⁴ S. Tamale, *Decolonization and Afro-Feminism*, (Daraja Press Ottawa, 2020) pp. 328-329 ; B. Schmueli, 'What Has Feminism Got To Do With Children's Rights: A Case Study of a Ban on Corporal Punishment', 22, *Wisconsin Women's Law Journal* (2007) , p. 185.

¹⁵ J. Abramovaite *et al.*, 'Classical deterrence theory revisited: An empirical analysis of Police Force Areas in England and Wales', *European Journal of Criminology*, (2022); D. S. Nagin, Deterrence in the Twenty-First Century, 42(1) *Crime and Justice*, (2013) pp. 199-263.

¹⁶ P. Gwirayi, 'Functions Served by Corporal Punishment: Adolescent Perspectives', 21:1. *Journal of Psychology in Africa* (2011) pp. 122-123.

recidivism.¹⁷ Another point of contention is that deterrence is based on the theory of a rational adult person. Children are still developing and often lack the rational qualities that adults have and so harming them physically will not have the desired effect because their ability to rationalise is compromised.

2.2 The Rationale for the Continued Use of Corporal Punishment

Proponents of corporal punishment argue that it is a necessary part of discipline in the home that is culturally appropriate. Most parents believe that it is a way to steer children towards the right path and that a ban on corporal punishment would promote bad behaviour because parents would no longer have a primary method of control.¹⁸ A common argument is, consequently, that parents and guardians would lose control over children in the absence of corporal punishment.¹⁹ In addition to losing control, parents believe that corporal punishment reduces bad behaviour in children in the short term and long term. Studies, however, provide contrary evidence, proving that for short-term results, it is unclear if corporal punishment is effective.²⁰ For long-term behaviour change, empirical data also does not support the effectiveness of this method of parenting. Where children change their behaviour, it is because they associate negative experiences with it, but the children would not have internalised why they should behave appropriately.²¹

It is noteworthy, that even opponents of corporal punishment urge the public to take possible adverse consequences into consideration when arguing for a total ban. Such laws could, for instance, lead to arrests of parents for minor violations, such as isolated spankings that do not result in injury. This could then disturb the life of children and put their psychological wellbeing in jeopardy due to feelings of guilt.²² While Zimbabwean law allows for parents and guardians to raise children according to the morals and religion of their choosing; it nevertheless provides a qualifier in the form of children's rights.²⁴ This implies that "parents should not prejudice the rights to which their children are entitled under the Constitution including the right to education, health, safety and welfare".²³ Notwithstanding, many

¹⁷ B.C. Watson et al., 'Different approaches to measuring specific deterrence: some examples from speeding offender management', Proceedings of the 2010 Australasian Road Safety Research (2010) p. 7.

¹⁸ G. D. Gwenzi et al., 'The prevailing social attitudes towards child discipline in Zimbabwe', 11:5 *African Journal of Social Work*, (2021) p. 217.

¹⁹ *ibid* pp. 213-221.

²⁰ T. Hecker et al., 'Corporal Punishment and Children's Externalizing Problems: A Cross-Sectional Study of Tanzanian Primary School Aged Children', 38 *Child Abuse and Neglect* (2013) pp. 884-894.

²¹ *Ibid*.

²² B. Wood, 'A Report from New Zealand: four years post law change', 2016 <epochnz.org.nz/images/stories/mediaol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> (accessed 7 September 2022). ²⁴ Section 60(3) of the Constitution provides that "parents and guardians of minor children have the right to determine, in accordance with their beliefs, the moral and religious upbringing of their children, *provided they do not prejudice the rights to which their children are entitled under this Constitution, including their rights to education, health, safety and welfare.*" Emphasis added. The Zimbabwe Human Rights Commission (ZHRC) in 'ZHRC Practitioners' Manual On Constitutional Rights' (Vol.1,p.62) has summarized the scope and content of S 60 as follows: "(a) the freedom to choose one's religious or other beliefs without direct and indirect pressure from the State, individuals or other sources. This suggests that religious entities may not bar people from leaving their fold and converting to other religions; (b) the right to declare one's faith or religious beliefs openly and without fear of victimization means that every person has the right to profess or express their religious beliefs in public and the State or any other person or entity should not compel members of a particular religion to worship in private; (c) it entails the right to express one's religious beliefs by worship and/or to practice them by teaching and dissemination; (d) it entails the right to assemble to practice religious or other observances with other members of the same religion (sic) or other community."

²³ ZHRC, *supra* note 4, p. 62. A conspectus of core international instruments on freedom of conscience include

Christians who constitute the majority of Zimbabwean parents, believe they not only have a right to use corporal punishment on their children, but that they contemporaneously have a duty to do so. Adherents often rely on the Proverbs 13:24's 'spare the rod, spoil the child' rhetoric which has often been used to justify the use of corporal punishment on children as it is believed that failing to beat children will result in unruly children who eventually become criminals as adults.²⁴ Thus, corporal punishment becomes a site of struggle for children's rights promotion. Sloth-Nielsen²⁵ quoting Freeman²⁸ postulates that "the case that children have rights has to a large extent been won: the burden now shifts to monitoring how well governments honour the pledges in their national laws and carry out their international obligations".²⁶ Our contention is that corporal punishment in the home and other similar settings is irreconcilable with children's rights. We note, however, that this position could generate debate. On one hand, there is the uncontested view that children are physically and economically vulnerable and powerless. This implies their inability to overcome their disadvantaged status merely by fully exercising the rights granted to them.²⁷

2.3 Rationale for Ending Corporal Punishment

Perhaps the most common argument for the abolishment of corporal punishment is the lack of clear direction between reasonable chastisement and child abuse. Acts of corporal punishment have the potential to escalate to incidents that cause injury or death. In many incidents where parents were arrested for child abuse, the parent had intended to discipline the child. In Zimbabwe, of the 19 child deaths in the first nine months of 2022 that have been reported by the Herald, four of the ten who died at the hands of their parents were killed during the administration of corporal punishment.²⁸ Nevertheless, the general sentiment appears to be that children are entitled to equal protection under the law, including in the privacy of the homes in which they reside. When corporal punishment is legal, parents and guardians are more likely to believe that it is an acceptable practice. Consequently, making the practice illegal can encourage parents and guardians to seek alternative forms of disciplining children in their care.²⁹ Additionally, it can encourage governments to provide resources and education for the purpose of eliminating corporal punishment in all environments. The Children's Amendment Act, 2023 (No. 8 of 2023) is an example of this. Section 49B states that the government will ensure the promotion of positive and non-violent forms of discipline.³³

Article 18 of UDHR, Article 18 of the ICCPR, Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 14 of the CRC, Article 9 of the ACRWC, Article 8 of the African Charter on Human and People's Rights (ACHPR), Article 12 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CRMW).

²⁴ J. Becker, 'Corporal Punishment: Legal Reform as a Route to Changing Norms', 85, *Social Research: An International Quarterly*, (2018) p.255; Gwenzi, *supra* note 19, pp. 213-221.

²⁵ J. Sloth-Nielsen, 'Chicken soup or chainsaws: some implications of the constitutionalisation of children's rights in South Africa' in U Kilkenny and L. Lundy (eds.), *Children's Rights* (Routledge, London, 2017). ²⁸ M. D. A. Freeman, 'The Limits of Children's Rights', in M. Freeman P. E. Veerman (eds.), *The Ideologies of Children's Rights* (Brill, Leiden, 1992). pp. 29-46.

²⁶ Sloth-Nielsen, *supra* note 27, p.6.

²⁷ *Ibid.*, p.7.

²⁸ The Herald, 'Man kills daughter (5), dumps body along highway', 2022, <herald.co.zw/man-kills-daughter-5dumps-body-along-highway/> (accessed 8 September 2022); The Herald, 'Missing girl (11) found murdered', 2022, <herald.co.zw/missing-girl-11-found-murdered/> (accessed 10 August 2022); The Herald, 'Crimes of passion involving women up', 2022, <herald.co.zw/crimes-of-passion-involving-women-up/> (accessed 15 June 2022).

²⁹ M. A. Strauss, 'Prevalence, Societal Causes, and Trends in Corporal Punishment by Parents in World Perspective', 73 *Law and Contemporary Problems*, (2010), pp. 22-23.

Another reason cited for the abolishment of corporal punishment is psychological in nature. It recognises that although moderate corporal punishment is not meant to cause injury to the child it nonetheless causes pain.³⁴ Corporal punishment from parents is unique since an assumption that the parents love and care for their children can be inferred.³⁵ As corporal punishment uses violence, however mild, it can create the connection, in the minds of children that love and violent behaviour go hand in hand. Numerous studies have made the connection between men who were physically punished as children becoming adults who use violence with their partners and children.³⁶

The contention is that any form of physical violence can hurt children. In addition to direct physical harm, including death, they can also suffer emotional harm. It can also result in longterm physical diseases that are caused by prolonged stress and worry.³⁷ With corporal punishment, it is not only the physical strike that is harmful but the anticipation regarding when the next strike will hit their body.³⁸ If the home is a place where pain occurs, children also learn that family and home is not a safe place. Corporal punishment leaves lasting lessons that violence is a method of achieving one's goals. In order for children to conform to the behaviour their parents want, they use violence on their children and that can raise them to adults who believe that this is the way to convince others to do what they desire. Numerous studies have demonstrated that people who experienced violence as a child go on to perpetuate violence as an adult.³⁹

³³ Children's Amendment Act, 2023 (No. 8 of 2023)

<https://www.jsc.org.zw/upload/Gazette/Act%20No.%208%20of%202023%20Children's%20Amendment.pdf>
<www.veritaszim.net/node/5375#:~:text=Among%20other%20definitions%2C%20the%20definition,at%20risk

> (accessed 1 June 2023)

³⁴ Convention Against Torture Initiative, 'Positive Discipline and Alternatives to Corporal Punishment of Children', <endcorporalpunishment.org/wp-content/uploads/2021/04/CTI-Tool-10-Positive-Discipline-2021ENG-draft6_FINAL.pdf> (accessed 2 September 2022).

³⁵ A. Moyo, '(Il)limitable and Non-Derogable Rights, Judicially Sanctioned Whipping and the Future of Punishment in All Setting in Zimbabwe', in Raoul Wallenberg Institute, *Final Papers of the 2017 National Symposium on the Promise of the Declaration of Rights under the Constitution of Zimbabwe*, 2017, <old.zimlil.org/zw/blog/Final%20Papers%20of%20the%202017%20National%20Symposium.pdf> (accessed 8 September 2022), pp.18-37.

³⁶ E. Fulu *et al.*, 'Pathways between childhood trauma, intimate partner violence, and harsh parenting: findings from the UN Multi-country Study on Men and Violence in Asia and the Pacific', 5(5) *Lancet Global Health*, (2017) pp. e512-e522.

³⁷ P. Mahlangu *et al.*, 'Prevalence and Factors Associated with Experience of Corporal Punishment in Public Schools in South Africa', 16(8) *PLoS ONE* (2021), pp. 1-15.

³⁸ Moyo, *supra* note 35.

³⁹ P. Romito, *A Deafening Silence: Hidden Violence against Women and Children*. (The Policy Press, Great Britain, 2008). p. 25.

3 Constitutionalisation of Children's Rights and Corporal Punishment: Children, the Rod and the Law⁴⁰

The Constitution of Zimbabwe Amendment (No.20) Act, 2013⁴¹ champions children's rights.⁴² It presents the judiciary in particular with an opportunity to advance children's rights⁴³ and protect minors from all forms of violence. In that sense, the Constitution recognises the need to address both contemporary and antecedent forms of violence. The current work falls in the continuum of similar scholarship on children's rights which tries to evaluate the contribution of the 2013 Constitution to achieve an egalitarian, free and just society.⁴⁴ Magaya and Fambasayi for example conceptualise the 2013 Zimbabwean Constitution as a catalyst for the realisation of children's rights. In their audit of evolving children's rights jurisprudence, they take a more nuanced view and a historical and evaluative methodology. They embark on a constitutional exegesis to look back at the former Constitution of Zimbabwe to examine the jurisprudence and gain a deeper understanding of the 2013 Constitution. In relation to the current project, their work supports the idea that the 2013 Zimbabwean Constitution could serve as a liberating and protective device for children who find themselves being subjected to or threatened by violence, impunity and any inhibiting environment. Therefore, having surveyed the Court's performance in a myriad of areas such as the administration of estates and succession, judicial corporal punishment *inter alia*, they conclude with brevity that Zimbabwe is making promising progress in the development of children's rights, due in part to the 2013 Constitution.⁴⁵

The above-cited authors concur with Moyo who not only sees enormous potential in the 2013 Zimbabwean Constitution; but also observes that both child law and children's rights are nascent expressions in Zimbabwe.⁴⁶ Moyo contrasts the 2013 Constitution, which provides children with protection, provision, and participation rights with its predecessor, which protected customary laws from constitutional provisions, allowing traditional norms that violate children's rights to continue.⁴⁷

⁴⁰ Adapted from D. Benatar, 'The child, the rod and the law' in R. Keightley *Children's Rights* (Juta, 1996) p. 197.

⁴¹ Subsequently referred to as the 2013 Constitution.

⁴² See *Mudzuru and Another v. Minister of Justice*, CCZ 12/2015.

⁴³ See *Dzvova v. Minister of Education Sports and Culture and Others*, ZWSC 26 (2007) (freedom of religion and conscience under section 19(1) of the Lancaster House Constitution); *Bhila v. Master of the High Court*, *supra* note 2; *S v. FM (A Juvenile)*, ZWHHC 112 (2015); *S v. Banda*, *supra* note 4; *S v. Chakamoga*, *supra* note 1; *S v. Chokuramba*, *supra* note 13.

⁴⁴ A Moyo, 'The Judiciary and Children's Rights in Zimbabwe', in J Tsabora (eds.), *The Judiciary and the Zimbabwean Constitution* (University of Zimbabwe Press, 2022) pp.228-250; B.Mushowe, 'A ray of hope for the outlawing of corporal punishment in Zimbabwe: A review of recent developments', *The Zimbabwe Electronic Law Journal* (2018), <old.zimlil.org/zw/journal/2018-zelj-01/%5Bnode%3Afield_jpubdate%3Acustom%3AY/ray-hope-outlawing-corporal-punishment> (accessed 12 January 2023).; The Herald, 'Ban on corporal punishment opens new era for children', 2015, <herald.co.zw/ban-on-corporal-punishment-opens-new-era-for-children/> (accessed 12 January 2023).; A. Moyo, 'The Legal Status of Children's Rights', in A Moyo, *Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights* (2nd Edition, 2022), pp.243-286 <staging.rwi.hemsida.eu/wp-content/uploads/2022/09/RWI-HR-Anthology-FINAL2-1.pdf> (accessed 12 January 2023).

⁴⁵ I. Magaya and R, Fambasayi, 'Giant leaps or baby steps? A preliminary review of the development of children's rights jurisprudence in Zimbabwe', *De Jure Law Journal*, (2021), <scielo.org.za/pdf/dejure/v54n1/02.pdf> p. 34.

⁴⁶ Moyo, *supra* note 44, p.228.

⁴⁷ *Ibid.* Emphasis added. p. 228.

The post-*Chokuramba* period has seen a surge in the interest on the legality of corporal punishment in other settings. Nevertheless, these calls are not in themselves new since various institutions have previously implored Zimbabwe to outlaw the practice. For instance, “in 1998, the Human Rights Committee emphasized to Zimbabwe that corporal punishment is incompatible with the International Covenant on Civil and Political Rights”.³⁰ Also, the Government of Zimbabwe responded affirmatively to the results of the first cycle of the Universal Periodic Review in 2011 which urged the country to outlaw corporal punishment in all settings.³¹ Now that the Constitutional Court has outlawed judicially sanctioned corporal punishment, the main objective of this paper is to demonstrate why all forms of corporal punishment should be outlawed in all settings. The main argument is that a liberal and purposive construction of the 2013 Zimbabwe Constitution will have the effect of outlawing corporal punishment in the home, alternative care settings, day care institutions and foster homes alike. With respect to the latter, recent studies seem to suggest that some parents are in support of corporal punishment.³²

Corporal punishment has a long genealogy in constitutional adjudication in Zimbabwe.³³ Recent analyses straddle abolitionist and relativist constructions of the law on corporal punishment.⁵² Nevertheless, the central contention is that corporal punishment is irreconcilable with the elaborate rights of children under the 2013 Constitution.³⁴ The Constitution provides no carve out probably indicative of the drafters’ intention to engender a society free from violence. Moreover, the international agreements that Zimbabwe is party to arguably demonstrate that corporal punishment cannot pass muster. The Constitutional Court of Zimbabwe concurs partially with the ongoing discourse when it comes to deploying certain rights, especially right to dignity, to judicially imposed corporal punishment.³⁵ Magaya and Fambasayi evaluate the evolving children’s rights jurisprudence in Zimbabwe.³⁶

The test to determine if an impugned law, conduct or custom should still subsist in a constitutional democracy would largely depend on whether it can co-exist with dignity as a constitutional value. Before, the Court was the legality of the extant practice of corporal punishment under adjectival law. The Court found the right to dignity (and as a principle) was instructive. It explained that:

Human dignity... is a special status which attaches to a person because he or she is a human being [...] Human dignity is therefore inherent in every person all the time regardless of circumstances or status of the person... Human dignity is not created by the State by law; the law can only recognise the inherence of human dignity in a person and provide for equal respect and protection of it.⁵⁶

However, it is pertinent, before proceeding to illuminate the holding and reasoning of the Court, to provide a crisp background to the constitutional matter. As noted above, the matter was

³⁰ S. Owen, ‘Briefing on Zimbabwe for the Committee on the Rights of the Child’, *End All Corporal Punishment of Children*, June 2015, visited on 13 July 2023 p. 4.

³¹ *Ibid.* p. 4.

³² Gwenzi, *supra* note 26, p 218.

³³ Veritas, ‘Court Watch 6/2019 Corporal Punishment: When the Beating Had to Stop’, (2019), <veritaszim.net/node/3507> (accessed 12 January 2023). ⁵² Moyo *supra* note 44.

³⁴ *Ibid.*

³⁵ *S v. Chokuramba*, *supra* note 13; *S v C (A Juvenile)*.

³⁶ Magaya and Fambasayi, *supra* note 45.

⁵⁶ *S v. Chokuramba*, *supra* note 13, p 19.

brought to the Constitutional Court via the section 175 of the Constitution route where the Constitutional should confirm preliminary constitutional findings made by the High Court. The pertinent facts are that a juvenile of fifteen years, who had been convicted of rape in the Magistrate's Court, was sentenced to corporal punishment. This meant that he was to be subjected to three strokes based on Section 353 of the CPEA and as fleshed out in the Regulations.³⁷ Furthermore, the court a quo concluded that it was inconceivable to justify the administration of corporal punishment without violating the inherent dignity of the juvenile. In unequivocal words, the High Court found that Section 353 was incompatible with the spirit of Chapter 4 of the Constitution, in particular Section 53 as read with 52(a) and 51 of the 2013 Zimbabwean Constitution.

Despite the progressive ruling of the High Court, it suffices to note that judicially sanctioned corporal punishment has a long genealogy in constitutional practice. In the late 1980s, it was found to be inconsistent with the then s 15(1) of the maiden Constitution of Zimbabwe (Lancaster House Constitution), and by the Supreme Court, in *S v A Juvenile*.⁵⁸ Although the latter case was decided under the auspices of the former Constitution, it matters still that Zimbabwean courts have consistently maintained that corporal punishment stood in sharp contradistinction with the ideals and values of a progressive and civilized society. Notwithstanding, the differences between the *Chokuramba* and *S v A Juvenile* decisions is mainly that the legislature effected a constitutional amendment which overturned the judgment of the Supreme Court. In essence, the end result of the reforms was that they defied court decisions, and by doing so, undermined tenets of judicial independence and the rule of law.

Accordingly, the limited judicial review powers sanctioned by Section 15(3) (b) of the now defunct Lancaster House Constitution, meant that corporal punishment remained extant. Despite the controversial architecture of Section 15 (3) (b), cited above in relation to the powers of the judiciary, it appears now, by virtue of *Chokuramba*, that the constitutional morality has been revolutionised. In the opinion of the Court, in the absence of any constitutional prohibition or limitation of its powers, it is empowered to test either executive or legislative conduct for compliance with the Constitution. In other terms, in the pre-2013 constitutional era, courts were unable to contest judicially sanctioned corporal punishment as unconstitutional since the amended Constitution made it permissible. Moreover, the holding of the Court, was that in the absence of a provision such as Section 15(3) (b) of the Lancaster House Constitution, the Court was empowered to determine whether the conduct of the President or Parliament were compliant with the constitutional intent. Further, the Court appeared to reemphasise that its powers are directly derivable from the Constitution which created it.

According to the Court, the determination of whether or not corporal punishment still had a place in Zimbabwean society could be answered by asking one broad question which has two components. The core question was whether moderate corporal punishment violated the inherent human dignity of juveniles as protected under the Constitution. The sub-questions hinged on the epistemological formulations of the terms "inhuman punishment" and "degrading punishment". One preliminary observation is that the ancillary questions are derived from the constitutional right to inherent dignity enumerated in the Constitution. The court reasoned that dignity is a supreme, foundational value and right which permeates the whole constitutional enterprise. Furthermore, a distinction was made between dignity in the general sense and inherent human dignity in juridical terms. The latter is innate and therefore

³⁷ *S v A Juvenile* 1989 (2) ZLR 61 (S).⁵⁸ *Ibid.*

different from its counterpart which is narrower in scope. Furthermore, the Court held that the test ought to be objective in that extra-legal factors are irrelevant in the constitutional adjudication of corporal punishment. In essence, this connotes that the lived political, social, cultural, religious and other personal experiences and innuendos of judges should not cascade into the adjudication process. The constitutional morality, which is itself fluid and dynamic and deeply rooted in the

Constitution, should drive the interpretation exercise instead. Arguably, the reasoning of the Court aligns with the Dworkinian Herculean model for judges who possesses superb adjudicative and lawyering skills, patience, acumen, foresight, objectivity and impartiality. This could also imply that there is no law beyond the law.

3.1 Limitation of Rights and Corporal Punishment

The general rule is that all rights in the Declaration of Rights can be limited.³⁸ If the limitation or the infringement is found to be reasonable and justifiable then it is constitutional.³⁹ Section 86 of the 2013 Constitution sets out the test for determining whether a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The limitation process involved a two-legged approach:

in cases where there is direct application of the Constitution, the court considers two issues. The first is whether a right in the Bill of Rights has been limited or infringed. If the answer to the first inquiry is that a right has been limited or infringed, then the court moves on to the second issue: is the limitation reasonable and justifiable?⁶¹

Accordingly, Section 86 captures the notions of acceptability of limitations to human rights such as the conditions of legality, legitimacy and necessity.⁴⁰ Olivier De Schutter succinctly explains the limitation of human rights as follows:

[R]ights of an absolute character are the exception. In general, limitations may be imposed on human rights, provided three conditions are satisfied. First, any interference with a right should be prescribed by law (condition of legality). Second, it must be justified by the pursuance of a legitimate aim (condition of legitimacy). Third, the interference must be limited to what is necessary for the fulfilment of that aim, which means that it must be appropriate to pursuing the objective, and that it may not go beyond what is required in order effectively to achieve that aim-or, at a minimum, that all the interests involved should be carefully balanced against one another (condition of proportionality).⁴¹

Consequently, under the Section 86 inquiry, the question would be whether corporal punishment is a justifiable and reasonable limitation of rights such as the right to personal security in Sections 52 (right to personal liberty), 53 (freedom from torture or cruel, inhuman or degrading treatment or punishment), 56 (equality and non-discrimination) and 60 (freedom of conscience) of the Constitution. Section 241(2) (a) of the Criminal Law (Codification and Reform) Act 2004, for instance, enunciates that “a parent or guardian shall have authority to

³⁸ In South Africa a provision (S 28(2)) similar to S 81 of the 2013 Zimbabwean Constitution has been used to limit children’s rights. See *Sonderup v Tondelli and Another* SA 1171 (CC) (2001), *De Reuck v. Director of Public Prosecutions and Others*, CCT5/03, (2003) *S v M* (Centre for Child Law as Amicus Curiae) CCT 53/06, (2007).

³⁹ S. Human, ‘The Theory of Children’s Rights’, in T. Boezaart (ed.) *Child Law in South Africa* (Juta 2018) p.261. ⁶¹ *Ibid*, p. 274.

⁴⁰ See generally, O. De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (3rd Edition), (Cambridge, 2019), pp.344-386.

⁴¹ *Ibid*. p. 652.

administer moderate corporal punishment for disciplinary purposes upon his or her minor child or ward”.⁴² Subparagraph (6) states that:

In deciding whether or not any corporal punishment administered upon a minor person is moderate for the purposes of this section, a court shall take into account the following factors, in addition to any others that are relevant in the particular case: (a) the nature of the punishment and any instrument used to administer it; and (b) the degree of force with which the punishment was administered; and (c) the reason for the administration of the punishment; and (d) the age, physical condition and sex of the minor person upon whom it was administered; and (e) any social attitudes towards the discipline of children which are prevalent in the community among whom the minor person was living when the punishment was administered upon the minor person.⁴³

Thus, we are called to question the impugned provision in light of the above constitutional provision. Section 86(3) is beyond the scope of the study to the extent that the *Chokuramba* Court has already dealt with it in the context of corporal punishment. The contention is that Section 241 will not pass muster given the discussion below. Also, we draw comparative constitutional law inspiration by virtue of Section 46 (1) (e) of the 2013 Zimbabwean Constitution, from jurisprudential developments in South Africa, a common law jurisdiction, where courts outlawed corporal punishment via the Section 36 (limitation clause) route which is the Zimbabwean equivalent of S 86 of the Constitution.⁴⁴ The argument is that corporal punishment should be outlawed in the home. Specifically, there is no reasonable connection between its use and purpose. The examination of the legality of reasonable chastisement culminates into collateral issues. The practice affects the development of children, and its impact can only be seen in the long run. Section 86 is meritorious in that it involves a balancing exercise, one that leans in favour of child protection. There appears to be no cogent explanation from the State as to why the practice should still subsist except for the public opinion which the court is not bound by. In the context of Section 46 the judiciary is provided with a platform to develop common and customary law progressively.

4 International Framework: Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child

The CRC is an international treaty which entered into force on 2 September 1990 and Zimbabwe is a signatory. ⁴⁵ The Convention is an amalgam of civil and political rights and economic, social, and cultural rights, which is unconventional in the human rights sphere.⁴⁶ Article 1 circumscribes the definition of the “child” to “every human being below the age of eighteen years unless, under the law applicable to the child, the majority is attained earlier.” Within the CRC are obligations by State Parties to create an enabling legal environment in the spirit of children’s rights, including protection of rights irrespective of their status and other criteria.

Overall, the key feature of the CRC is that it captures the Four Ps of provision, protection, participation and prevention rights in the Convention.⁴⁷ Provision rights denote “rights that

⁴² Criminal Law (Codification and Reform) Act 2004, Section 241 (2) (a), p. 124.

⁴³ *Ibid*, Section 241, (6).

⁴⁴ *Freedom of Religion South Africa v. Minister of Justice and Constitutional Development and Others*, CCT320/17, ZACC 34, (2017).

⁴⁵ The Law of the Treaties apply.

⁴⁶ P. Mahery, ‘The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law’, in T. Boezaart (ed.), *Child Law in South Africa* (Juta, 2016), p. 311.

⁴⁷ *Ibid*, p.314.

children have to be provided with services to realise their basic needs; examples are the right to the highest attainable standard of health, the right to social insurance and the right to education”.⁴⁸ Moreover, protection and prevention rights refer to “rights aimed at protecting children from harmful and violent acts or practices and preventing children from being subjected to such acts and practices, for example a child’s right to privacy and to be protected against unlawful interference in his or her private life”.⁴⁹ The central argument is that children should be protected from harmful acts especially economic, sexual and any other exploitation. Participation rights refer to rights that allow children to participate in decisions affecting them. Examples are the child’s right to express his views in all matters affecting him or her and the right to freedom of expression.⁵⁰ Scholars such as Moore et al. have proposed *perception* as the fifth “p” which denotes a consideration of the impact that human perception has on the rights and lives of children.⁵¹ Furthermore, the CRC contains four general principles which are fundamental to its implementation. These are non-discrimination in Article 2; the best interests of the child in Article 3; the right to life survival and development in Article 6; and respect for the views of the child in Article 12 of the Convention respectfully. The Committee established under the Convention has occasionally applied these canons in specific contexts.⁵² Specifically, General Comment 8 calls for the protection of children from corporal punishment and other forms of degrading punishment.⁵³ Prohibiting all corporal punishment asserts children’s equal right to full respect for their human dignity and physical integrity.

The African Charter on the Rights and Welfare of the Child (African Children’s Charter, ACRWC) is an African legal instrument on children’s rights which was adopted in 1990 and came into force in 1999.⁵⁴ To date, it has been ratified by 49 African countries, with Zimbabwe among them. Drawing inspiration from the CRC, the ACRWC emphasizes the rights of the child and requires states to protect children from inhuman or degrading treatment while in the care of a parent or guardian.⁷⁷ The Charter also requires that in the act of disciplining a child, the child should be treated with humanity and with respect to the inherent dignity of the child.⁵⁵ In 2011, the African Committee of Experts on the Rights and Welfare of the Child issued a statement on violence against children, highlighting corporal punishment as one of the issues that should be addressed by governments. In the statement, not only did the experts rely on legal reasoning, but also included the harms which come from experiencing violence as young person. Those include trauma, challenges to their education, and increased risk for perpetuating violence themselves, as children and as adults.⁵⁶ It is in that spirit of recognizing

⁴⁸ *Ibid.*, p.314.; See UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989 United Nations Treaty Series vol 1577 Articles 24, 26 and 28.

⁴⁹ *Ibid.*, Article 16.

⁵⁰ *Ibid.*, Articles 12 and 13.

⁵¹ S. Moore, L. Melchior and J. Davis, ‘Me and the 5 P’s: Negotiating rights-based critical disabilities studies and social inclusion’, 16(2) *International Journal of Children’s Rights*, 2008 , p. 249.

⁵² UN Committee on the Rights of the Child (CRC), *General Comment No. 3, HIV/AIDS and the Right of the Child*, CRC/GC/2003/3, (2003) CRC, *General comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, CRC/GS/2003/4 (2003); CRC, *General Comment 7 Implementing Child Rights in Early Childhood*, CRC/C/GC/7/Rev1, (2006); CRC, *General Comment 12: The Right of the Child to be Heard*, CRC/C/GC/12, (2009).

⁵³ CRC, *General Comment 8 (2006) The Rights of the Child to Protection from Corporal Punishment and other Cruel and Degrading Punishment*, CRC/C/GC/8, (2008).

⁵⁴ African Union, *African Charter on the Rights and Welfare of the Child, 1990/1999* Accessed from <<https://au.int/en/treaties/african-charter-rights-and-welfare-child>> ⁷⁷ *Ibid.*, Article 16 (1).

⁵⁵ *Ibid.*, Article 11 (5); Article 20

⁵⁶ African Committee of Experts on the Rights and Welfare of the Child, ‘Statement on Violence Against Children’. 2011, Accessed from <<http://endcorporalpunishment.org/wp-content/uploads/key-docs/ACERWCstatement-on-VAC-2011-EN.pdf>> accessed 19 July 2023. pp. 2-3

the harms of corporal punishment that the ACRWC recommended that the government abolish corporal punishment in all settings and instead adopt methods of positive discipline.⁵⁷

5 Conclusion

The study sought to demonstrate that corporal punishment in the home and other similar situations violates children's rights as contained in leading international standards. The point of departure was that the legal protection of children's rights marked a massive departure from archaic approaches that regarded children as objects of parental control. The adoption of the Constitution which elaborately enlists children's rights specifically and human rights broadly is the hallmark of progress as it calls for equality, dignity, justice and freedom. The grand norm creates a world of possibilities coupled with discernible contradictions and paradoxes which it tries to resolve. Nevertheless, corporal punishment presents a compelling challenge in that it implicates moral and religious norms whose status is determinable by resorting to the Constitution and international law. Suitable interventions should be considered in light of the legal commitments that Zimbabwe has made. Having noted that the country has outlawed corporal punishment in the criminal justice and educational systems, the call to action is that the deployment of the canons of child law especially the best interests the child, nondiscrimination, life and development principles equally demand that the practice is repugnant and cannot pass constitutional muster. In the main, an intentional reading, for example, of the CRC and the African Children's Charter, arguably demonstrates that corporal punishment in the home violates children's rights. While the study relied on other rights than the right to dignity which is an elusive and all-encompassing right, the conclusion is that there are less restrictive means to achieve the same goals which corporal punishment serves to achieve. To that end, we argued that such punishment is disproportionate and therefore unnecessary in an open and democratic society that is founded on the values espoused in section 3 of the 2013 Constitution. And for that reason, we recommend the following non-exhaustive interventions:

5.1 Recommendations for the Government

- Ensure that domestic child law is compliant with international normative standards. This can be achieved through domestication of the CRC and the African Children's Charter.
- Adopt and implement a clear and comprehensive National Policy on Corporal Punishment. The policy should contain a comprehensive and up-to-date assessment and analysis of the extent, nature, causes and consequences of violence especially corporal punishment against children as a basis for further policy and programmes. This should include constant evaluations of the effectiveness of existing programmes and approaches; ongoing research on the socio-economic costs of violence against children; services, such as hotlines that allow children to report cases of violence against them and the maintenance of official records on child deaths, disaggregated by cause. A protective environment for children requires an effective monitoring system that records the incidence and nature of child abuses and allows for informed and strategic responses.

⁵⁷ African Committee of Experts on the Rights and Welfare of the Child. 'Concluding Observations and Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) in the Republic of Zimbabwe Report on the Statuts of Implementation of the African Charter on the Rights and

- Ensure that adequate resources are available to implement laws. This process would involve detailed budget analysis and agreed implementation strategies across sectors.
- Adopt participatory approaches to ensure that children are involved in legal reforms and development of legal frameworks on corporal punishment. Promoting child participation and strengthening children's own resilience.

Welfare of the Child.' 2018 Accessed from < https://www.acerwc.africa/sites/default/files/202206/Concluding_Observations_Zimbabwe.pdf> .accessed 19 July 2023. p. 8

5.2 Recommendations for the Zimbabwe Human Rights Commission and Other Stakeholders

- Ensure that information on the impact of corporal punishment on children is widely disseminated and, more particularly, that the CRC is available in the sixteen local languages. This can be achieved through public speeches on corporal punishment and child protection; public debates on television and radio; articles for newspapers on corporal punishment; public events to celebrate 20 November, International Children's Day, and through drawing attention to corporal punishment. Public information campaigns should involve religious, traditional, community, and peer education involving parents and children.

5.3 Recommendations for the Public

- Social development programmes designed to help children and adolescents develop social skills, manage anger, resolve conflicts and develop a moral perspective;
- Prevention of offending to ensure that those who come forward because they fear they may resort to corporal punishment are offered counselling and treatment programmes. The availability of such programmes should be widely promoted;

Training in positive parenting practices and family therapy programmes for general, long-term prevention.

