Exploring the prospects of litigation to end corporal punishment in the home in Zimbabwe

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Chapter 1

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1.1 Introduction

Johnson notes that 'raising children has never been easy, no matter time and place, humanity's most fundamental challenge comes not in the global arena, but rather in the day-to-day process of protecting and shaping our young.'[1] Corporal punishment of children in home settings is the most pervasive and accepted form of violence against children.[2]Janquera points out that the practice can be traced way back to the beginning of civilisation, however, the evolving understanding of children as distinct people, worthy of the same minimal human rights as adults,[3] has brought about judicial challenges to the ancient practice in several jurisdictions including South Africa[4] and Zimbabwe.[5] This mini-dissertation begins from the position that prohibition of corporal punishment is fundamental to child protection. According to the Ending Violence in Childhood: Global Report 2017, 'on average about 80 percent of children worldwide experience some form of violent discipline at home and an estimated 1,3 billion aged 1-14 experienced corporal punishment in a single year'.[6]The statistics underscore the need for banning the practice, which in many states, including Zimbabwe, remains lawful due to the common-law defence of reasonable chastisement.

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[1]KK Johnson 'Crime or Punishment: The Parental Corporal Punishment Defense-Reasonable and Necessary or Excused Abuse?' (1998) *U III L Rev* 413.

[2] Ending Corporal punishment of children: a short guide to effective law reform (www.endcorporalpunishment.org (04 May 2020)

[3] B Janquera 'Corporal Punishment: An Analysis of the Constitutionality of Domestic Corporal Punishment' (2014) *Political Science* 18.

[4] The South African Constitutional Court in *S v Williams* 1995 (3) SA 632 (CC) abolished judicial whippings. In *Christian Education v Minister of Education and Others* the court held that law prohibiting corporal punishment in schools constituted reasonable and justifiable infringement of parents' right to religious freedom. Recently in *Freedom of South Africa v Minister of Justice and Constitutional Development and Others* the court ruled that corporal punishment in the home setting is unconstitutional.

[5] The Zimbabwean Constitutional Court in the recent landmark case of *S v Chokuramba CCZ 10/19* held that judicial corporal whipping is inhumane, cruel, degrading punishment. The High Court in *Pfungwa and Another v Headmistress, Belvedere Jnr Primary School & Others* HH 148-17 again ruled that corporal punishment in the schools was unconstitutional.

[6] Ending Violence in Childhood: Global Report 2017, *Know Violence in Childhood* (www.endcorporalpunishment.org (accessed 04 May 2020).

There are ongoing efforts to remove the legal defence of reasonable chastisement, which will end the legal protection of corporal punishment in all settings in Zimbabwe. However, the path to prohibition of corporal punishment in the home in Zimbabwe, and indeed in many jurisdictions, has been a winding and a long one. Prohibition of the practice is generally achieved through law or constitutional reform processes or through challenging corporal punishment in all or some settings before the courts through litigation.[7] The Zimbabwean legislature has been reluctant to enact laws that explicitly ban the use of corporal punishment in the home.[8] Litigation in South Africa has culminated in the prohibition of corporal punishment as a sentence in the justice system, discipline in the school and in the home.[9] It is argued in this dissertation that litigation challenging the constitutionality of the practice will probably yield the same legal outcome in Zimbabwe.

1.2 Literature Review

1.2.1 Historical background of Corporal punishment in Zimbabwe.

The use of corporal punishment in Zimbabwe and other former British colonies was inherited from the English Common law.[10] The origins of corporal punishment were elucidated when a member of the Irish Parliament during a parliamentary sitting on enacting a law to prohibit the practice said,

> 'The ancient defence of reasonable chastisement is not an Irish invention. It came to us from English Common law. Through its colonial past, England has been responsible for rooting this legal defence in over 70 countries and territories throughout the World. In England, Wales and Northern Ireland, the reasonable punishment defence still allows parents and some other cases to justify common assault on children. In Scotland, there is another variation,

[7] S Vohito 'Using the court to end corporal punishment-The international score card' (2019) 52 De Jure 597-609.
[8] The Children's Act and the Domestic Violence Act of Zimbabwe do not explicitly prohibit corporal punishment of children in the home. However, the recently enacted Education Amendment Act make it clear that children shall not be subjected to corporal punishment.
[9] *S v Williams 1995 (3) SA 632 (CC)* the court ruled that corporal punishment as sentence to children violated their constitutional right to equality, dignity and exposed them to cruel, inhuman or degrading treatment.
[10] W Blackstone *Commentaries on the laws of England (1765-1769)*. The defence of reasonable chastisement in relation to a wife was officially abolished in *R v Jackson* [1891] 1 QB 67.

> namely the defence of justifiable assault. In this action being taken today, the government is putting children first and providing leadership, which will hopefully give confidence to the government at Westminster, the devolved UK administrations and other countries across the globe to discard these archaic, and disreputable defences and give full respect to the dignity of children…With this amendment we have a way to unite and agree that all citizens are equal. There must be never be a defence for violence against children'.[11]

The powerful remarks made by Senator Jillian van Turnhout in the Seanad not only give a clear account of the origins of corporal punishment, it also drives a clear message that this kind of punishment on children is disreputable.

In Zimbabwe, corporal punishment has been an integral practice in child disciplining, dating back to precolonial times.[12] Colonisation is rather credited for bringing the legal justification for the practice. A plethora of case law from the colonial era substantiates that physical punishment of children in the home was considered lawful.[13] According to Mushowe, the continued existence of corporal punishment in Zimbabwe is a product of the Lancaster House Constitution (LH Constitution),[14] section 15(3) that permitted statutes that existed then and that which continue to exist to provide for the common law defence of moderate or reasonable punishment.[15] Over the years, the legal rules have remained much the same. Parents are authorised to discipline children in terms of section 241(2) of the Criminal Law (Codification and Reform) Act 23 of 2004.[16] However, where corporal punishment exceeds reasonable or moderate punishment a parent or guardian may not escape criminal liability. Section 241(6) provides that the court when, considering whether punishment is moderate must take into account:

- The nature of the punishment and any instrument used to administer it;

[11]Senator Jillian van Turnhout contribution in the Seanad during the final stages of the Bill amending the law on children physical punishment in the home (http://www.endcorporalpunishment.org (accessed 15-08-2020).
[12]J Alexander & G Kynoch 'Introduction: Histories and legacies of punishment in Southern Africa' 2011(37) 3 Journal of Southern Africa Studies 395-413.
[13] See for example R v Pondo v Anor 1966 RLR 478 (G) and S v Walata HH-84-89.
[14] Lancaster House Constitution of 1979 (hereinafter LH Constitution)
[15] B Mushohwe 'A ray of hope for the outlawing of corporal punishment in Zimbabwe: A review of recent developments'2018 (1)1 *University of Zimbabwe Law Journal* 76-71.
[16] G Feltoe Commentary on the Criminal law (Codification and Reform) Act [Chapter 9:23] 2018

- The degree of force with which the punishment was administered;
- The reason for the administration of the punishment;
- The age, the physical condition and sex of the minor person upon whom it was administered;
- 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

Despite the regulatory framework being in place, Lenta asserts that there are no hard and fast rules to determine moderate or reasonable punishment, the degree and or intensity of physical punishment is subjective and vary from one parent to another.[17] Thus, what parent A may consider reasonable in her home would likely differ from what parent B considers being moderate.

1.2.2 Lancaster House Constitution

Magaya and Fambasayi submit that the LH Constitution 'was a transitional document' which addressed injustices which were associated with the colonial regime.[18] However, the LH Constitution failed in protecting child rights as evidenced by the absence of an 'express provision dedicated to children rights'.[19] They observe that despite the absence of child rights in the LH Constitution, the courts, through constitutional litigation within the context of human rights, did well in protecting the interests of children.[20] Section 15(1) of the LH Constitution accorded every person the right not to be subjected to torture or inhuman or degrading punishment, and children benefited on the basis that they were human. The provision formed the basis of the prohibition of physical punishment from an earlier stage of constitutional democracy, way before the ratification of the UNCRC and the ACRWC.[21]

[17] P Lenta 'Corporal punishment of children' 2012 (38) 4 *Social Theory and Practice* 689-716.
[18] I Magaya and R Fambasayi 'Giant leaps or baby steps? A preliminary review of the development of children's rights to jurisprudence in Zimbabwe' 2021(16) *De Jure Law Journal* 16-34.
[19] Magaya and Fambasayi (2021) 16 *De Jure Law Journal* 22.
[20] Magaya and Fambasayi (2021) 16 De Jure Law Journal 23.
[21] Magaya and Fambasayi (2021) 16 *De Jure Law Journal* 23.

According to Moyo,[22] during the LH Constitution regime, the courts in Zimbabwe classified corporal punishment as a violation of the constitutional prohibition of torture or cruel, inhuman or degrading treatment or punishment. As shall be seen in Chapter 3 below, the Supreme Court in *S v Ncube*[23] and *S v Ndhlovu*[24] held that the practice of judicial whipping on adults was, 'inhuman and degrading'. In the case of *S v A Juvenile*, [25] the court further ruled the practice as an 'antiquated and inhuman punishment which blocks the way to understanding the pathology of crime'.

The above-mentioned judgments highlight that the LH Constitution prohibited institutionalised corporal punishment. The decisions came at a time when the LH Constitution provided narrow rules of standing. Chiduza and Makiwane submit that LH Constitution adopted the common law approach of standing which required a litigant to have a personal, direct or substantial interest in human rights litigation.[26] The approach as shall be seen in Chapter 3 failed to recognise the importance of broader rules of standing, which would accommodate public interest litigation[27]

However, the enactment of the New 2013 Constitution, which is more bent towards human rights, changed completely the standing hurdle. One of the positive developments brought about by new Constitution, key and crucial to interpretation and development of child rights is the clarity on legal standing.[28]

1.2.3 The new 2013 Constitution of Zimbabwe and child rights litigation developments

Since the adoption of the new Constitution in 2013, Zimbabwe has seen notable reforms being achieved through litigation, for example the banning of child marriages, prohibition of judicial whippings and elimination of corporal punishment in the schools. This research aims at exploring whether litigation can achieve the goal of prohibiting

[22] A Moyo 'Illimitable and non-derogable rights, judicially sanctioned whipping and the future of punishment in all setting in Zimbabwe' (2019) *Zimlii* 1-7 (http://zimlii.org).
[23] *1988 (2) SA 702 (ZSC)*
[24] *1990 (4) SA 151 (ZS) 168-169B.*
[25] *1989 (2) ZLR 61 (SC).*
[26] L Chiduza & PN Makiwane 'Strengthening locus standi in human rights litigation in Zimbabwe: An analysis of the provisions in the new Zimbabwean Constitution' 2016 (19) *Potchefstroom Electronic Law Journal* 1-29.
[27] Chiduza & Makiwane (2016) 19 PELJ 11.
[28] S 85 of the Constitution of Zimbabwe.

corporal punishment in the home in Zimbabwe and examining the possible arguments that litigators are likely to rely on. According to Vohito, strategic litigation forces governments that are refusing or neglecting to introduce law reform, to accept their obligations to realise children's rights.[29] As mentioned above during the LH Constitution regime, locus standi was a barrier to child rights litigation. In the landmark case of *Mudzuru and Tsopodzi v Minister of Justice*[30] the court clarified the issue of standing in constitutional litigation, use of international law and the reliance on a purposive approach in interpreting constitutional provisions dealing with child rights. The applicants challenged the provisions of the Marriage Act and Customary Marriage Act, which permitted a girl child to be married before reaching the age of 18 years. Locus standi was a bone of contention between parties. Malaba DCJ, as he was then, addressing the issue borrowed Chidyausiku CJ remarks in the *Mawarire v Mugabe NO and Others* [31] at paragraph 8 of the judgment where he stated that the complainant need not to be 'dripping with blood of the actual infringement of their right'.

The *Mudzuru* case completely changed the locus standi doctrine in a progressive way in that interested parties are now able to challenge the constitutionality of laws, even if they are not victims of an infringement or threatened infringement of a fundamental right of freedom enshrined in the Constitution of Zimbabwe. As a result, interested individuals and civil society organisations may invoke the constitutional provisions of section 85, which provide for the enforcement of fundamental human rights and freedoms.

Kilkelly and Liefaard submit that child rights public interest litigation is normally founded on a constitutional bill of rights and international instruments, particularly the Convention on the Rights of the Child.[32] Thus, national domestic laws, which fall short of the precepts of the Constitution and international instruments, are judicially challenged to determine whether they pass constitutional muster. Children's rights in Zimbabwe are enshrined in section 19 and 81 of the new Constitution. Section 19,

[29] S Vohito 'Using the courts to end corporal punishment-The international score card' 2019 *De Jure Law Journal* 597-609.
[30] *Mudzuru and Tsopodzi v Minister of Justice, Legal and Parliamentary Affairs, Minister of Women's Affairs, Gender and Community Development and Attorney-General of Zimbabwe CCZ 12/2015.*
[31] *CCZ 1/2013.*
[32] U Kilkelly and T Liefaard 'Legal implementation of the UNCRC: lessons to be learned from the constitutional experience of South Africa' 2019 *De Jure Law Journal* 521-539.

which is in Chapter 2 of the Constitution, forms part of the National Objectives. Magaya argues that national objectives are justiciable.[33] The paramountcy of children's best interests, and protection from maltreatment, neglect or any form of abuse are some of the key rights in the National Objectives.[34] Furthermore, section 81 provides that:

> (1) Every child, that is to say every boy and girl under the age of eighteen years, has the right-
>
> (a) To equal treatment before the law, including the right to be heard;
>
> (e) To be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse.
>
> (2) A child's best interests are paramount in every matter concerning the child.
>
> (3) Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.

The above section makes it clear that the Constitution seeks to protect children and the High Court must play a role in this protection, through its status as their upper guardian.[35] Skelton submits that the upper guardian concept require judges to accord children rights matters urgency and minimise 'technical squabbles'.[36]The Constitution further provides for the right to dignity,[37] right to personal security,[38] right to freedom from torture or cruel, inhuman or degrading treatment or punishment[39] and the right to equality and non-discrimination.[40] These rights at face value show that the Constitution accords children protection against abuse and violence, however, it remains to be

[33] K Magaya 'Justiciability and constitutional interpretation value of chapter 2 on National Objectives of the Constitution of Zimbabwe Amendment No 20 Act of 2013' 2016 Journal *of Civil and Legal Sciences* 1-4.
[34] S 19(1) and (c) of the Constitution of Zimbabwe.
[35] S 81(3) of the Constitution of Zimbabwe.
[36] A Skelton 'Incorporating the CRC in South Africa' in U Kilkelly, L Lundy and B Byrne (eds) Incorporating the UN Convention on the Rights of the Child Intersentia 2021.
[37] S 51 of the Constitution of Zimbabwe.
[38] S 52(a) of the Constitution of Zimbabwe provides for the right to freedom from all forms of violence from public or private sources.
[39] S 53 of the Constitution of Zimbabwe.
[40] S 56 of the Constitution of Zimbabwe.

determined in the courts whether corporal punishment in the home would constitute infringement of all or some of the mentioned constitutional rights.

The role of the judiciary has been notable recently in Kenya, Namibia, South Africa and Zimbabwe, where the courts have declared corporal punishment, to be unconstitutional because it is in violation of children's rights, including in the home setting.[41] It is also noteworthy, that such developments in common law countries, based on the national legal system, can effectively protect children from all corporal punishment.[42] The 2019 judgment in *S v Chokuramba*[43] where the Constitutional Court held that that corporal punishment as judicial sentence option constitutes cruel or inhuman or degrading treatment or punishment of children, lays a solid foundation of law that shall be very important in litigating for the elimination of corporal punishment in the home and other settings in Zimbabwe.

Although the constitutional protections seem to promise a victory, building a successful case of corporal punishment in the home is not easy, because it is value laden. Therefore, every legal argument has to be carefully thought through. Skelton, writing in 2015, considered what the Constitutional Court might make of a hypothetical challenge to the common-law defence of reasonable chastisement in relation to corporal punishment in the home.[44] The article addressed the South African legal principles and constitutional provisions, which the court was likely to consider in prohibiting corporal punishment. She asserts that corporal punishment in the home, impugns the right to equality, dignity, right to be free from all forms violence from public and private sources, right to be protected from maltreatment and abuse and the right to children's best interests.[45] Skelton was proved right, as these were the provisions on which the Constitutional Court ultimately decided to declare the defence of reasonable chastisement to be unconstitutional in the case of *Freedom of Religion*

[41]BD Mezmur 'Don't try this at home? Reasonable or moderate chastisement, and the rights of the child in South Africa with *YG v S* in Perspective' (2018) 32 *Speculum Juris* 75-92.
[42] *Freedom of Religion South Africa v Minister of Justice and Constitutional Development 2019 ZACC 34.* The case culminated in total ban of corporal punishment in South Africa, however, the parliament has not yet adopted national legislation to confirm the Constitutional Court ruling.
[43] *CCZ 2019-10.*
[44] A Skelton 'S v Williams: a springboard for further debate about corporal punishment' 2015 *Acta Juridica* 336-359.
[45] Skelton (2015) *Acta Juridica* 347.

South Africa v Minister of Justice and Constitutional Development and Others,[46] discussed in detail in Chapter 4. More recently, Sloth-Nielsen has made a comparison of judicial and legislative developments of South Africa, Zimbabwe and other SADC nations, regarding corporal punishment.[47] She points that parliamentary or legislative 'steps to abolish corporal punishment in the home have not borne fruit, absent a court order which Parliament is required to implement'.[48] Nevertheless, she stresses that the promising route to striking down laws permitting corporal punishment in the home is through Superior courts declarations of unconstitutionality.[49] Mezmur has also acknowledged the courts' role and coined the phrase 'judicial-decision based prohibition of corporal punishment'.[50] He assesses the arguments in *YG v S*,[51] where the High Court ruled that the defence of reasonable chastisement was against international and foreign law, which supports the banning of corporal punishment.

The harmony between the scholars in articulating the role of a judicial challenge to determine the constitutionality of corporal punishment in the home, validates the position that litigation is instrumental in the prohibition and elimination of the practice. The scholarly work from the three internationally recognised child rights experts cited in the previous paragraph triggers legal academics to dig deeper on the value and role of child rights litigation in the prohibition of corporal punishment in the home in Zimbabwe. There appears to be evidence that litigation has been an effective course to achieve an immediate elimination and prohibition of the practice, particularly where the legislature is not taking steps to do so. As such, judicial-decision-based prohibition demands academics and scholars to examine the judgments, which shed light on some of the possible litigation approaches to achieve prohibition of corporal punishment in the home.[52]

[46] *2019 ZACC 34.*
[47] J Sloth-Nielsen 'Southern Africa Perspectives on Banning Corporal Punishment-A comparison of Namibia, Botswana, South Africa and Zimbabwe' in Saunders, Leviner and Naylor (eds) Corporal punishment of children: Comparative legal and social developments (2019) 245-264.
[48] Sloth-Nielsen (2019) 263.
[49] Sloth-Nielsen (2019) 264.
[50] Mezmur 2018 (32) 2 *Speculum Juris* 82.
[51] *2018 (1) SACR 64.*
[52] Mezmur 2018 (32) 2 *Speculum Juris* 83-85.

The legislature's failure to enact explicit legal instruments prohibiting corporal punishment in the home in Zimbabwe seems to be in line with the public opinion of retaining the practice,[53] hence the need to employ litigation as a way to make the state fulfill its obligation to protect children. The new Constitution has presented an opportunity in Zimbabwe to champion child rights protection through litigation. However, the success of the litigation will depend on the interpretation of the courts of the various rights-based legal arguments that will be advanced in an attempt to challenge the common law defence of reasonable chastisement.

Since the adoption of the new Constitution, corporal punishment has been prohibited in the judicial sentencing system and the schools in Zimbabwe through litigation, however, it remains lawful in the home. Zimbabwe is one of the few countries to take early judicial steps to ban corporal punishment, way before ratifying the Convention on the Rights of the Child. Consequently, one may argue that judicial and legislative developments should be at an advanced stage to address the practice in the home.[54]

On a positive note, recent litigation in the Superior courts in Zimbabwe challenging the constitutionality of physical punishment as a sentence and in schools suggests that there is a ray of hope in banning the practice in the home.[55] It is only a matter of time before constitutional litigation challenging the practice in the home is lodged with the court and this dissertation considers the best arguments to yield a positive result.[56] Prohibition of corporal punishment in the school in the *Pfungwa* case[57], which culminated in the enactment of the amended Education Act,[58] highlights that the executive is inclined to follow the directives of the Court and put in place measures to enforce state obligations. There is a possibility that the Courts will follow the South African legal position in the *FORSA* Case, given that the case addresses relevant legal

[53] See S Ndoma *Afrobarometer* report discussed in (n63) below.
[54] *S v Ncube 1987(2) ZLR (S): S v Ndhlovu 1988 (2) SA 702 (ZSC): S v A Juvenile 1990(4) SA 151 (ZS) 168-169B; S v Juvenile 1989 (2) ZLR 61 (SC).*
[55] *S v Chokuramba HH 718-2014: Pfungwa and Justice for Children Trust v Headmistress Belvedere Junior Primary and Others HC 6029/2016.*
[56] Mushohwe 2018 (n15) above.
[57] *Pfungwa & Another v Headmistress, Belvedere Jnr Primary School & Others HH 148-17.*
[58] Section 68A of the amended Education Act [Chapter 25:04].

principles and constitutional rights found in both Zimbabwe and South Africa constitutional democracies.

It is noteworthy to mention that physical punishment within the home setting is sui generis, different from corporal punishment in schools and the justice system, because it emanates from private sources rather than public sources. Although, the legal principles may appear to be clear, the case will not be simple because the most basic of human emotions have to be confronted.[59] In the *Christian Education South Africa v Minister of Education* case[60] the court noted 'the intimate and spontaneous atmosphere of the home', in which corporal punishment is meted out to children. The right to administer discipline is founded on the parental responsibilities to do what they deem fit for their children. Therefore, a finding that removes the reasonable chastisement defence can be characterised by those who wish to retain the defence as being an unreasonable limitation of the rights of parents, and as criminalisation of parental authority to discipline their children.

This raises questions as to whether a parent's right to rear and bring up a child precludes state involvement in disciplinary matters in all but the worst cases of abuse, or if state intervention should be triggered by something less. According to the Afrobarometer report of 2017, almost 72% of adult Zimbabweans see physical disciplining of children as justified with 28% saying it is never justified.[61] The findings are a cause of concern given that they come at a time when the court had already ruled the practice as unconstitutional in the judicial and school settings. One would have expected the majority to support Superior court rulings on the subject, unfortunately that is not the case. The predicament raises the issue of whether the society will accept and comply with the ruling of the Superior courts or it is likely that the ruling might become a brutum fulmen[62] judgment. Whether laws are shaped by society, or society is shaped by laws is a difficult question to answer. Litigators will

[59] Johnson (1998) *U III L Rev* 413.
[60] *2000(4) SA 757 (CC).*
[61] S Ndoma 'Contrary to court ruling, Zimbabweans endorse parental right to physically discipline children' *Afrobarometer Dispatch No. 156*| July 2017.
[62] Latin phrase used to indicate a judgement of law, which has no practical effect.

need to navigate cautiously all these legal hurdles in their attempt to bring societal change on this issue in Zimbabwe.

Decisions of superior courts in common law countries are binding and have the same effect as legislation. South Africa and Zimbabwe are common law countries,[63] a system they inherited as colonies of the British colonial regime. Most notably both have adopted a comparative law approach and this is evident in their reliance on foreign precedent in developing and making law.[64] Mavedzenge notes that since the inception of the 2013 Constitution, Zimbabwe has shown an intent to 'break from the autocratic past and facilitate a transition into a democratic future'.[65] In the event that litigation is instituted challenging the constitutionality of the common law defence of reasonable punishment in the home, the chances of getting a favourable judgment prohibiting the practice are high, as shall be argued in Chapter 3 below. The new 2013 Constitution clearly provides for the autonomy and protection of children's rights. The courts have embraced this transformative approach in adjudicating child rights matters. In *S v Chokuramba*,[66] the Constitutional Court emphasised the State obligation to protect the right to physical integrity of every person against violence. The court, though it was addressing corporal punishment in judicial sentencing, indicated that the prohibition and elimination of corporal is an immediate and unqualified state obligation and viewed continuation of the practice as a failure to comply with section 53 of the Constitution.[67] According to Magaya, the 2013 Constitution is a 'monumental and progressive development in Zimbabwe's history', in that it 'introduces salient foundational democratic elements that are in tandem with international human rights best practice and standards'.[68]

The courts have often interpreted the Constitution to be a living document, which seeks to correct all the past injustices. It is on that basis that this research seeks to

[63] A mix of Roman Dutch and English law, as a result they have consistently sought guidance from foreign high court judgment in commonwealth countries, the USA, Canada, Israel and England.
[64] Janguera (2014) *Political Science* 18.
[65] J Mavedzenge 'The Zimbabwean Constitutional Court as a key site of struggle for human rights protection: A critical assessment of its human rights jurisprudence during its first six years*' 2020 (20) African Human Rights Law Journal* 181 -205.
[66] *S v Chokuramba CCZ 10/19.*
[67] *S v Chokuramba* para 70.
[68] Magaya (2016) 6 *Journal of Civil and Legal Sciences* 1.

reveal the prospects of litigation in the matrix of addressing the reasonable chastisement defence and the ultimate goal of banning corporal punishment in the home in Zimbabwe. Elimination of physical punishment in the home will not be merely accomplished by court decisions prohibiting the practice. However, litigation is one of the first crucial steps towards achievement of a violence free home. The transformation from corporal punishment to positive parenting in Zimbabwe will be a significant step in upholding human rights and bringing Zimbabwe in line with its international legal obligations.

1.2.4 Regional instruments and Commitments

The African Charter on Human and Peoples Rights (ACHPR) and the African Charter on the Rights and Welfare of the Child (ARCWC) are the two most important instruments at a regional level addressing physical punishment of children. In the year 2000, the African Commission responsible for implementing the African Charter, deliberated on a complaint against Sudan, which had legislation permitting flogging of students at school. The Commission held that physical punishment of children is a violation of article 5 of the African Charter.[69] The African Children's Committee's adoption of the African Agenda for Children 2040: Fostering an Africa fit for children is also a strong statement by the regional body to 'restore the dignity of the African child'.[70] Vohito observes that Aspiration 7 of the Agenda aims to ensure that every child is protected against violence as such no child may be subjected to corporal punishment.[71] Building on the guidance of this regional jurisprudence, it is argued that litigation to challenge corporal punishment in Zimbabwe is a necessary step towards implementation and full realisation of the African regional instruments and vision.

1.2.5 The United Nations Convention on the Rights of the Children

The Convention on the Rights of the Children[72] (hereafter 'CRC') lays a solid foundation for the elimination and prohibition of corporal punishment. Skelton submits that the Convention wields influence through litigation and it can be deployed

[69] *Doebbler v Sudan (2003) AHRLR 153 (ACHPR 2003).*
[70] African Children's Committee Africa's Agenda for Children 2040: Fostering and Africa fit for children (2016) 11.
[71] Vohito (2021) 80.
[72] The United Nations Convention on the Rights of the Children of 1990.

effectively within constitutional democracies that obligates the courts to consider international law in Bill of Rights cases and to prefer an interpretation compatible with it.[73] The Zimbabwean new Constitution places a positive obligation on the courts to take account of international law and all treaties and conventions to which Zimbabwe is a party.[74]

The legislature has failed to align the laws to the Constitution and international law.[75] The CRC therefore becomes the compass in navigating litigation challenging the constitutionality of corporal punishment in the home in Zimbabwe. According to Phooko, South Africa and Zimbabwe have a similar dualist legal system.[76] This means regional and international laws are only binding on national courts if they have been incorporated into national law through legislation. Although both countries subscribe to the dualist system, this dissertation in Chapter 2, 3 and 4 will show that the two countries have consistently relied on international law in corporal punishment litigation. Given that the CRC is the main treaty that addresses corporal punishment, it may be predicted that litigation challenging the constitutionality of the practice will heavily rely on the CRC.

Zimbabwe signed the CRC in 1990 and ratified the instrument in 1991.[77] The CRC, Article 2 (2) provides that state parties shall take appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of status, activities, expressed opinion, or belief of the child's parents, legal guardians, or family members.[78] Article 19(1) further stresses that states have legislative, administrative, and social and education obligation to protect the child from all forms of physical violence. Sandberg asserts that in interpreting the scope of Article 19 guidance must be sought from the CRC Committee general comments particularly

[73] A Skelton 'South Africa' in T Liefaard & J Doek *Litigating the Rights of the Child. The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 13.
[74] S 46(1) (c) Constitution of Zimbabwe.
[75] S 34 of the Constitution of Zimbabwe provides that the state must incorporate all international treaties into domestic law to which Zimbabwe is a party.
[76] R Phooko 'The direct applicability of SADC community law in South Africa and Zimbabwe: A call for supranationality and the uniform application of SADC community law' 2018 (21) *PELJ* 1-34.
[77]T Mude 'The History of International Human Rights Law in Zimbabwe' (2014) *Journal of Social Welfare and Human Rights* 53-86.
[78] CRC, Article 2(2).

General Comment 8 and General Comment 13, which deal with the subject of corporal punishment.[79]

Tobin and Cashmore submit that general comment 13 represents a significant shift from a welfarist child protection approach to a rights-based approach consistent with the CRC.[80]The shift from a welfarist approach envisaged in general comment 1 and 8 to a child rights approach in general comment 13 'based on the declaration of the child as a rights holder and not a beneficiary of benevolent activities of adults' indicate that children must be given the same protection, which is accorded, to adults.[81] Hart, Lee and Wernham writing in 2011 about the adoption of general comment 13, point out that the Committee succeeded in giving a holistic approach to child protection.[82]

In *S v Chokuramba*,[83] the Constitutional Court noted that by ratifying the CRC, Zimbabwe was bound to comply with international norms providing for protections afforded to children.[84] The recent court rulings by the High Court and Constitutional Court provides a touchstone to banning of corporal punishment in the home. Although Zimbabwe is a conservative country, the Courts have proven recently that they are inclined to find corporal punishment in the home as unconstitutional. In *Chokuramba* case, Malaba CJ, expressed that:

> 'The Constitution is a dynamic document which must by its very nature be interpreted and applied to absorb the changes in society's attitudes towards what is right and wrong at any given period in its development. Like every human rights instrument, the Constitution is a living document.'[85]

The United Nations Sustainable Development Goal 16, Target 16.2.1 also emphasises the need for States to urgently reform national legislation and work towards ending all

[79] K Sandberg 'Children's right to protection under the CRC' in AF Eriksen and EB Hansen (eds) *Human Rights in Child Protection: Implications for Professional Practice and Policy* 2018.
[80] J Tobin & J Cashmore 'Thirty years of the CRC: Child protection progress, challenges and opportunities' (2020) 110 *Child Abuse & Neglect* 1-8.
[81] CRC/C/GC/13 para 72b.
[82] SN Hart, Y Lee & M Wernham 'A new age for child protection-General comment 13: Why it is important, how it was constructed, and what it intends?' (2011) 35 *Child Abuse & Neglect* 970-978.
[83] *S v Chokuramba CCZ 10/19.*
[84] *S v Chokuramba* 17 para 2.
[85] *S v Chokuramba* 42.

violence against children by 2030.[86] Zimbabwe has shown its support and commitment to implement sustainable goals. Vohito asserts that all states have made commitment to prohibit and eliminate all forms of corporal punishment, and she considers the commitment as a catalyst to implementation of Target 16.2.[87]Chapter 2 will set out the framework fully.

1.3 Research Question

This dissertation seeks to answer the following central research question: Is litigation to abolish corporal punishment in the home likely to succeed in Zimbabwe?

The following sub questions will be explored in order to answer the central research question:

- Does the current constitutional framework and the international law provide a sound basis for such litigation?
- What indications from Zimbabwean jurisprudence lean in favour of successful litigation to abolish the defence?
- What were the arguments underpinning the successful abolition of corporal punishment in the home in South Africa, and would these arguments be applicable in Zimbabwe?

1.4 Assumptions, scope and limitations

As highlighted above, banning corporal punishment in the home is required in terms of international law. This research proceeds from the assumption that the legislature's failure to ban corporal punishment makes it necessary to consider the route of a judicially ordered ban, which can be achieved through a constitutional challenge to the defence of reasonable chastisement. The second assumption is that there are reasonable prospects of success for an argument that the defence, through providing impunity to parents who apply corporal punishment, violates several rights in the Bill of Rights. If the court were to rule that the defence is unconstitutional, it would go a long way towards achieving a violence- free society and a Zimbabwe Fit for Children.

[86] The 17 Goals-SDGs-the United Nations (2015) (https://sdgs.un.org/goals (accessed 21-08-2020).
[87] Vohito (2021) 21 *African Human Rights Law Journal* 79.

However, the actual eradication of corporal punishment in the home is only possible if there is a comprehensive legal regime and a complete shift of mind by society to shun the practice of physically punishing children. This dissertation is limited to the legal abolition of the defence of reasonable chastisement through the courts, and does not engage with broader questions of statutory law reform and the programmatic and educative work that may need to be done to actually eliminate corporal punishment in the home.

This research is a contribution to the existing legal scholarly research. It seeks to explore the value of litigation and the possible legal arguments that can be made in addressing the ban on corporal punishment in the home.

1.5 Methodology

This study will be conducted through desktop research. It is essentially based on primary and secondary sources of law. The primary sources include instruments in international human rights law such as multilateral agreements, conventions, and soft law instruments such as general comments. Case law from Zimbabwe and foreign jurisdictions, and international tribunals will also be used. Secondary sources to be relied on include textbooks, journal articles, official international and national reports and documents.

1.6 Outline of Chapters.

The research consists of five chapters. Chapter 1, the current chapter, introduces the research question and proffers an overview of the study. This chapter provides information about the research problem and the sources that will be relied upon to answer the research question.

Chapter 2 examines the extent to which the international law and constitutional framework protects children from corporal punishment in the home. It analyses firstly, international and regional law that deals with the subject of corporal punishment. Secondly, it focuses on the Zimbabwean constitutional framework which affords children rights and explains how physical punishment in the home infringes the rights.

Chapter 3 studies the Zimbabwean case law and precedents. It outlines the Superior courts' findings and ruling on corporal punishment. Furthermore, the Chapter identifies and elaborates on the key constitutional values that influence interpretation of rights and principles that are at the centre of a court challenge in litigating for the elimination and prohibition of corporal punishment. The Chapter considers in detail and evaluates the *S v Chokuramba* (both HC[88] and CC[89]) and the *Pfungwa & Another v Headmistress of Belvedere Primary School & Others*,[90] and makes reference to the arguments in the Constitutional Court case, which are important in litigating for the ban of the practice in the home.

Chapter 4 studies lessons from abroad, particularly South Africa. It discusses and evaluates the protections accorded to children in the Republic of South Africa, and how litigation in *YG v S*[91] and *Freedom of Religion South Africa v Minister of Justice and Constitutional Development*[92] succeeded in prohibiting corporal punishment in the home.

Chapter 5 concludes the study. The chapter analyses the applicability of the South African case law arguments and reasons as to why and how Zimbabwe may apply these and draw from the jurisprudence in determining the constitutionality of corporal punishment in the home.

[88] *HH 718-14 CRB R 87/14.*
[89] *CCZ 10/19.*
[90] *HH 148-17.*
[91] *2018 (1) SACR 64 (GJ).*
[92] *2019 ZACC 34.*

Chapter 2

International law and constitutional framework providing a sound basis for constitutional challenge of corporal punishment in the home in Zimbabwe

2.1 Introduction.

Zimbabwe is a party to international and regional instruments providing for promotion and protection of children's rights, in particular the Convention on the Rights of the Child[93] and the African Charter on the Rights and Welfare of the Child.[94] There is harmony between international instruments and the Constitution of Zimbabwe on the idea that children are vulnerable and deserve special protection.[95] The Constitution of Zimbabwe[96] is a progressive and developmental constitution, which is bent towards respect of human rights.[97] Zimbabwean children are beneficiaries of all the human rights and freedoms enshrined in the Constitution (except where these are expressly reserved for adults such as the right to vote), and certain special rights are accorded to them in a dedicated section. Corporal punishment in the home violates the right to dignity and freedom from torture or cruel, inhuman or degrading treatment or punishment. The continued use of corporal punishment in the home will have to be viewed in the Constitutional mirror.[98] This Chapter gives an account of international law, Zimbabwean constitutional framework and arguments that are central to possible litigation challenging corporal punishment in the home.

2.2 International law framework and provisions.

Zimbabwe is a member of the United Nations and the African Union. Most importantly, it has ratified the United Nations Convention on the Rights of the Child and the African

[93] Convention on the Rights of the Child, adopted by the United Nations General Assembly in 1989 (hereinafter CRC).
[94] African Charter on the Rights and Welfare of the Child adopted by the African Union in 1990 (hereinafter ACRWC).
[95] S 19 and 81 of the Constitution of Zimbabwe.
[96] Constitution of Zimbabwe Amendment (No. 20) act 2013 (hereinafter the Constitution).
[97] J Sloth-Nielsen 'Southern African Perspectives on Banning Corporal Punishment-A comparison of Namibia, Botswana, South Africa and Zimbabwe' in Saunders B J et al (ed) Corporal *punishment of Children* (2019) 252.
[98] Government of Zimbabwe 'Initial report of the Republic of Zimbabwe under the African Charter on the Rights and Welfare of the Child' 2013 page 29 para 5.7.

Charter on the Rights and Welfare of the Child,[99] which are the most important treaties on the subject of corporal punishment of children in the home. International and regional treaties play an important role in determining the legitimacy of corporal punishment in the home. Couzens, in her doctoral thesis analysing the application of the CRC by national courts, affirms that reference to the CRC framework strengthens the weight and legitimacy of the constitutional norm at stake.[100]This demonstrates that international and regional treaties form a solid foundation for children rights litigation more so where there is compatibility between the international law and domestic standards. Section 46(1) (c) of the Constitution states that when interpreting rights a court 'must take into account international law and all treaties and conventions to which Zimbabwe is a party'.[101]This means that Zimbabwe is bound by the CRC and ACRWC, must perform its obligations in good faith, and may not invoke provisions of its domestic laws as its justification for its failure to perform under a treaty.[102] The Committees overseeing implementation of the CRC and the ACRWC have made it clear that ending violence against children includes the banning of corporal punishment in all settings.[103] Litigation challenging the practice will rely on the relevant general comments and concluding observations, given that the current legal system of Zimbabwe lacks clear legislative provisions and case law prohibiting the practice in the home.[104]

2.2.1 Convention on the Rights of the Child.

The CRC is the first treaty that addresses directly the subject of protection of children from violence.[105] In 1990, Zimbabwe ratified the CRC. By so doing, the government made a strong statement on its commitment to protection of children's rights. The LH Constitution, which was the supreme law by then only provided for civil and political

[99] Initial report of the Republic of Zimbabwe under the African charter on the Rights and Welfare of the Child (2013) 8-12.
[100] M Couzens 'The application of the United Nations Convention of the Rights of the Child by national courts' 2019 *LLD thesis University of Leiden* 175.
[101] S 46(1) (c) of the Constitution.
[102] Article 17 & 46 of the Vienna Convention on the Law of Treaties 1969.
[103] CRC/C/GC/13 para 17.
[104] B Bhaiseni 'Zimbabwe Children's Act alignment with international and domestic legal instruments: unravelling the gaps' 2016 *African Journal of Social Work* 3-6.
[105] MDA Freeman 'Upholding the dignity and best interest of children: International law and the corporal punishment of children' (2010) 73 *Law and Contemporary Problems* 219.

rights, and did not make specific provision for children. Fambasayi and Moyo describing the LH Constitution, submit that it 'was an invisible constitution, in terms of which children were neither seen nor heard, and not accorded special recognition'.[106]In the absence of the CRC, it meant that the courts could only rely on common law and legislation when determining child related matters in Zimbabwe.[107] The legal system offered little to uphold child rights. Mezmur submits that before the adoption of the CRC children were 'considered to be the property of their parents' and 'treated as mini human beings'.[108]He notes that Zimbabwe is amongst the pioneer countries to ratify the CRC in Africa, however, he observes that ratification without implementation of the CRC is not enough.[109]

The CRC is anchored on four cardinal principles or the 'soul of the treaty',[110] which are critically important in children enjoying their rights. The four cardinal principles are article 2: non-discrimination, article 3: best interests, article 3: right to life, survival and development, and article 12: child participation. The principles are relevant in determining the legitimacy of corporal punishment in the home. Article 4 of the CRC is also of crucial importance, as it places a positive immediate duty on Zimbabwe to undertake all appropriate legislative, administrative and other measures for the implementation of the rights of children.[111]Banning corporal punishment through litigation would not only protect children from physical punishment but also show Zimbabwe's commitment to comply with the CRC. However, it seems more likely that litigation, rather than legislation, is the most likely route to tackle corporal punishment in the home. The next section of this chapter therefore identifies the rights in the CRC,

[106] R Fambasayi and A Moyo 'The best interests of the child offender in the context of detention as a measure of last resort; A comparative analysis of legal developments in South Africa, Kenya and Zimbabwe' 2020 *South African Journal of Human rights* 45.
[107] Fambasayi & Moyo (2020) *SALJ* 45.
[108] BD Mezmur 'The United Nations Convention on the Rights of the Child' in Boezaart (ed) *Child law in South Africa* (2017) 403.
[109] Mezmur (2017) 404-405.
[110] Mezmur (2017) 403.
[111] CRC Article 4 provides that 'State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, State parties shall undertake such measures to the maximum extent of their available resources and where needed, within the framework of international co-operation.'

which are likely to be the basis of arguments in litigation determining the constitutionality of corporal punishment in the home.

2.2.1 (a) Right to dignity

Although there is no self-standing right to dignity in the CRC, it indirectly emphasises dignity in a number of articles. Article 37(a) provides for the right of the child not to be subjected to cruel, inhuman, or degrading treatment or punishment. Freeman argues that article 37(a) is crafted in a way that protects both dignity and the physical and mental integrity of the child.[112] Not only does the article make it a right, it places an obligation on states to comply by ensuring protection against acts that infringe the dignity of a child. Article 28(2) requires states to take all appropriate measures to ensure that school discipline is carried out in a way that is consistent with the child's human dignity, and that conforms to the CRC.[113] Even though the article clearly addresses disciplining of children in schools, it underscores the principle that dignity of children must be protected. Reyneke asserts that dignity commands that, 'nobody should thus be merely the object of someone else's acts'.[114] Woolman shares Reyneke's view; he asserts that dignity calls for 'refusal to turn away from suffering and duty to recognise your fellow citizens as autonomous beings'.[115] He points that dignity implies equal worth of humanity and acknowledging the existence of fellow beings. Corporal punishment of children in the home involves disciplining of children by parents, which causes suffering, pain and humiliation. Dignity requires children to be treated as humans as opposed to 'instruments or objects of the will of others.'[116]

Furthermore, the CRC, Article 40(1) states that accused children (children in conflict with the law) must be treated in a manner consistent with their sense of dignity. This implies that children's misbehaviour does not take away their dignity in the eyes of those who are supposed to guide them on the noble and correct path. This understanding has been powerful in the abolition of corporal punishment in the school

[112]Freeman (2010) 73 *Law and Contemporary Problems* 215.
[113] Freeman (2010) 73 *Law and Contemporaryy Problems* 215. Punishment should rehabilitate and not mark a child's body.
[114] M Reyneke 'The right to dignity and restorative justice in schools' *PER/PELJ* (2011) 131.
[115] S Woolman 'Dignity' in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* (2013) 2699-2773.
[116] Woolman (2013) 2700.

and administration of justice. Dignity as a value forbids the use of physical violence as a means to enforce discipline. Woolman postulates that dignity is a founding value, which lays a solid ground for constitutional democracy, and the bill of rights.[117] He argues that dignity informs interpretation of constitutional provisions and bills of rights and is the compass on which justification of the limitation of rights or freedoms are anchored. The provisions of the CRC and the views of the scholars mentioned above make it clear that the question of whether physical punishment of children in the home should be prohibited or not shall be hugely influenced by the court's interpretation of the right to dignity. To give some clarity on dignity and its relation to corporal punishment, it is interesting to consult the general comment of the CRC Committee on the aims of education.

2.2.1 (a) (i) General Comment No. 1: Aims of Education

In 2001, the Committee adopted its first ever-general comment.[118] Although, this general comment addresses corporal punishment in the school setting, it emphasises the point that the CRC is against the use of violence on children as discipline. The general comment provides that 'children do not lose their human rights by virtue of passing through the school gates education must be provided in a way that respects the inherent dignity of the child'.[119]The paragraph makes it clear that the dignity of children must be the focal point in child disciplining. It therefore follows that even in the home; disciplining children need to consider their dignity. The general comment give room to litigators to challenge children's loss of dignity in the home by virtue of being under parental authority and subjected to violence.[120]

2.2.1 (b) Freedom from torture or other cruel, inhuman degrading treatment or punishment.

Article 19 is at the heart of the subject of corporal punishment in the home. It provides that 'state parties shall put all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental

[117] Woolman (2013) 2732.
[118] General Comment No. 1 (2001) The aims of education, 17 April 2001.
[119] CRC/ GC/2001/1 para 38 and 40.
[120] CRC/GC/2001/1 para 38 and 40.

violence…, while in the care of parent(s), legal guardian(s) or any other person who has care of the child.'[121]The provision makes it clear that parents or legal guardians should not subject a child to any form of physical violence. It addresses all family unit set ups thus leaving no room for exceptions, justification or excuse to use physical punishment on children in the home. Writing in 2010, Freeman points out that the CRC Committee regularly affirms that, in this provision and others, corporal punishment by parents and others is outlawed by the Convention.[122] To bring clarity to the interpretation of Article 19, the Committee issued a general comment discussed below.

2.2.1 (b) (i) General Comment No. 8: The right to protection from corporal punishment and other cruel or degrading forms of punishment.

This particular general comment highlights the obligation of state parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment on children 'in many settings, including the home and family'.[123] The general comment provides that eliminating corporal punishment is an immediate and unqualified obligation of state parties.[124]Most importantly, the general comment makes it clear that a child is a holder of human rights and 'not a possession of parents, nor…simply an object of concern'.[125] The position that children are autonomous beings is of great significance in litigating for the ban on corporal punishment. It brings into consideration child participation on the subject given that they are on the receiving end of the practice. The general comment emphasises that eliminating corporal punishment of children is a key strategy for reducing and preventing all forms of violence in societies. It also proffers a definition of corporal punishment as 'any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light'.[126]The Committee accepts that children need discipline in the form of 'necessary guidance and direction' and such guidance need not involve violence and humiliation.[127]In addition, the committee

[121] Article 19(1) of the CRC.
[122] Freeman (2010) 216.
[123] CRC/C/GC/8 para 12.
[124] CRC/C/GC/8 para 22.
[125] CRC/C/GC/8 para 47.
[126] CRC/C/ GC/8 para 11.
[127] CRC/C/GC/8 para 14-15.

accepts that it may be necessary in some instances to intervene physically to protect children from harm for example pulling a child away from danger. The Committee also recognises 'the right of every person to other's respect for his or dignity and physical integrity and equal protection under the law'.[128] The provision sends a clear message that children are equally worthy of the dignity accorded to adults, where their rights are violated, they are entitled to seek immediate redress like any other citizens.

2.2.1 (c) Best interests

The CRC provides for an important fundamental norm of the child's 'best interests'. Article 3 states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.[129] Mezmur asserts that the best interests is controversial in nature and its appropriate meaning is not established.[130] Many scholars indicate that best interests is value laden and to some extent indeterminate.[131] Skelton's critique in 2019 questions whether over-reliance on best interests by the South African courts is 'too much of a good thing'. She argues that the courts have sometimes gone too far in interpreting children's rights under the best interests 'rubric' even where there are other constitutional rights being violated. She points out that the best interest concept does not supplant rights and the court must guard against romanticism, simplification and 'papering over the cracks of complexity'.[132] Article 3 of the CRC, does not necessarily refer to parents. The article seems to address legislative and administrative public and private authorities in contact with children. However, Article 3 read together with article 5 and 18(1) states that '…parents have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern',

[128] CRC/C/GC/8 para 16.
[129] Article 3 of the CRC.
[130]BD Mezmur 'The United Nations Convention on the Rights of the Child' in Boezaart (ed) *Child law in South Africa* (2017) 412.
[131]Mezmur (2017) 412; Freeman (2010) 73 Law Contemporary Problems 216; S Chirawu 'Longing for the wisdom of King Solomon: custody and the best interests of the child concept' 2013(1) *University of Zimbabwe Student Journal* 57-74; R Fambasayi and A Moyo 'The best interests of the child offender in the context of detention as a measure of last resort: a comparative analysis of legal developments in South Africa, Kenya and Zimbabwe' (2020) *South African Journal on Human Rights* 25-48.
[132] A Skelton 'Too much of a good thing? Best interest of the child in South African Jurisprudence' 2019 *De Jure* 557-579.

suggest that parents must consider the child's best interests. The CRC Committee issued a general comment in 2013, clarifying Article 3, which is discussed in the next section.

2.2.1 (c) (i) General Comment 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration.

The CRC Committee has expounded on the interpretation of best interests in its General Comment No 14.[133] The general comment provides that the best interest concept is a threefold concept, a substantive right, fundamental interpretative legal principle and a rule of procedure.[134] The relationship between the child's best interests and constitutional prohibition of corporal punishment is attributed to the link it has with other general principles in the CRC.[135] Zermatten submits that the relationship between corporal punishment and best interests can only become clear through realising a child as an individual, considering the short-medium-long term effects of the practice. He adds that one must also bear in mind that the child is a human being in development, the global spirit of the CRC and adopting an interpretation that is not cultural relativist or that denies children protection.[136] He elaborates that parents cannot use the best interest concept 'to justify practices like corporal punishment and other forms of cruel or degrading punishment which conflict with the child's human dignity and the right to physical integrity.'[137] Although Zermatten's report was written prior to the adoption of the general comment 14, it gives a helpful explanation of how the best interests principle relates to corporal punishment in the home. General comment 14 embraced Zermatten's report and his submissions were included into the provisions in paragraph 16.

[133] CRC/C/ GC/14
[134] CRC/C/GC/14 para 1.
[135] CRC/C/GC/14 para 41 and 44.
[136] J Zermatten 'The best interests of the child principle: Literal analysis and function' 2010 (18) 4 *The International Journal of Children's Rights* 483-499.
[137] Zermatten 2010 (18) 4 *The International Journal of Children's Rights* 490.

2.2.2 United Nations Committee on the Rights of the Child: Concluding Observations: Zimbabwe

The CRC Committee's concluding observations in response to Zimbabwe's initial report was adopted in February 1995. The Committee noted that the LH Constitution which was then in force, particularly section 37(a), adequately provided against cruel, inhuman or degrading treatment or punishment.[138]However, the same Constitution in section 15(3) (b) provided that corporal punishment on those below 18 years of age was not inhuman and degrading.[139] The Committee noted that the issue of corporal punishment remained controversial in that the child best interests' principle was in conflict with administering of corporal punishment.[140]

The second report was presented to the CRC Committee in January 2016.[141]The Committee's concluding observations recommended the state to take all measures necessary to address its previous recommendations of 1995, which had not been sufficiently implemented, and, in particular, those relating to reviewing of the national legal framework,[142] and specifically, forbidding corporal punishment.[143]The Committee welcomed the new constitutional guarantee of freedom from torture or cruel, inhuman or degrading treatment or punishment. However, it expressed its concern that corporal punishment remained legal and widely practiced in the family and about the existence of legislative provisions and Government policy allowing the administration of reasonable or moderate corporal punishment.[144]The Committee made reference to General comment No.8[145] and reiterated the concluding observations to the initial Zimbabwe report that recommended the state to repeal or amend, all legislation and administrative regulations in order to explicitly prohibit corporal punishment in all settings as a correctional or disciplinary measure.[146]

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[138] Section 37(a) of the LH Constitution.
[139] Section 15(3) (b) of the LH Constitution. The provision is more complex than what it seems in the above discussion.
[140] CRC/C/3/Add.35 (1995) para 68.
[141] CRC/C/ZWE/CO/2 (2016).
[142] CRC/C/ZWE/CO/2 para 22.
[143] CRC/C/ZWE/CO/2 para 31.
[144] CRC/C/ZWE/CO/2 para 18.
[145] General Comment No.8 (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment.
[146] CRC/C/3/Add.35 (1995) para 31.

Despite the clear and consistent direction given by the CRC Committee since 1995, there has been a failure by the Zimbabwe legislature to amend or repeal the laws providing for physical punishment.[147]Given the above circumstances, litigation challenging the practice would be the most effective and immediate route to protect the best interests of the child enshrined in the CRC. The Zimbabwean delegation presenting its second report to the Committee, upon inquiry by the members of the Committee on continued use of corporal punishment, went on to cite the case of *S v Chokuramba*[148] that dealt with judicial punishment of children. The delegation did not table any efforts by the executive or the legislature to address the practice, and instead laid emphasis on the fact that there was a matter before the court. The response of the government, weighed against the background of the 1995 and the 2016 reports and concluding observations, spanning from the era of the LH Constitution to the new Constitution portrays the lack of urgency or desire on the part of the government to deal with the ban of the practice. Section 241(2) of the Criminal Law (Codification and Reform) Act, 23 of 2004 is a good example, as it authorises parents and guardians to administer moderate corporal punishment. In addition, the Children Act of Zimbabwe, 22 of 1971 still provides for corporal punishment in the home whereas the new Constitution provides for promotion and protection of children rights.[149]The continued legal existence of corporal punishment in Zimbabwe may therefore be credited to the Legislature's indecisiveness to amend and repeal legislation, which perpetuates the practice in the home.

2.2.3 Universal Periodic Review of Zimbabwe's human rights.

Zimbabwe was examined in the first cycle of the Universal Periodic Review in 2011.[150]The report by the Government stated that, 'Zimbabwe administers corporal punishment to juveniles.'[151] The UN Human Rights Council recommended Zimbabwe to 'prohibit corporal punishment as a form of sentence as well as prohibit corporal

[147] CRC/C/ZWE/CO/2 (2016) para 42-43.
[148] *CCZ 10/19.*
[149] S 7(6) of the Children Act of Zimbabwe provides that parents or guardians have a right to administer reasonable punishment to a child.
[150] Universal Periodic Review, Session 12, Zimbabwe, 2011.
[151] A/HRC/WG.6/12/ZWE/1 (2011) para 49.

punishment in all other settings; ratify the CAT, clearly criminalise torture and ban all kinds of corporal punishment'.[152]

Zimbabwe accepted the recommendations.[153] However, it took no steps to rectify the problems, and in its second examination, which took place in 2016, the Council again recommended government to abolish corporal punishment in all settings; and strengthen child protection systems in full compliance with international human rights obligations, including the implementation of national child protection programmes by December 2018.[154]

At the Human Rights Council session in March 2017, the government of Zimbabwe submitted that it was not able to support the recommendation concerning corporal punishment. The reason given was that the matter dealing with the constitutionality of the practice was pending before the Constitutional Court.[155] The government also stated that it was considering enacting a legal ban.[156]From this, it is apparent that Zimbabwe finds it difficult to prohibit the practice in the domestic sphere, but is trying to shield the state from criticism in the international sphere. The legislative arm of the government has the power to promulgate a law that explicitly bans corporal punishment in all settings. Rather than exercising its legislative powers to resolve the issue the legislature have chosen to rely on court rulings.

2.2.4 African Charter on the Rights and Welfare of the Child

Mezmur submits that the African Charter on the Rights and Welfare of the Child[157] (hereafter the 'African Charter') complements the CRC and its protocols, and provides an African perspective to the specific needs of African children.[158] Article 16(1) of the African Charter provides that state parties shall take specific legislative, administrative, social, and educational measures to protect the child from all forms of torture, inhuman or degrading and especially physical or mental injury. The African Charter also

[152] A/HRC/19/14 (2011) para 94(22) and 95(5).
[153] A/HRC/19/2 (2011) para 706.
[154] A/HRC/WG.6/26/L5 (2016) para132 (81).
[155] A/HRC/34/8/Add.1 (2017) para 31.
[156] A/HRC/34/8/Add.1 (2017)
[157] Herein after referred to as the 'African Charter'.
[158] Mezmur (2008) 23 SA Public Law 1.

addresses parental responsibility in relation to their children. Article 20 (1) further states that parents or other persons responsible for the child shall have the primary responsibility for the upbringing and development of the child and shall have the duty:

a) to ensure that the best interests of the child are their basic concern at all times;
b) …
c) To ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.

The African Charter also take into cognisance the existence of harmful social and cultural practices in African states. Article 21(1) provides that states shall take appropriate measures to eliminate harmful and social practices affecting the welfare, dignity, normal growth and development of a child and in particular:

a) …
b) Those customs and practices discriminatory to the child on the grounds of sex or other status.

There are strong arguments that corporal punishment is inhuman or degrading treatment of children, and conflicts with the principle of best interests of the child. It can further be argued that it is also discriminatory in its application in that it applies to children purely because of their status as children. Credit must be given to the drafters of the African Charter in that by addressing harmful social and cultural practices, which are sometimes used to justify the practice, arguments relating to culture are neutralised.[159] Even though corporal punishment is not explicitly prohibited, it may be argued that the wording of the African Charter leaves no loopholes for its retention. The African Charter upholds the principle of child protection, dignity, equality and freedom from all forms of inhuman or degrading punishment, which are foundational pillars of the constitutional challenge of the practice in the home.

[159] Sloth-Nielsen (2019) 264.

In March of 2011, the African Committee of Experts on the Rights and Welfare of the Child[160] set out a statement on violence against children, which provides as follows:

> 'The notions deeply rooted in the social and cultural norms and traditions which accept, tolerate and indeed encourage violence, including sexist clichés, racial or ethnic discrimination, the acceptance of corporal punishment and other harmful traditional practices should be publicly condemned and eliminated. The harmful consequences that all forms of violence can have on children should be widely publicised'[161]

The statement cleared all misunderstandings on the subject. Therefore, litigation challenging the practice in Zimbabwe is well within the confines of the regional African Charter on the Welfare and Rights of the Child. As a member state, Zimbabwe cannot take lightly its obligation. Mezmur notes that the African Charter offers an appropriate standard, which addresses African realities. According to the End Corporal Punishment global report of March 2021, only 62 states have banned corporal punishment in the home.[162] Zimbabwe is amongst the 137 states that have not yet banned the practice. The report indicates that Zimbabwe ranks within the category of states without a clear commitment to law reform.[163] Magadze, Shayamano and Lupuwana, submit that in Zimbabwe, corporal punishment 'has been viewed in a positive light; however perceptions are changing due to globalisation'.[164]Despite evidence that ten African countries have achieved a total ban of the practice,[165] Gudyanga, Mbengo and Wadesango submit that findings from a school survey on the issues and challenges surrounding the notion of corporal punishment proves that

[160] African Committee of Experts on the Rights and Welfare of the Child (Herein after African Committee of Experts)
[161] African Committee of Experts on the Rights and Welfare of the Child: Statement on violence against children (2011).
[162] Legality Table (March 2021) available on endcorporalpunishment.org
[163] Legality Table (2021).
[164] TO Magadze, M Shayamano & VP Lupuwana 'Government outlawing of corporal punishment: perspectives from guardians in Zimbabwe' (2020) 33 *Acta Criminologica* 44-57.
[165] Progress in Africa endcorporalpunishment.org Benin, Togo , Guinea, Cabo Verde, South Sudan, Kenya, South Africa, Congo Republic , Tunisia have banned corporal punishment in the home.

parents and guardians still view outlawing the practice as an American or European way of raising children not compatible with a typical family home in Zimbabwe.[166]

2.2.5 Zimbabwe's state party report to the African Committee of Experts on the Rights and Welfare of the Child.

In 2013, Zimbabwe submitted its initial report to the African Committee of Experts on the Rights and Welfare of the Child.[167] Fambisayi and Magaya note that the report should have been submitted in 2003,[168] and they point out that Zimbabwe's failure to comply with its reporting obligations deprived the African Committee to review its implementation of the ACRWC.[169] The report did not address corporal punishment. Rather, it reiterated that the new Constitution guaranteed the right to human dignity, freedom from torture, inhuman and degrading punishment and any other such treatment and that this applied equally to children.[170] It also stressed the point that the Children's Act prohibits assault of children by their parents or guardians. The role of the Domestic Violence Act was emphasised, in that it recognises children as potential victims of domestic violence.[171] In its Concluding Observations to the initial report, the African Committee of Experts noted its concern about Zimbabwe's failure to put in place measures to prohibit corporal punishment and said:

> 'While appreciating the State party for taking various legislative and administrative measures to protect children from abuse and torture, the Committee is concerned of the fact that children could be still sentenced by courts for whipping. The committee, therefore recommends the State Party to expedite the adoption of the General Amendment Bill as it has the effect of

[166] E Gudyanga, F Mbengo & N Wadesango 'Corporal punishment in schools: issues and challenges' 2014 (5) 9 *Mediterranean Journal of Social Science* 493-500.
[167] Initial Report of the Government of Zimbabwe under the African Charter on the Rights and Welfare of the Child 2013.
[168] I Magaya & R Fambasayi 'Giant leaps or baby steps? A preliminary review of the development of children's rights jurisprudence in Zimbabwe' 2021 *De Jure Law Journal* 16-34.
[169] Magaya & Fambasayi (2021) *De Jure Law Journal* 21.
[170] Initial Report of the Government of Zimbabwe under ACRWC (2013) 29 para 5.7.
[171] Initial Report of the Government of Zimbabwe under ACRWC para 5.7.

prohibiting child whipping and to abolish corporal punishment in all settings and to promote alternative positive disciplinary measures.'[172]

Recently, in its combined report under the African Charter on Human and Peoples' Rights, Zimbabwe made an interesting and progressive submission.[173] It submitted that:

> 'In its concluding observations, the Commission passed a recommendation for Zimbabwe to repeal laws that sanction the application of corporal punishment: the High Court of Zimbabwe declared that corporal punishment is unconstitutional in the case of S v Chokuramba, HH 718/14. This decision has since been confirmed by the Constitutional Court, which held that judicial corporal punishment is by its nature an inhuman and degrading punishment as contemplated in section 53 of the Constitution. The court further underscored that corporal punishment inflicted on juveniles in schools and in homes by their parents, legal guardians or persons in loco parentis is unconstitutional. This locus classicus case thus effectively outlaws any form of corporal punishment on juveniles in Zimbabwe.'[174]

The government's interpretation of the Constitutional Court judgment is incorrect in that the court avoided giving a determination on the constitutionality of corporal punishment in the home. As such, a ruling dealing with specifically the constitutionality of judicial whipping cannot be stretched to cover the home setting. The above submission viewed from another angle shows that the government accepts that the practice is in violation of section 53 of the constitution of Zimbabwe. Perhaps what is lacking to curtail the practice is only an order specifying the prohibition in the home.

[172] African Committee of Experts on the Rights and Welfare of the Child Concluding observations on Zimbabwe Initial Report (October 2015) para 26.
[173]The Republic of Zimbabwe 11th, 12th, 13th, 14th and 15th Combined Report under the African Charter on Human and Peoples' Rights And 1st, 2nd, 3rd and 4th Combined Report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (2019).
[174]The Republic of Zimbabwe Combined Report under the ACHPR (2019) 17 para 2.10.

2.3 Constitutional framework.

Sloth-Nielsen argues that a constitution is a precondition for judicial abolition through a court challenge, and it must be clear about the protection it affords to children's dignity and the right to be free from cruel, inhuman or degrading treatment or punishment.[175] She postulates that constitutional protection of children's full right to bodily integrity is a pre-requisite for a successful legal challenge. The new Constitution of Zimbabwe provides a solid foundation for protection and enforcement of children rights.

Chapter 1 of the Constitution provides for founding provisions, which form the cornerstone upon which all other sections of the Constitution are anchored particularly section 2, which provides that:

(1) This Constitution is the Supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
(2) The obligation imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.

The section makes it clear that the Constitution is the yardstick or standard against which every law, conduct or practice is measured. The common law and legislative provisions[176] authorising reasonable chastisement by parents in the home does not escape the scrutiny. Section 3 further provides that:

(1) Zimbabwe is founded on respect of the following;
(a) Supremacy of the constitution

(c) fundamental human rights and freedoms;

(d) recognition of inherent dignity and worth of each human being;

[175] Sloth-Nielsen (2019) 264.
[176] Children Act [Chapter 5:06], section 7(6) Nothing in this section shall be construed as derogating the right of any parent or guardian of any child or young person to administer reasonable punishment to such child or young person.

(f) recognition of the equality of all human beings;

(2) (i) recognition of the rights of-

(iii) women, the elderly, youth and children:

The abovementioned provisions imply that the Constitution seeks to advance human rights of children as one of the vulnerable groups in the society. The provision also stresses the principle of equality and human dignity. Fowkes, writing in relation to South African Constitution which shares some similarities with the Zimbabwean Constitution, asserts that founding provisions have an interpretive significance, are a source of legal obligations and enforcement.[177] The Zimbabwean founding provisions establish key values that are very important in realisation and enforcement of children rights in the bill of rights. Skelton asserts that the 'supremacy of the Constitution gives life to the fact that any law or conduct can be measured against the constitution and if it is found not to comply… it can be declared invalid by a court.'[178] Corporal punishment as discussed below infringes several rights in the declaration of rights. This means that should the court find the legislative provisions and common law defence of reasonable chastisement unconstitutional, there is a possibility that it will nullify the relevant sections passed by the legislature.[179]

The new Constitution provides for National objectives in Chapter 2. Magaya notes that the National Objectives are 'elaborate and expansive, present a lofty and aspirational framework of guidance….in formulation and implementation of law'.[180] He points out that justiciability and constitutional interpretation are the two concepts central to developing jurisprudence of the rights in Chapter 2. He draws his finding from section 46(d) which serves as an interpretation guideline of the declaration of rights.[181]He affirms that the National Objectives contained in Chapter 2 are

[177] J Fowkes 'Founding provisions' in Woolman S and Bishop M (eds) *Constitutional law of South Africa* 2013 (ch13 p10-25)
[178] A Skelton 'Constitutional protection of children's rights' in Boezaart T (ed) *Child law in South Africa (*2017) 328.
[179] Skelton (2017) 329.
[180] Magaya (2016) 6 *Journal of Civil & Legal Sciences* 1.
[181] Section 46(d) of the Constitution provides that when interpreting the Bill of Rights a court, tribunal, forum or body; 'must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2...'.

justiciable.[182]Magaya and Fambisayi dispute that national objectives are justiciable and enforceable in courts.[183] They argue that the national objectives provide guidance when developing laws and policies. Section 19(2) (c) under the National Objectives stresses that state must ensure that children 'are protected from maltreatment, neglect or any form of abuse'. Abuse is a component of corporal punishment. Given that, the National Objectives are a framework of guidance it is clear that the subject of corporal punishment stands to be scrutinised in order to curb abuse. Perhaps, litigators may rely on section 19(2) (c) which is part of the National Objectives to prove the need by the state to address corporal punishment so as to protect violation of constitutional rights of children.

Chapter 4 of the Constitution of Zimbabwe is made up of the declaration of rights. It is important to note that the chapter is very similar to Chapter 2 of the South African Constitution, commonly known as the bill of rights. The Zimbabwean declaration of rights provides for fundamental human rights and freedoms. In relation to corporal punishment, the Constitution confers rights to human dignity, personal security, freedom from torture or cruel, inhuman or degrading treatment or punishment, equality and non-discrimination, and the rights of children that encompass amongst other rights the obligation to ensure their best interests. The Constitution's declaration of rights[184] places a positive immediate obligation on the persons and state institutions to respect, protect, promote, and fulfil the rights enshrined in the Chapter. Although, the declaration of rights provides for the aforementioned rights, section 241 of the Criminal Law (Codification and Reform) Act, 23 of 2004 and section 7(6) of the Children Act, 22 of 1971 make it legal for parents or guardians to administer reasonable punishment.[185] This dissertation argues that the legislative provisions violate fundamental human rights and freedoms. The impugned rights are discussed below.

(a) Right to dignity

[182] Magaya (2016) 6 *Journal of Civil and Legal Sciences* 3.
[183] Magaya & Fambisayi 2021 *De Jure Law Journal* 26.
[184] Chapter 4 of the Constitution.
[185] Children Act Chapter 5:06 section 7(6) 'Nothing in this section shall be construed as derogating from the right of any parent or guardian of any child or young person to administer reasonable punishment to such child or young person.'

Section 51 provides that every person has inherent dignity in their private and public life, and the right to have that dignity respected and protected. The home constitutes a private life setting, however the law places a positive immediate duty on every one including parents to have children dignity respected and promoted. The right to dignity is an absolute right.[186] In *S v Chokuramba*,[187] the Constitutional Court had to decide on the unconstitutionality of judicial corporal punishment order made by the High Court. The High Court held that section 353 of the Criminal Procedure and Evidence Act, which authorised the sentence of whipping of juvenile male offenders, was unconstitutional. Deputy Chief Justice Malaba (as he was then), stated that section 51, 52(a)[188] and 53[189]of the Constitution 'protects the person as such.'[190] The court further stated that human dignity 'asserts the worth of the person who is imbued with it. We cannot define what a human being is without recourse to an essential characteristic such as inherent dignity.'[191]The court stressed on the importance of human dignity and went a step further to state that:

> 'Human dignity is a special status which attaches to a person for the reason that he or she is a human being. Human dignity is innate in a human being. It remains a constant factor and does not change as a person goes through the stages of development in life. 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.'[192]

The above findings show that the Constitutional Court of Zimbabwe is strongly inclined to give a decision that protects and promotes human dignity. The court emphasised that dignity is not a creature of the law neither is it bestowed on person by age. This means that children possess dignity from the day they are born. The judgment in *S v*

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[186] Section 86(3) no law may limit the following rights enshrined in this Chapter, and no person may violate them:
(b) the right to human dignity.
[187] *CCZ 10/19*.
[188] S 52(a) of the Constitution provides for a right to bodily and psychological integrity and for the right to freedom from all forms of violence from public or private sources.
[189] S 53 provides for the right to freedom from torture or cruel, inhuman or degrading treatment or punishment.
[190] *S v Chokuramba* 14 para 3.
[191] *S v Chokuramba* 19 para 1.
[192] *S v Chokuramba* 19 para 3.

Chokuramba signals that future litigation challenging physical punishment of children in the home will need to show that the practice infringes dignity. Despite several rights being infringed by the practice the whole judgment by Malaba DCJ addressed human dignity vis- a- vis corporal punishment.

(b) Right to personal security

Section 52 is one of the most important provisions relating to corporal punishment of children in the home in Zimbabwe. The section emphasises the position of the law that everyone, children included 'has the right to bodily and psychological integrity which include the right to freedom from all forms of violence from public or private sources.'[193]The provision is very similar to the South African Constitution, section 12 (1) (c). The South African Constitutional Court in the case of *Freedom of Religion South Africa v Minister of Justice and Constitutional development and Others*[194]*(hereinafter FORSA)* found that reasonable or moderate chastisement unconstitutional. The court unanimously found that the common law defence was inconsistent with the constitutional right to dignity and freedom from all forms of violence either from public or private sources. The court held that corporal punishment entails use of force or violence to cause displeasure, fear or hurt with main purpose of disciplining a child.[195] Even though the *FORSA* case has no binding effect within the Zimbabwean jurisdiction, it gives possible principles and arguments that the court will likely consider in banning the defence.[196]

(c) Freedom from torture or cruel, inhuman or degrading treatment or punishment

Section 53 of the Constitution provides that no person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment. Corporal punishment of children in the home involves infliction of pain and suffering on children. The Constitutional Court in *S v Chokuramba* stated that, 'the principle is that violence must not be used to enforce moral values or to correct behaviour'.[197]In

[193] S 52(a) of the Constitution of Zimbabwe.
[194] 2020 (1) SA 1 CC (hereinafter *FORSA* case)
[195] *FORSA* para 41.
[196] S 46(e) of the Constitution states that the court may consider relevant foreign law.
[197] *S v Chokuramba* 27 para 2.

short, the use of physical force by parents to instil values and discipline children lacks contemporary standards of decency[198] which require a person not to be treated as a mere object.[199]

The court also defined degrading punishment as 'punishment, the infliction of which involves debasement or humiliation of the person in his or her own esteem, exposes disrespect and contempt from fellow human beings superintending the administration of the punishment'.[200]The court's finding indicates that corporal punishment goes against the concept of decency. Even though the ruling addressed judicial whipping, it is very probable that litigation challenging the practice in the home will have to determine whether legal provisions allowing the practice are commensurate with the decency test.

(d) Equality and non-discrimination

The 2013 Constitution states that all persons are equal before the law and are entitled to equal protection and benefit of the law.[201] Discrimination based on age is deemed unfair,[202] unless the discrimination is fair, reasonable and justifiable in a democratic society based on openness, justice, dignity, equality and freedom.[203] Corporal punishment in the home involves physical punishment of children by parents. This kind of punishment is applicable to children, by virtue of their status. By targeting a specific group of persons, the practice appears, on the face of it, to violate the right to equality and non-discrimination that are the core tenets of human rights. Magaya and Fambasayi submit that the 2013 Constitution inclusion of a children rights clause 'underscores the status of Zimbabwean children as individual rights holders'.[204]They further indicate that the child rights clause does not waive the opportunity for children to claim all other rights in the Declaration of Rights.[205]The effect of the right to equality

[198] The contemporary standard of decency test is a product of American Supreme Court jurisprudence. The Zimbabwean apex courts first adopted the test in S v Ncube 1988 (2) SA 702. Since then the test has been consistently applied in corporal punishment challenges to find that the practice infringes human dignity.
[199] *S v Chokuramba* 22 para 2-3.
[200] *S v Chokuramba* 22.
[201] S 56(1) of the Constitution.
[202] S 56(3) of the Constitution.
[203] S 56(5) of the Constitution.
[204] Magaya and Fambasayi (2021) *De Jure Law Journal* 16-34.
[205] S 81 of the Constitution.

is that children like adults are entitled to dignity, freedom from torture, cruel, inhuman or degrading punishment, right to personal security discussed above. Weighed altogether with rights of children, the infringement of these rights boosts the prospect of the challenge succeeding in prohibiting corporal punishment.

(e) Rights of Children

The drafters of the Constitution of Zimbabwe had children in mind. This is evidenced by classification of the rights of the child in part 3 of the Bill of Rights. Part 3 titled Elaboration of Certain Rights is not only a repetition of rights which children enjoy in the general declaration of rights, it also emphasises children as a particular class of rights bearer. Section 81 lists the rights that children are entitled to as a class of persons. The section provides for a child's right to be protected from maltreatment, neglect or any form of abuse.[206] Section 81 of the Constitution of Zimbabwe is very similar to section 28 of the South African Constitution.

The Constitution makes it clear that a child's best interests are paramount in every matter concerning the child. Several judgments of the South African Constitutional Court[207] have stated that the right does not trump all other rights. Nevertheless, the Court has found it to be a powerful right. Friedman, Pantazis and Skelton observe that although the right does not trump other rights in the Constitution, it has a 'leg-up vis-à-vis other rights'.[208]

Section 81(3) of the Zimbabwean Constitution further provides that children are entitled to adequate protection by the courts, in particular the High Court as their upper guardian. There is a realistic possibility that litigation challenging reasonable chastisement in the Superior courts may be viewed as an attempt to give children adequate protection in the home.

[206] S 81(1) (e) of the Constitution.
[207] *S v Williams and others 1995 3 SA 632 (CC); Christian Education South Africa v Minister of Education 20000 4 SA 757 (CC); Minister of Welfare and population v Fitzpatrick and Others 2000 (30 SA 422 (CC); De Reuck v Director of Public Prosecutions 2003 3 SA 422 (CC); S v M 2008 3 SA 232 (CC).*
[208] A Friedman, A Pantazis & A Skelton 'Children Rights' in Woolman S and Bishop M (ed) *Constitutional Law of South Africa* (2013) 41.

Recent Zimbabwean Superior court jurisprudence on the subject of corporal punishment indicates that the courts are inclined towards the protection and realisation of children rights. In the case of *S v Chokuramba*[209] and *Pfungwa v Headmistress of Belvedere Junior Primary School*[210] the High court ruled that corporal punishment in the home violates the rights of children as set out in sections 51, 53 and 81 of the Constitution. However, the Constitutional Court, in its review of the *Chokuramba* case avoided giving a determination of the constitutionality of corporal punishment in the home, remarking that 'it is trite that courts generally loath to determine issues not brought before them'.[211]The court as matter of principle avoided descending into the litigants' ring given that the matter before it addressed judicial whipping and as such could not be stretched to cover all settings.

2.3.1 Justiciability of the impugned fundamental human rights and freedoms.

Skelton argues that for a case to be heard it needs to be real, deal with live issues as opposed to the 'hypothetical, abstract or merely academic'.[212] She submits that justiciability includes a consideration of the rules of 'standing, ripeness and mootness.'[213] Section 46(2) of the Constitution provides that, when interpreting an enactment, and developing the common law, a court, tribunal, forum or body must promote and be guided by the spirit and objectives of the declaration of rights. Corporal punishment of children in the home is a creature of statute, and of common law, however the Constitution gives room to challenge statutes and to develop common law.

The Constitution also provides for enforcement of fundamental human rights and freedoms.[214]Unlike its predecessor, the 2013 Constitution, Section 85 provides for enforcement of fundamental human rights and freedoms. A matter challenging the constitutional validity of corporal punishment in the home may be brought by:

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[209] *CCZ 10/19.*
[210] *HH 148-17*.
[211] *S v Chokuramba* 13 para 2.
[212] A Skelton 'Constitutional protection of children's rights' in Boezaart T (ed) *Child law in South Africa* (2017) 329.
[213] Skelton (2017) 329-330.
[214] S 85 of the Constitution.

a) any person acting in their own interests;
b) any person acting on behalf of another person who cannot act for themselves;
c) any person acting as a member, or in the interests, of a group or class of persons;
d) any person acting in the public interest;
e) any association acting in the interests of its members.[215]

Section 85 of the Zimbabwean Constitution is similar to section 38 of South African Constitution. Chirawu postulates that children in Zimbabwe lack capacity to litigate[216] until they reach the age of majority provided in section 15 of the General Law Amendment Act[217] and this is a significant hurdle given the nature of corporal punishment in the home. The Constitution does not give clarity on children's standing save to say any person acting in their own interests.[218] However, Zimbabwe in its Second Periodic Report to the UN Committee on the Rights of the Child indicated that there is no minimum age for children to seek redress before the courts and children can lodge complaint without parents.[219]This means that a child at any age may litigate on his or her own behalf. Recent child rights cases suggest that parents or only those who have become majors may litigate in courts.[220]The judiciary appears to take the view that children lack standing and can only litigate through their guardians or parents.

Although, the law in Zimbabwe is still developing with regard to children standing, lessons can be drawn from South Africa. Boezaart and de Bruin writing in 2011, submit that under South African common law children were generally considered to have no persona standi in iudicio and could only institute legal proceedings with assistance of their parents or guardians.[221] She notes that the South African, Children Act, 38 of 2005 amended the common law rules and children are now eligible to litigate in their

[215] S 85(1) (a)-(e) of the Constitution.
[216] Chirawu (2013) *University of Zimbabwe Student Journal* 9.
[217] General Law Amendment Act section 15 provides that a child becomes a major at 18.
[218] S 85(1) (a) of the Constitution of Zimbabwe.
[219] CRC/C/ZWE/2, 16 July 2013 para 111 and 112.
[220] Chiduza and Makiwane 2016 *PELJ* 5-8. In *Pfungwa* Case the mother of the child had to litigate on behalf of her daughter; *Mudzuru* Case the applicant were all above 18 years challenged child marriages which they were forced to enter before turning 18.
[221] T Boezaart & DW de Bruin 'Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate' 2011 *De Jure* 416-436.

own name.[222]Boezaart and de Bruin observe that the UNCRC provides that children can 'express their views freely' through participation and representation in matters affecting them.[223] They explain that participation encompasses the rules that give children the right to approach the courts directly and right to be consulted on their opinion without the assistance of an intermediary.[224] In the case of *Centre for Child Law v Governing Body of Hoerskool Fochville*,[225] the Supreme Court found that the Children's Act, section 14 and 15 were intended to 'create wide and generous mechanisms for the protection and enforcement of children's rights' which were not available at common law.[226] The court thus held that every child has a right to approach the court with or without assistance from parents, guardians or a curator ad litem.[227]

There has been noticeable jurisprudential development with regard to standing recently in Zimbabwe. The LH Constitution regime interpreted standing in a traditional, narrower manner and no one could ordinarily seek relief for legal injury suffered by another person. In *Mudzuru and Another v Minister of Justice*,[228] a landmark case, the bench developed the key principles of locus standi and public interest litigation. Even though, the case was premised on challenging legislation, which permitted child marriages, the case laid a solid jurisprudential foundation for would be litigators when challenging violations or infringements of children's rights in an applicable court. Sloth-Nielsen and Hove submit that the *Mudzuru* case brought significant jurisprudential contribution, firstly to the issue of standing to bring a constitutional challenge under the new Constitution, secondly to the use of international treaty law and foreign case law and lastly to the purposive approach to interpretation of relevant constitutional provisions relating to child rights.[229]

[222] Boezaart (2011) *De Jure* 417.
[223] T Boezaart 'General principles' in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act (Revision Service 6 2013)* 2-15.
[224] Boezaart (2013) 2-15.
[225] *Centre for Child Law v The Governing Body of Hoerskool Fochville 2016 2 SA 121*(Hereinafter *Fochville* case)
[226] *Fochville* para 23.
[227] *Fochville* para 23.
[228] *Mudzuru & Another v Minister of Justice, Legal and Parliamentary Affairs & 2 Others CCZ 12/15.*
[229] J Sloth-Nielsen & K Hove 'Recent Developments: Mudzuru & Another v Minister of Justice, Legal and Parliamentary Affairs & 2 Others: A review' 2015 *African Human Rights Law Journal* 554-568.

The court affirmed the legal position that an applicant should only act in a single capacity when approaching a court. This observation was necessitated by the application in *Mudzuru* where the applicant approached the court as a victim and a public interest litigator. It may be possible that, the applicant had in mind the traditional, narrow approach, which existed prior to the new Constitution hence the ploy to insulate the standing argument, which was likely to be raised during the proceedings. The respondent raised the issue as point in limine and the court avoided the narrow locus standing and proceeded to hear the case on the basis that the applicants were pursuing a public interest matter on behalf of children who are vulnerable members of the society.[230]

By so doing, Sloth-Nielsen and Hove submit, the bench in the *Mudzuru* case chose a wider interpretation of locus standi, meaning that the standing rule no longer serves as an overly restrictive tool used for narrowing access to litigation. The wider interpretation gives anyone with sufficient direct and indirect interest in a matter the right to be heard before an appropriate court of law. In light of the court's decision, one would say the new Constitution liberalised and gave the locus standi principle a much more generous interpretation. Chidyausiku CJ in the case of *Mawarire v Mugabe NO and Others* also acknowledged the locus standi development, where he stated that:

> *'Certainly this court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to save the threat, more so under the liberal post-2009 requirements.'*[231]

This sizeable jurisprudential development is a milestone by the Court in Zimbabwe. Litigation on infringement or violation of children's fundamental rights has significantly improved in comparison to the LH Constitution regime where all constitutional challenges of corporal punishment were ordinarily automatic confirmatory reviews. Mavedzenge disagrees with the court's finding that a litigant may only act in not more

[230] *Mudzuru* 3.
[231] CCZ 1/2013, 8.

than one capacity in a single matter. He argues that the purpose of the rule of standing is to ensure that 'the right to approach the court is fully facilitated'.[232] To support his claim he gives reference to Kenya and South Arica where litigants are able to litigate in more than one capacity.[233]

Furthermore, the CRC article 12(2) provides for the participation and representation of the child in judicial proceedings. The ACRWC article 4(2) also provides for child litigation although the wording is different from the CRC. According to the CRIN report of 2016 on access to justice for children, 'access to justice is a human right, but it is also what make other rights a reality.'[234] It emphasises that children must be able to litigate independently and the law must afford the legal personality, which make it possible for children to protect their interests in court.[235] The CRIN report on access for justice for children states that children in Zimbabwe may seek redress before the courts with or without parental assistance.[236] Given that legislation in Zimbabwe is not clear on children's standing, litigators will have to rely on international instruments to prove children's locus standi. The easiest legal route to avoid unnecessary argument on standing is to litigate in the name of civil societies like the Justice for Children Trust or the Zimbabwean Lawyers for Human Rights Trust, and this would insulate the planned case from the standing obstacle.

Litigation challenging the practice needs to comply with the constitutional principle of ripeness.[237] As mentioned above, the CRC and ACRWC concluding observations and recommendations handed down to Zimbabwe, as well as recommendations under the Universal Periodic Review of Zimbabwe highlight that prohibition of corporal punishment in the home is an urgent matter, and the government has acknowledged this. This means that litigation challenging the practice is ripe for hearing. In the case of *YG v S*,[238] upon appeal by the appellant against the conviction for assault of his

[232] J Mavedzenge 'The Constitutional Court of Zimbabwe's unconstitutional approach of applying rules of locus standi' 2019 *University of Zimbabwe Law Journal* 1-23.
[233] Mavedzenge 2019 *University of Zimbabwe Law Journal* 12.
[234] CRIN Rights, Remedies and Representation: Global Report on access to justice for children (2016) 5.
[235] CRIN (2016) 17.
[236] CRIN report on access to justice for children: Zimbabwe (2014) 2-3.
[237] Skelton (2017) 331.
[238] 2018 (1) SACR 64 (GJ).

child, the learned Keightley J, went on to raise the constitutionality of corporal punishment in the home question. Skelton argues that by raising the issue mero motu, and accepting concluding observations of the CRC in the judgment, the Court highlighted its readiness to deal with matters it considers ripe. Given the recent Zimbabwean court rulings, the timing may be good to challenge the constitutional validity of the defence of reasonable chastisement in the home. Parliament's failure to pass legislation over a relatively long period since the new 2013 Constitution was adopted means that children remain exposed to corporal punishment.

Mootness is an issue, which has to be decided on a case-by-case basis, but it is linked to standing because if a child has already become an adult the case might be considered moot. In *Mudzuru* case, the applicants were no longer children, but were young adults litigating in the interests of children, the court ruled that a case may not be considered moot if the primary purpose is to protect the public interest adversely affected by the infringement of a fundamental right.[239]The court reiterated that 'section 85(1) (d) of the Constitution was introduced with the view of providing expansive access to justice to wider interests in society, particularly the vulnerable…' [240]

To conclude on justiciability, the Superior courts have inherent jurisdiction to preside over all constitutional and public interest matters. The practice in Zimbabwe is that the High Court is the court of first instance to hear child rights infringement. High Court orders declaring legislation or common law applicable in Zimbabwe unconstitutional has to be confirmed by the Constitutional Court. In *S v Chokuramba*, High Court case, Muremba J order declaring corporal punishment for juvenile offenders unconstitutional was suspended pending determination of the Constitutional Court, which was finally handed down in April 2019 nearly three and half years later, the Constitutional Court ruled that corporal punishment in the criminal justice system is cruel, inhuman and violates dignity.[241]

It is highly likely that litigation will be instituted in terms of section 85 of the Constitution. Although the Constitution suggests that children do have the right to litigate, there is

[239] Mudzuru 12.
[240] Mudzuru 14.
[241] Court Watch 6/2019 Corporal punishment: When the beating has to stop 08 May 2019 available on www.veritaszim.net.

no guarantee that the Courts will view it this way, so it will be safer for a child to act with the assistance of an adult, for an adult to act on the child's behalf.[242] The best strategy may be for a child rights organisation to bring the case on behalf of all children in terms of section 85(1) (d). The challenge is ripe given the recent jurisprudence in the country on the subject, and the delay in legislative reform. Zimbabwe is a State party to the CRC and the ACRWC, concluding observations and recommendations from the committees have highlighted to the State to act expeditiously to prohibit corporal punishment in the home. The Constitutional Court as the highest court in the land has the power to abolish the legislative and common law reasonable chastisement defence on the basis that it infringes a number of fundamental rights in the Constitution as discussed above.

2.3.2 Limitation of Rights

Fundamental rights and freedoms in the Declaration of Rights are subject to limitations.[243]Currie and de Waal argue that constitutional rights and freedoms are subject to boundaries.[244] Constitutional rights therefore can be limited or justifiably infringed.[245]Section 86(2) of the Constitution which is similar to section 36 of the South African Constitution, provides that the rights and freedoms may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors including:

a. the nature of the right or freedom
b. The purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
c. the nature and extent of the limitation;
d. the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedom of others;

[242] Domestic Violence Act Chapter 5:16 section 7(c) and (d).
[243] S 86 of the Constitution of Zimbabwe.
[244] I Currie and J de Waal *The Bill of Rights Handbook* 2014.
[245] Currie and de Waal (2014) 151.

e. the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the rights or freedom concerned than are necessary to achieve its purpose; and
f. Whether there are any less restrictive means of achieving the purpose of the limitation.

The provision stipulates grounds on which rights and freedoms can be subjected to the limitations clause. The rights impugned by corporal punishment include the right to dignity and right to freedom from torture or subjected to cruel, inhuman or degrading treatment or punishment. These two rights in terms of section 86(3) (b) and (c) require greater justification in the event that they are to be limited. However, should the court rule that corporal punishment does not violate dignity and freedom from torture, cruel, inhuman or degrading punishment, the limitation clause still applies.

In *Sogolani v Minister of Primary and Secondary Education and Others*,[246] the Constitutional Court was tasked with determining the constitutionality of executive authority to compel every student to salute the flag and recite a pledge of allegiance to the country. The court observed that the approach to be taken when interpreting the limitation clause requires a two-step inquiry. Malaba CJ stressed that the first inquiry step is to find out whether a right in the declaration of rights has been infringed by law or conduct. Secondly if the answer to the first question is in the affirmative, the next inquiry is to find whether the violation could be justified as a permissible limitation of the right, applying the test set out in section 86(2).[247]

2.4 Possible arguments for and against the retention of corporal punishment in the home

From the above discussion, it is clear that corporal punishment in the home fails to comply with international, regional children rights treaties and the Zimbabwean constitutional framework. Nevertheless, the legislature has been delaying to align laws with the new Constitution. The most probable way to eliminate and prohibit corporal punishment in the home in Zimbabwe is through litigation. Parties against and for the

[246] CCZ 20/20.
[247] CCZ 20/20 45 para 2.

practice will have to argue their case. This research will consider the key central arguments that are likely to be made, following the approach that was taken by Skelton in her 2015 article.

(a) Arguments against the retention of corporal punishment

Skelton, writing before the YG v S[248] and the FORSA cases, submitted that Southern African jurisprudence is inclined to the view that corporal punishment in the home is inhumane and degrading treatment.[249] The Zimbabwe jurisprudence on corporal punishment, as shall be discussed in the next chapter, highlights that the practice is inhumane and degrading treatment or punishment. However, in the absence of legislation prohibiting the practice in the home, it remains uncertain if the apex court will uphold the same view in relation to banning the practice in the home. The CRC and regional laws uphold the prohibition and elimination of the practice.

The constitutional framework discussion above highlights that corporal punishment violates rights to equality and non-discrimination, dignity, personal security and to freedom from all forms violence from public or private sources. Skelton likened the situation of children being subjected to corporal punishment as similar to that of women in the past 'when it was perceived as men's right to hit women because they were regarded as inferior and in need of control and discipline'.[250]On a positive note, the enactment of the Domestic Violence Act in Zimbabwe[251], which came into effect in February of 2007, testifies to the acceptance of women as equal human beings with an equal right to live free from violence. Only children remain recipients of physical punishment, and the new Constitution and constitutional jurisprudence on the rights of the child seem to point to the conclusion that the practice in the home is degrading. Feltoe asserts that 'culture and tradition are not static and immutable: they may change with changing social and economic conditions'.[252]This means that cultural

[248] 2018 (1) SACR 64 (GJ).
[249] Skelton (2015) *Acta Juridica* 336-359.
[250] Skelton (2015) *Acta Juridica* 337; Ending Corporal Punishment of children: A short guide to effective law reform (2019) available on www.endcorporalpunishment.org (accessed on 6 July 2020).
[251] Chapter 5:16.
[252] G Feltoe 'When culture clashes with criminal law: Case note on S v Hamunakwandi 2015 (1) ZLR 392 (H); S v Musino HH-158-17 and S v Taurayi HH-298-90' 2019 *The Zimbabwe Electronic Law Journal* 1-9 available on https://zimlii.org (accessed on 20 September 2020).

practices, which were previously acceptable, may now be deemed unconstitutional particularly those that harm women and children.[253]

Those against the practice are also likely to argue that the CRC and the Constitution of Zimbabwe affords children protection against violation of the right to bodily and psychological integrity. The former United Nations High Commissioner for Human Rights, Louise Arbour, explains that corporal punishment of children falls within the bracket of violence. She emphasises that, 'violence against children is violation of their human rights, a disturbing reality of our societies. It can never be justified whether for disciplinary reasons or cultural tradition. No such thing as a reasonable level of violence is acceptable.'[254]

The above remarks are consistent with the CRC and the Committee on the Rights of the Child's arguments for elimination and prohibition of the practice. The CRC articles 19, 18 and 37 make a statement that state parties have an obligation to quickly prohibit corporal punishment. The Committee in its general comment has consistently described that all forms of violence targeted against children, 'however light' are unacceptable. General Comment 13 provides that:

> 'All forms of physical or mental violence does not leave any reason for any level of legalised violence against children. Frequently, the severity of harm and intent to harm are not prerequisites for the definition of violence. States parties may refer to such factors in intervention strategies in order to allow proportional responses in the best interests of the child, but definitions must in no way erode the child's absolute right to human dignity and physical and psychological integrity by describing some forms of violence as legally or socially acceptable'.[255]

In the case of *S v Chokuramba*[256] the court held that judicial whipping constitutes an infringement of both the right to freedom from violence and illimitable right to dignity. Most notably, a reading of Section 52(a), which provides for the right to freedom from

[253] Feltoe (2019) *The Zimbabwe Electronic Law Journal* 2.
[254] United Nations Human Rights Office of the High Commissioner: Violence against children 2007.
[255] CRC/C/GC/13 para 17.
[256] *CCZ 10/19.*

all forms of violence from public or private sources, is authoritative about violence in the home setting.

Litigants may also argue that there are alternative ways of treating and redeeming children. Mushowe notes that positive parenting spares children from pain and shame as discipline. [257]

(b) Arguments for retention of corporal punishment

Those in favour of the retention of the practice are likely to argue that the 2013 Constitution of Zimbabwe guarantees parents the right to freedom of conscience.[258] Moyo argues that the right to freedom of conscience 'imposes on parents the duty to spank wayward children to nurture them into a right direction which is sharply opposite to dehumanising and degrading treatment or punishment'.[259] He further contends that the right to religion encapsulate the parental duty not to spare the rod or spoil the children.[260] He submits that, 'if the law prevents parents from raising their children according to their religious practices they adhere to, it would have failed in fulfilling its purpose which is to serve the people and meet their legitimate aspirations, to prevent children from misbehaving'.

The Zimbabwean cultures and traditions afford parents with authority to physically punish children, so that they grow up disciplined instead of being unruly or delinquent. Dziva submits that Zimbabwe is a cultural relativist country[261]and this poses a mammoth legal battle in the quest to end corporal punishment in the home. Moyo supports Dziva's assertion and argues that there are differences between corporal punishment in the home and all other settings.[262] He notes that the unique differences might curtail considerations of human dignity and inhuman or degrading treatment. He

[257] Mushohwe (2018) *University of Zimbabwe Law Journal* 76-91.
[258] S 60(1) (a) every person has the right to freedom of conscience, which includes freedom of thought, opinion, religion or belief.
S 60(3) parents and guardians of minor 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 they are entitled under this constitution, including their rights to education, health, safety and welfare.
[259] Moyo (2019) ZELJ 13.
[260] Moyo (2019) *ZELJ* 13.
[261] C Dziva 'The 2013 Constitution of Zimbabwe: A positive step towards ending corporal punishment against children' 2019 *Child Abuse Research: A South African Journal* 28-35.
[262] Moyo (2019) *ZELJ 12-13* available on zimlii.org.

emphasises that corporal punishment in the home differs in many respects from judicial whipping and school disciplining in that administering corporal punishment in the home excludes the presence of state functionaries, punishment is given by the parent not a stranger and the atmosphere involve no procedures.

(c) Possible outcome

The Superior courts, from the LH Constitution regime to the new Constitution has consistently indicated that corporal punishment infringes dignity and freedom from torture or cruel, inhuman, or degrading treatment. These two absolute rights coupled with right to equality, right to personal security and rights of children are likely to triumph against rights claimed by those in support of corporal punishment. The claim that a ban of the practice violates freedom of conscience and right to language and culture by parents and activists who are in favour of corporal punishment cannot pass muster the limitation clause. This dissertation in Chapter 4 will draw on case law from South Africa that dealt with many of the arguments for and against, and came down in favour of abolishing the defence of reasonable chastisement.

2.5 Conclusion

Given the analysis of the international law and the Zimbabwean constitutional framework above, it is clear that Zimbabwe has a positive and immediate obligation to abolish the corporal punishment in the home. The children's rights provided for in the new Constitution can only be realised if they 'can be directly invoked before the courts'.[263] Skelton asserts that child rights inclusion in the constitution does not equate to automatic respect of the rights.[264] Thus, Zimbabwe needs to amend or repeal legislation and develop or change the common law authorising the use of corporal punishment in the home. The CRC, ACRWC and various relevant general comments of the UNCRC committee give a solid foundation for litigating against the practice. The Committee has consistently highlighted that physical punishment in the home is inhumane and degrading treatment of children who in terms of international law are right holders like adults. The new Constitution of Zimbabwe is 'bent towards respect

[263] A Skelton 'Child justice in South Africa: Application of international instruments in the Constitutional Court' 2018 (26) 3 *The International Journal of Children's Rights* 391-422.
[264] Skelton 2018 (26) *3 The international Journal of Children's Rights* 392.

of human rights'[265] is a progressive development, which litigants and courts can rely upon in determining whether the common law defence of reasonable chastisement and the legislative authority authorising the practice, are constitutionally valid. To insulate arguments on standing, litigators may lodge the application in the name of civil society organisations. In South Africa, child rights organisations like the Centre for Child Law have litigated for protection and promotion of children's rights in its own name in several cases, and this is possible in Zimbabwe. There is harmony between the new Constitution and International law that corporal punishment infringes children's rights as encapsulated in the declaration of rights, CRC and ACERWC. It is evident that the legislature in Zimbabwe is reluctant to put in place legislation explicitly banning the practice. Despite court cases highlighting the unconstitutionality of corporal punishment and the recommendations from international human and children's rights bodies, the government has been dragging its feet and giving excuses. Those against the continued use of corporal punishment will have to show to the court how the practice infringes several fundamental rights enshrined in the Constitution. It is also evident that those in favour of the practice are likely to base their justification on parental authority and religious conscience. Over and above, the battle is within the Court's interpretation and the outcome will depend on how the Court views the practice, weighs the constitutional provisions, and applies international law.

[265] Sloth-Nielsen (2019) 252.

Chapter 3

Indications from Zimbabwean jurisprudence in favour of successful litigation to abolish the defence of reasonable chastisement

3.1 Introduction.

In 1980, Zimbabwe obtained independence from the British hegemony. The Colonial legal regime was characterised with corporal punishment of both adults and children.[266] Negotiations facilitated by Lord Carrington and the Lancaster House culminated in the adoption of the Lancaster House Constitution (LH Constitution) in 1979.[267]The LH Constitution[268] signified the new era of constitutional democracy in Zimbabwe. Moyo submits that, 'since the late 1980s, Zimbabwean apex Court appears to have inclined towards compliance with international standards and human rights obligations'.[269]The inception of the LH Constitution and the recent adoption of the 2013 new Constitution, has witnessed several court cases challenging corporal punishment in the criminal justice system and schools. The judgments in both settings ruled that the practice violated constitutional rights to human dignity and freedom from torture or cruel, inhuman or degrading treatment or punishment. This Chapter will analyse the jurisprudence of Zimbabwe in two parts, the period from 1980-2012 (Lancaster Constitution era) and the 2013 new Constitution era which is in force to date. Although, the judgments on the constitutionality of the practice in the administration of criminal justice and discipline in schools give 'a ray of hope', the practice remains unchallenged in the home setting.

3.2 Brief background to the colonial period position on corporal punishment.

Magadze, Shayamano and Lupuwana assert that parents in Zimbabwe have relied on corporal punishment since the ancient times and the practice has been generationally inherited, making the cycle hard to break.[270] They point that the long existence of the corporal punishment in the home is a result of cultural and religious beliefs attached

[266] *Torture in Zimbabwe Past and Present: Prevention, punishment, reparation: A survey of Law and Practice 2005 The Redress Trust 4 (hereafter Torture in Zimbabwe 2005).*
[267] Lancaster House Agreement, 21 December 1979.
[268] Constitution of 1979 (hereinafter referred to as the LHC).
[269] Moyo (2019) *ZELJ* 4.
[270] Magadze, Shayamano & Lupuwana (2020) *Acta Criminologica* 44-57.

to the practice.[271] The UNCRC General comment 8, however, provides that the defence of reasonable or moderate chastisement is a product of English common law.[272] British masters in colonies and territories used to administer corporal punishment on slaves, servants and apprentices.[273] Husbands also relied on the defence to chastise their wives.[274] According to the Torture in Zimbabwe Survey of 2005, physical punishment was 'systematic and widespread particularly during the Unilateral Declaration of Independence (UDI) from 1965 onwards and especially the 1970s...'[275]The Report highlights that the Ian Smith Rhodesian Front regime used '…merciless punishment of adults and children in order to extract confessions and information as well as deliberate tactic aimed at intimidation and deterrence.'[276] Despite that historical experience, the Afrobarometer Report in 2017 highlighted that the majority of parents in Zimbabwe embrace the practice to discipline and punish children in the home.[277]

3.3 The Lancaster House Constitution era.

Hatchard submits that the LH Constitution was a typical product of the Westminster style of constitution.[278]Describing the LH Constitution, Mavedzenge points out that the Westminster system of government elevated 'parliamentary sovereignty and viewed judicial reviews with scepticism'. The law was what the legislature intended as opposed to what the judges would interpret it to be.[279]Moyo submits, 'the LH Constitution codified a restrictive approach to standing and prevented civil society organisations, pressure groups and political parties from seeking justice on behalf of marginalised groups".[280]The positive aspect of the LH Constitution is that it entrenched

[271] Magadze, Shayamano & Lupuwana (2020) *Acta Criminologica* 44.
[272] CRC/C/GC/8 para 31.
[273] CRC/C/GC/8 para 31.
[274] Global Initiative to End All Corporal Punishment of Children 'Ending corporal punishment of children: A short guide to effective law reform' (2019) 4 available on www.endcorporalpunishment.org.
[275] Unilateral Declaration of Independence of 1965 (UDI) A statement adopted by the Cabinet of Rhodesia on 11 November, announcing that Rhodesia, a British territory in Southern Africa that had governed itself since 1923, now regarded itself as an independent sovereign state.
[276] Torture in Zimbabwe (2005) 1.
[277] *Afrobarometer Dispatch No.156* (12 July 2017).
[278] J Hatchard 'The Constitution of Zimbabwe: Towards a model for Africa?' 1991 *Journal of African Law* 79-101.
[279] Mavedzenge (2019) *University of Zimbabwe Law Journal* 17.
[280] A Moyo 'Standing, access to justice and the rule of law in Zimbabwe' 2018 *African Human Rights Law Journal* 66-292.

a justiciable declaration of fundamental human rights and freedoms.[281]Gubbay elucidates that the rights were derived from the Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.[282]Even though the LH Constitution entrenched fundamental rights and freedoms, Magaya and Fambasayi assert that, the LHC 'had no express provision dedicated to children's rights'.[283] The LH Constitution made it difficult for marginalised children to litigate their rights. The Constitution did not explicitly prohibit corporal punishment. However, LH Constitution section 15 provided that '[n]o person shall be subjected to torture or to inhuman or degrading punishment'. The Court had to decide the constitutionality of judicial whipping of male adults and male juveniles as a sentence through judicial reviews. Summarising the LH Constitutional jurisprudence on the subject of corporal punishment, Moyo reasons that the courts viewed the practice as a violation of the constitutional prohibition of torture or cruel, inhuman or degrading treatment or punishment.[284]

3.3.1 Case dealing with abolition of judicial corporal punishment of adults as form of sentence.

From 1980, corporal punishment remained an option the courts relied on as a sentence in the administration of justice. Gubbay submits that the punishment was lawful for over eight decades, and was propelled by successive Criminal codes.[285] The case of *S v Ncube*[286] presented a chance for the court, for the first time to determine the constitutionality of judicial whipping as sentence on male offenders above the age of 19 years. The appellant was convicted by a regional court of rape and sentenced to imprisonment and whipping of six strokes. The LH Constitution provided in section 15(1) that, '[n]o person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.' Relying on that provision the court went on to find that judicial whipping of adults was unconstitutional, inherently inhuman and

[281] LH Constitution, Chapter III.
[282] AR Gubbay 'The protection and enforcement of fundamental human rights: the Zimbabwean experience' (1997) 19 *Human Rights Quarterly* 230.
[283] Magaya and Fambasayi 2021 *De Jure Law Journal* 22.
[284] Moyo (2019) ZELJ 16.
[285] Gubbay (1997) 19 *Human Rights Quarterly* 235.
[286] *1988 (2) SA 702 (ZS).*

degrading, and hence violated the Constitution.[287]Gubbay JA notes that the Supreme Court adopted an expansive interpretation to section 15(1) and stated that:

> 'The raison d'etre underlying section 15(1) is nothing less than the dignity of man. It is a provision that embodies broad and idealistic notions of the dignity, humanity and decency, against which penal measures should be evaluated. It guarantees that the power of the state to punish is exercised within the limits of civilised standards. Punishment which are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton infliction of pain are repugnant. Thus, a penalty that was permissible at one time in our nation's history is not necessarily permissible today. What might not have been regarded as inhuman or degrading decades ago may be revolting to the new sensitivities which emerge as civilisation advances'.[288]

The Court insisted on the right to human dignity in determining the constitutionality of judicial whipping. More importantly, the court found that any punishment that violates human dignity was inhuman and degrading. The learned judge noted that in reaching the decision, the court took into consideration the detailed features of the punishment.

As a point of departure, the court considered the manner in which judicial whipping of adults was administered. The court was of the view that judicial whipping was similar to flogging at the whipping post, a feature considered barbaric and more prevalent in the past. The court further observed that corporal punishment stripped the recipient his dignity and self-respect thus making it incompatible with the evolving standards of decency.

The court also found that the nature of the punishment amounted to treatment of the human race as non-humans. The majority bench held that whipping failed to accord human dignity, a status that cannot fall away even when one has committed the vilest offence.

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[287] W Ncube 'Defending and protecting gender equality and the family under a decidedly undecided constitution in Zimbabwe' 1997 *Zimbabwean Law Review* 1-17.
[288] *S v Ncube 267B-D.*

Furthermore, the bench found that the punishment was subjective in that the prison officer administering the whipping had the power to determine the extent of the pain. The court also noted that regulatory safeguards governing judicial whipping could not explain the differences in the amount of force applied from one prison officer to another. Lack of an objective standard associated with administering the punishment posed a danger of abuse of the punishment by prison officers.

Concluding on the features, the court observed that the practice degraded both the punished and the punisher. It caused the executioner representing the society to stoop to the level of the criminal and generated hatred against the prison system and the justice system in general.[289]

Although the ruling was addressing corporal punishment of adults by the justice system, it raised pertinent principles of law that are also applicable in use of the practice in the home. The *S v Ncube* case is a landmark ruling in the sense that it challenged a well-established and accepted practice. It showed the need for constitutional alignment of laws with the dictates of the Constitution. The court firmly asserted the dynamism of the law in that standards of decency evolve as such a society could not afford to remain static. Naldi argues that the judgment did not explain what constitutes inhuman or degrading treatment or punishment rather it gave attention to 'cases of judicial whipping that were directly relevant'.[290]He further submits that the court overlooked the fact that Zimbabwe was a party to the African Charter on Human and Peoples' Rights.[291]

3.3.2 Case dealing with abolition of judicial corporal punishment of juveniles as form of sentence.

Two years after the prohibition of adult whipping, the Supreme Court ruled on the constitutionality of judicial whipping of juveniles. In *S v A Juvenile*[292] an eighteen-year-old male child was found guilty of aggravated assault and sentenced to receive four

[289]*S v Ncube* 274C-F.
[290] GJ Naldi 'Judicial corporal punishment declared unconstitutional by the Supreme Court of Zimbabwe' 1990 *African Journal of International and Comparative Law* 131-135.
[291] Naldi (1990) *African Journal of International and Comparative Law* 135.
[292] *1989 (2) ZLR 61 (SC).*

cuts with a light cane in accordance to the provisions of section 330 of the Criminal Procedure and Evidence Act. The court held that section 330 of the Act was in violation of section 15(1) of the Constitution by a majority of three to two. Dumbutshena CJ highlighted the Court's abhorrence of corporal punishment by stating that:

> 'Judicial whipping, no matter the nature of the instrument used and the manner of execution, is a punishment inherently brutal and cruel; for its infliction is attended by acute physical pain….
>
> In short, whipping which invades the integrity of the human body, is an antiquated and inhuman punishment which blocks the way to understanding the pathology of crime. It has been abolished in very many countries of the world as being incompatible with contemporary concepts of humanity, decency and fundamental fairness.'[293]

The reasoning in *S v Ncube* and *S v A Juvenile* was more or less the same. The court held that the practice amounted to torture or cruel inhuman treatment of a person. Even though the former dealt with judicial whipping of adults and the latter a juvenile, the court set precedent in matters to do with corporal punishment. Khosa JA, concurring with majority judgment remarked that:

> '…the mere idea of inflicting physical pain as form of punishment corresponds, in my view with torture and the lex talionis-an eye for an eye, a tooth for a tooth, a life for a life-all of which have been condemned because they represent an inhuman approach to punishment.'[294]

Writing extra-curially, Gubbay observes that the majority judgment was influenced by the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, [295]and research proving the practice failure to attain the desired goal of disciplining children.[296] The majority judgment highlighted that the use of the practice violated

[293] *S v A Juvenile 91B-D.*
[294]*S v A Juvenile 101E-G.*
[295] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) adopted 29 November 1985.
[296] Gubbay (1997) 19 *Human Rights Quarterly* 237.

human dignity, an interpretative value in section 15(1), of the Constitution, which outlawed torture, cruel and inhuman treatment.

McNally JA, in his dissenting judgment notes that caning was in the best interests of the male juveniles. The judge did not refer to human dignity and the clear and absolute obligation of the State to uphold the status of juveniles as autonomous human beings with dignity. Responding to the majority judgment, which found the practice to be cruel and inhuman, he remarked that:

> 'I am in danger of straying into fields of sociology and psychology where I have no expertise. In a sense, I am forced into them by being presented with this question. But I can say as a lawyer of many years of practice that young people often appear before the courts on charges of doing wicked things, cruel things, irresponsible things, stupid things, thoughtless things. Very often, a large element in the offence is their lack of judgment, their lack of experience, their lack of forethought. Sending them to prison achieves nothing and usually does them a great deal of harm; the same can be said of remand homes and reformatories; they cannot pay a fine and there is little point in their parents paying it. The imposition of a moderate correction of cuts enables a magistrate or judge to avoid all these unpleasant alternatives. It enables him to impose a short, sharp, salutary and briefly painful punishment, which achieves in very many cases what is required. I must say that in twenty-five years in the law I have never heard a complaint about the brutality of cuts. Indeed, the only comment I have had was from one client who said his headmaster hit much harder than the prison office'.[297]

The above remarks have been heavily criticised by jurists. Writing extra-curially, Gubbay asserts, 'the minority decision was primarily based on the lack of satisfactory alternative sentences for juveniles and the belief that sending them to custodial institutions achieves nothing and usually does a great deal of harm'.[298] In *S v Chokuramba*, Chief Justice Malaba addressed the submission of the state and the amicus that a male juvenile offender reacts to the infliction of corporal punishment on

[297] *S v A Juvenile 95B-D.*
[298] Gubbay (1997) 19 *Human Rights Quarterly* 237.

him different from an adult offender. The learned judge dismissed the view that age of the person being punished was a redeeming factor stating that McNally J, expression was subjective founded on religious faith that uphold the utility of corporal punishment on male juvenile offenders.[299] He reasoned that the expression failed to reconcile corporal punishment with constitutional rights.

The jurisprudential development brought about by *S v A Juvenile* was short-lived. The government responded by repealing those sections of the Criminal Procedure and Evidence Act that allowed courts to carry out judicial whipping. In his journal article written in 1997, Gubbay in his article observes that in early 1991 the Parliament went on to amend the constitution and a provision to section 15(3) (b) was added making it lawful to inflict corporal punishment on male juveniles under the age of eighteen.[300]The amendment further provided that such whippings by courts and parents would not be deemed inhuman or degrading. The amendment nullified the majority judgment in *S v A Juvenile* and upheld the minority dissent of McNally J and Manyarara J. The legislative amendment came at a time when Zimbabwe had ratified the CRC in 1990.[301]By making the practice legal, it may be construed that Zimbabwe failed to implement and enforce the CRC from an early stage.

Writing in 1991, on the fall and the rise of the cane in Zimbabwe, Hatchard argues that the two Supreme Court cases discussed above were a 'constitutional and penological triumph'.[302] These cases highlighted that the judiciary in Zimbabwe was able to develop the declaration of rights in a way that benefited all citizens including children. The decisions were also a penological triumph in that corporal punishment was found to be an irrational and uncivilised way of punishment. The cases set precedents for litigators and child rights activists on the course and outcome of challenging the practice in other settings.

[299] *S v Chokuramba* page 41-42.
[300] Gubbay (1997) 19 *Human Rights Quarterly* 237.
[301] Ratified on 11 September 1990.
[302] Hatchard (1991) 35 *Journal of African Law* 200.

3.4 New 2013 Constitution

Sloth-Nielsen and Hove submit that the 2013 new Constitution of Zimbabwe has a strong bias towards the protection and promotion of children rights.[303]Dziva also shares the same view. He notes that the new Constitution entrenches clauses that promote and protect the rights of children.[304] The new Constitution affords children the right to dignity, physical integrity, personnel security, and freedom from torture or cruel, inhumane or degrading treatment or punishment. He asserts that the wording of section 51, 52, 53 and 81 of the Constitution of Zimbabwe was drafted in a way that recognises the importance of prohibiting corporal punishment.[305] He concludes that the provisions must be given their literal meaning when interpreting the Constitution on the basis that the words are ordinary, unambiguous and plain.[306]It is important to observe that the new Constitution particularly section 81(1) (e) declares that children have the right to be protected from maltreatment and all forms of abuse. Although the constitution does not explicitly ban corporal punishment of children, the above scholarly work supports the notion that the practice is against the constitutional provisions providing for children rights.

3.4.1 Case dealing with abolition of judicial corporal punishment of juveniles as form of sentence.

In the case of S v Chokuramba,[307] the High Court of Zimbabwe had to determine the constitutionality of judicial corporal punishment as sentence for male juveniles under the age of 18 years. A 15-year-old boy was convicted of rape in the regional magistrate court. The accused raped his neighbour, a 14-year-old girl, during the night in the hut where they were both sleeping. The magistrate sentenced the accused to receive moderate corporal punishment in terms of the section 353 (1) of the Criminal Procedure and Evidence Act.[308]The accused was sentenced after the enactment of

[303] Sloth-Nielsen & Hove (2015) *African Human Rights Law Journal* 555.
[304] Dziva 2019 (20) 1 *Child Abuse Research: A South African Journal* 30.
[305] Dziva 2019 (20) 1 *Child Abuse Research: A South African Journal* 31.
[306] Dziva 2019 (20)1 *Child Abuse Research: A South African Journal* 31.
[307] *S v Chokuramba HH-718-14* (hereafter-*S v Chokuramba HC*).
[308] Criminal Procedure and Evidence Act Chapter 9:07(hereafter the Act).

the 2013 Constitution and the magistrate sought guidance on the constitutionality of the impugned section by way of automatic review.

Muremba J writing for the full bench of the High Court observed that the 2013 Constitution entrenched an illimitable right not to be tortured or subjected to cruel, inhuman or degrading punishment.[309] She asserted that the right was differently crafted from the LH Constitution, [310]unlike its predecessor the new Constitution was clearly worded to indicate that the right was non-derogable which was not the case in the LH Constitution. The judge relied on the reading together of section 52,[311] 53,[312] 56[313] and 86[314]in the new Constitution and ruled that the practice of judicial whipping was unconstitutional. She found that judicial whipping of children is violence against children and constituted a breach of fundamental human rights.[315]Muremba J also relied on Zimbabwe's ratification of the Convention of the Rights of the Child, [316]African Charter on Human and Peoples' Rights,[317] International Covenant on Civil and Political Rights[318] and the African Charter on the Rights and Welfare of the Child.[319]She suggested that ratification of the treaties signified Zimbabwe's commitment to be bound to international legal obligations to respect, protect and fulfil human rights for everyone within its jurisdiction. She also highlighted section 81 of the new Constitution, which provides for the rights of children and submitted that the section was a confirmation of readiness of the State to comply with regional and international conventions, which prohibits corporal punishment. She stressed that section 81 '…made it clear that children are not half-human beings as they ought to be treated equally as adults and protected from all forms of abuse including violence.'[320]

[309] *S v Chokuramba HC 3.*
[310] In the LHC, the right not to be tortured or subjected to corporal punishment was limitable in terms of section 15(3). The 2013 Constitution clearly provides that the right in section 53 is not limitable.
[311] Right to personal security
[312] Right to freedom from torture or cruel, inhuman or degrading treatment or punishment.
[313] Right to equality and non-discrimination
[314] Limitation of rights and freedoms.
[315] *S v Chokuramba HC 4.*
[316] Ratified on 11 September 1990.
[317] Ratified on 30 May 1986.
[318] Ratified (ICCPR) on 13 May 1991.
[319] Ratified on 19 January 1995.
[320] *S v Chokuramba HC 6-7.*

The review dealt with judicial whipping of juveniles. Nevertheless, the learned judge ruled that section 53 outlawed all forms of corporal punishment in all settings in Zimbabwe.[321]The Constitutional Court however refused to confirm the High Court finding that corporal punishment in the home was unconstitutional. Mushowe submits that the judgment by Muremba J highlighted an expansive analysis of international law by the Superior courts in Zimbabwe, which is a positive development by the judiciary in child rights matters.[322]He also notes that the judgment indicated the willingness of the highest courts in Zimbabwe to ensure that child rights practices are aligned to international norms and standards.[323]

The ruling by Muremba found corporal punishment to be constitutionally invalid. The decision could not be enforced as it awaited Constitutional Court confirmation. The then Chief Justice of Zimbabwe, Chidyausiku directed the suspension of the decision awaiting a ruling of the apex Court. Children continued to be subjected to corporal punishment up until April 2019 when, in the apex court, Malaba CJ confirmed the ruling of the high court. It took nearly five years, the death of Chidyausiku CJ and the swearing in of Malaba as the chief justice for the court to pass a ruling prohibiting judicial whipping. The tendency to reserve judgments on matters requiring immediate relief especially for vulnerable groups has been an ongoing phenomenon in high-ranking courts in Zimbabwe. This is particularly problematic against the background that the CRC and General Comment 8 calls for state parties to put in place legislative and administrative measures to prohibit corporal punishment.[324]

The *S v Chokuramba* Constitutional Court ruling was delivered in April 2019.[325]The court unanimously held that judicial corporal punishment is by its nature, intent and effect inhuman and degrading within the meaning of section 53 of the new Constitution.[326]The court also found that the impugned provision was inconsistent with

[321] *S v Chokuramba HC 8-9.*
[322] Mushohwe (2018) *University of Zimbabwe Law Journal* 83.
[323] Mushohwe (2018) *University of Zimbabwe Law Journal* 83.
[324] CRC/C/GC/8 para 8.
[325] *S v Chokuramba CCZ* 10/19 (Hereinafter S v Chokuramba CC).
[326] *S v Chokuramba CC* 3.

section 53, thus confirming the High court ruling order concerning the constitutional invalidity of section 353 of the Act.

Malaba CJ, writing for the full bench refers to the Supreme Court case of *S v A Juvenile* and the case of *S v Ncube*.[327]He observes the differences between the LH Constitution and the new Constitution, in that the former had a clause clearly providing for corporal punishment of children whilst the latter contains no explicit provision. He reiterates that section 53 of the Constitution empowers the judiciary to review corporal punishment provided in the impugned section of the Act. The judge found that the Constitution, which is the supreme law of the land, conferred the courts the sacred trust of protecting fundamental human rights and freedoms.[328]The court however observes that the court a quo 'went outside its mandate in determining questions of other constitutional validity of other types of moderate corporal punishment'. The court emphasises that the review addressed judicial whipping. He clarifies that corporal punishment in the schools and home were not issues for review in the matter before the court, and remarked that, 'it is trite that courts generally loath to determine issues not brought before them'.[329]

He then considers the importance of human dignity as a foundational value in interpreting section 53 of the Constitution. The judge reiterates that human dignity is the foundation that anchors all other fundamental rights in Chapter 4 of the constitution.[330]He notes that the nexus between human dignity and the right to freedom from torture, cruel or inhuman and degrading treatment in section 53 was 'the evolving standards of decency that mark the progress of a maturing society'.[331] He further held that the interpretation clause, section 46 of the Constitution required the courts to adopt a purposive, broad, and progressive and value based approach when interpreting the provision of a fundamental human right.[332]

The court also relied on international and regional conventions to explain human dignity. The court also referred to the CRC Committee's General comment No 8 para

[327] *S v Chokuramba CC* 8-11.
[328] *S v Chokuramba CC* 12.
[329] *S v Chokuramba CC* 12.
[330] *S v Chokuramba CC* 15-16.
[331] *S v Chokuramba CC* 17.
[332]*S v Chokuramba CC* 17.

11, which makes it clear that 'any punishment …, however light' is inhuman and degrading.[333] To buttress the sanctity of human dignity he refers to the South African case of *S v Makwanyane 1995(3) SA 391 para 328* where the learned judge O Reagan reiterated that human dignity accords human beings to be 'treated as worthy of respect and concern'.[334]

The court also declared that the legislature was bound by section 44, which provides that the exercise of the legislature's power must protect the fundamental rights and freedoms entrenched in Chapter 4 of the Constitution.[335] Addressing the State submission that judicial whipping does not amount to inhuman and degrading treatment, the Court relies on the Namibian case of *Ex parte Attorney General, Namibia In Re Corporal Punishment by Organs of State 1991 (3) SA 76,* wherein it was ruled that the constitutionality of the punishment must be assessed in light of the values that underlie the Constitution.[336]

Moyo submits that the Constitutional Court ruling in *S v Chokuramba* was founded on the right to human dignity and the freedom from torture or cruel, inhuman or degrading treatment.[337] He elucidates that the judgment indicated that human dignity is both a right and a value.[338]

3.4.2 Case dealing with abolition of corporal punishment as form of discipline in schools.

Gudyanga, Mbengo & Wadesango submit that corporal punishment in Zimbabwe was used for behaviour control and correction in schools.[339] During the LH Constitutional regime, corporal punishment in schools was deemed an appropriate tool in maintaining order in the classroom.[340]The adoption of the 2013 Constitution however, brought about a constitutional challenge of the practice in the High Court. In the case

[333] *S v Chokuramba CC* 27.
[334] *S v Chokuramba CC* 20.
[335] *S v Chokuramba CC* 23.
[336] *S v Chokuramba CC* 25.
[337] Moyo (2019) *ZELJ* 7.
[338] Moyo (2019) *ZELJ* 7.
[339] Gudyanga, Mbengo & Wadesango 2014 (5) 9 *Mediterranean Journal of Social Sciences* 493-500.
[340] Gudyanga, Mbengo & Wadesango 2014 (5) 9 *Mediterranean Journal of Sciences* 494.

of *Pfungwa and Justice for Children Trust v Headmistress of Belvedere Junior Primary School, Minister of Education, Sport and Culture and Minister for Justice Legal and Parliamentary Affairs*,[341] the applicants sought a constitutional declaratory order declaring that corporal punishment in the school and home violates children's rights as set out in in section 51, 53 and 81 of the Constitution of Zimbabwe.

In March 2016, Ms Chemhere a teacher at Belvedere Junior Primary School assaulted the first applicant's daughter one Makanaka, using a rubber pipe for failing to have her homework book signed by her mother to confirm that she had done her homework. Makanaka sustained deep bruises and could hardly sleep because she was traumatised. She refused to go to school the following day after the incident. The assault details surfaced through a WhatsApp group where it transpired that several children had been assaulted. Makanaka's mother aggrieved with the teachers conduct and the practice instituted litigation proceedings seeking corrective action. The Headmistress who happened to be the first respondent was in support of the application. The Justice for Children Trust, a corporate body registered according to the laws of Zimbabwe to fight for the protection of children joined as the second applicant during the proceedings. The court found in favour of the applicants' submission and arguments. The matter was unopposed save for the Attorney General filing heads of arguments where he had failed to file an opposing affidavit. Mangota J found that the Attorney General's heads were premised on nothing and the application remained unopposed.[342] The judge put reliance on section 171 and 175 (1 and 5) of the Constitution of Zimbabwe. He found that the application by the applicants was not frivolous or vexatious. Mushowe observes that the Pfungwa case was important in that it addressed the urgency of prohibiting the practice in critical environments like the home and the school.[343]

The applicants argued that school officials and parents at home were not allowed to inflict corporal punishment on children. They submitted that use of the practice constituted physical abuse, which resulted in physical trauma to children. In addition,

[341] *Pfungwa and Another v Headmistress of Belvedere Junior Primary School and Others HH 148-17/HC 6029/16* (hereafter *Pfungwa* case).
[342] *Pfungwa* 3.
[343] Mushohwe (2018) *University of Zimbabwe law Journal* 82.

they submitted that the practice violated right to dignity[344] and freedom from torture or cruel, inhuman or degrading treatment or punishment.[345] Sloth-Nielsen notes 'they supported their application by making reference to the Constitution, domestic and regional case law, expert evidence and reliance on international treaties to which Zimbabwe is a party'. [346] The applicants also argued that corporal punishment was dangerous in that its administration on children was done indiscriminately without measure or control over teachers. The judge granted the order and remitted the matter to the Constitutional Court for confirmation. Mangota J pointed out that the applicants' case succeeded because it referred to relevant sections of the Constitution, case law jurisprudence from Zimbabwe and the region, expert evidence, regional and international instruments to which Zimbabwe is a party. [347]The ruling outlawed corporal punishment in schools.

Moyo submits that the ruling is unconvincing. He notes that the ruling is 'so short and thin on the law that is difficult to understand the legal reasons behind the High court's holding'.[348] The three-page ruling failed to proffer the constitutional basis why corporal punishment was abolished in the school and the family home. Although the judgment is 'thin on the law', Sloth-Nielsen assert that the case is important in that it highlights 'an auspicious start to strategic litigation to vindicate children's constitutional rights in Zimbabwe'.[349] She submits that the nature of the remedy in which applicants sought a formal declaration of unconstitutionality was a less confrontational route in consideration that the applicant could have insisted on criminal sanction or claim for damages for the teacher concerned.[350]Mushowe postulates that the *Chokuramba* and *Pfungwa* cases highlight the High court repeated call to outlaw corporal punishment, which adds hope to the currently building momentum in Zimbabwe to end the practice in all settings.[351]

[344] S 51 of the Constitution.
[345] S 53 of the Constitution.
[346] Sloth-Nielsen (2019) 244-265.
[347] Pfungwa 2.
[348] Moyo (2019) 11.
[349] Sloth-Nielsen (2019) 255.
[350] Sloth-Nielsen (2019) 255.
[351] Mushohwe (2018) 9.

The confirmation from the Constitutional Court is still awaited. However, soon after the High Court judgment, the Ministry of Education initiated reforms to the Education Act. Although the Pfungwa case remains not confirmed, the legislature through the Ministry of Education amended the Education Act[352] inserting a new section, which addresses corporal punishment. Section 68A on pupil discipline states that:

(1) The responsible authority of every school shall draw up a disciplinary policy for the school in accordance with standards set out in regulations prescribed by the Minister for the purpose.
(2) The regulations and any disciplinary policy shall-
(a) Not permit any treatment which-
(i) does not respect the human dignity of a pupil; or
(ii) amounts to physical or psychological torture, or to cruel, inhuman or degrading treatment or punishment;
(b) Prescribe the manner in which any punishment may be administered.
(3) Disciplinary measures must be moderate, reasonable and proportionate in the light of the conduct, age, sex, health and circumstances of the pupil concerned and the best interests of the child shall be paramount.
(4) No pupil may be suspended from school without first being granted a reasonable opportunity, with the support of his or he parents, to make representations with respect to the proposed suspension.
(5) Under no circumstance is a teacher allowed to beat a child.

The above section makes it clear that discipline remains an important aspect of education, however, beating of children or any form of punishment that fails to protect human dignity have no place anymore in educational environments. The judgment is weak but it led to the amendment of the Education Act to ban corporal punishment in schools. In his reply to the parliament during the second reading debate, the Minister of Primary and Secondary Education explaining to the parliamentarians who insisted on corporal punishment remarked that '…if we had not added that provision, our Bill

[352] Education Amendment Act 15-2019.

would be ultra vires section 53 of the Constitution.'[353]The Pfungwa case is a good example of how litigation can be a useful route to protect and promote children rights. Despite the Constitutional Court's delay or failure to confirm the High Court judgment, the prohibition of corporal punishment in schools is now enshrined in the Education Act.

3.5 Conclusion

The enforcement of children's rights and constitutional rights prohibiting corporal punishment in the home as shown in the above-discussed jurisprudence relies on the interpretation of the highest court in Zimbabwe of the legislative and common law provisions. Writing in 1997 on rights enforcement, Gubbay states that the existence of 'a justiciable declaration of rights can protect and enforce human rights if the highest court in the land is powerful enough, and independent enough, to proscribe all attempted infringements thereof'.[354] The New 2013 Constitution and the jurisprudence since its adoption sheds a light of hope that the apex court is gaining its ground in enforcing rights. The American jurist Oliver Wendell Holmes, describing the unbreakable relationship between legal obligations and remedies postulates that, 'legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp'. This view explains the position in Zimbabwe with regard to children rights to freedom from torture, cruel, inhuman, or degrading punishment. It may be argued that the drafters of the Constitution had the protection and autonomy of children in mind as evidenced by various sections mentioned in the chapter and the continued use of corporal punishment in the home defeats the intention. In the United States of America Supreme Court Case of *Trollop v Dulles*, Chief Justice Warren describes constitutional provisions as not, 'time worn adages or hollow shibboleths. They are vital living principles'.[355] The rights provided for in the new Constitution are justiciable hence the need for litigators to seek legal remedies for children to enjoy those rights.

[353] Education Amendment Bill-Minister's response to Second Reading debate 19 June 2019 (2) available at http://www.veritaszim.net
[354] Gubbay (1997) *Human Rights Quarterly* 229.
[355] 356 U.S 86, 103, 1958

Four decades later after Zimbabwe gaining its independence, and ratifying international treaties banning corporal punishment, children still experience corporal punishment in the home. The reluctance by the government to enact a law that explicitly bans the corporal punishment in all settings opens a wide door of litigation from child rights activists and litigators to challenge the practice in the Constitutional Court. Vohito submits that 'high level court judgments…..trigger changes in the general perception of protection and promotion of human rights.'[356] She further notes that banning of corporal punishment is generally done through law or constitutional reforms however, legal action forces governments to implement law reform or accept their legal obligations to realise children rights in their jurisdiction.[357] Faced with legal action the government of Zimbabwe may implement reforms prohibiting corporal punishment in the home. The Zimbabwean jurisprudence dealing with the subject of corporal punishment since the LH Constitution and the 2013 Constitution gives 'a ray of hope' that a sound legal challenge of the practice in the home may bring the much-awaited legal reform to protect vulnerable children in all settings.

[356] Vohito (2019) *De Jure Law Journal* 606-607.
[357] Vohito (2019) *De Jure Law Journal* 606.

Chapter 4

Arguments advanced in South African courts underpinning the successful abolition of corporal punishment in the home

4.1 Introduction

In 2019, South Africa became the 54th country to ban corporal punishment in the home.[358]The Global Initiative to End All Corporal Punishment report of 2021 shows that it is the only country that has prohibited the practice in the home in the Southern African region (SADC).[359]Prohibition of corporal punishment in the home was a result of constitutional litigation challenging the High Court order declaring common law defence of reasonable or moderate chastisement unconstitutional. The prevailing constitutional democracy, which subjects all legal provisions and common law to the constitutional scrutiny, was pivotal to the success of the challenge. Section 2 of the Constitution provides that any law found to be inconsistent with the Constitution must be declared invalid by a court.[360] This means that all conduct must pass muster with the constitutional dictates. Although South Africa adopted constitutional democracy in 1994, corporal punishment of children by parents remained part of the law for more than twenty years before it was firstly challenged in *YG v S*.[361]The matter was brought up to the Constitutional Court in the form of an appeal against the High Court order, which pronounced the practice as unconstitutional. The court ruled that reasonable chastisement was a form of violence as envisaged in section 12(1) (c) and infringed dignity of children as enshrined in section 10. This chapter discusses the arguments underpinning the South African High Court and Constitutional Court finding that the practice in the home is unconstitutional.

[358]B Clark 'Why can't I discipline my child properly? Banning corporal punishment and its consequences' 2020 *South African Law Journal* 339.
[359] Global report 2021|Global Initiative to End All Corporal Punishment of Children 12 available at https://endcorporalpunishment.org.
[360] S 2 of the Constitution of South Africa 108 of 1996.
[361] T Fletcher and E Sonnekus 'Constitutional Court puts foot down- reasonable chastisement defence unconstitutional' 2019 *Dispute Resolution Alert* 5-6.

4.1.1 South African jurisprudential and legislative background on corporal punishment.

Several scholars on the subject of corporal punishment in the home assert that the practice is a product of early Roman law paterfamilias power.[362] The father figure as head of the family had the power to decide the right of life and death over his family. The power was then developed in Roman law and in many jurisdictions including South Africa to the point that only children in a family were subjected to physical punishment. Parents enjoyed the defence of reasonable chastisement and in cases where they found themselves charged for assault, they could easily waive criminal liability by relying on the defence. Burchell and Milton confirm the view above.[363] They assert that corrective educational discipline was a long-established part of civilisation. They further submit that parents indulged the practice 'under the guise of religion' to correct child misbehaviour and exorcise demonic or evil spirits through use of force or pain.[364] In the case of *R v Janke*,[365] Chief Justice Cockburn remarked that:

> 'A parent may… for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment always however with this condition that is moderate and reasonable. If it be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature and or degree, or if it be protracted beyond the child's power of endurance or with an instrument unfitted for the purpose and calculated to produce danger to life and limb, in all such cases the punishment is excessive and the violence is unlawful'.[366]

This means that parents generally had a right at law to moderately and reasonably chastise children as long the punishment was deemed not excessive. Corporal punishment of children in South Africa applied in judicial sentencing, school discipline and the home. The practice however was prohibited in the judiciary and the school much earlier than in the home. Although, this research addresses litigation banning

[362] Fletcher & Sonnekus 2019 *Dispute Resolution Alert* 5-6.
[363] Burchell and Milton *Principles of Criminal law* 1991.
[364] Burchell and Milton (1991) 159 -161.
[365] *R v Janke 1913 TPD.*
[366] *R v Janke* 385.

the practice in the home, it is equally important to give a brief discussion of the arguments that supported the ban in judicial sentencing and school disciplining.

(a) Corporal punishment as judicial sentence

In 1995, a year after the adoption of constitutional democracy in South Africa, the Constitutional Court delivered a landmark judgment dealing with corporal punishment as judicial sentence. The case of *S v Williams*[367] was the first case, which dealt with the subject of physical punishment of children in a constitutional democracy. The Constitutional Court ruled that juvenile whipping, as sentence under section 294 of the Criminal Procedure Act 51 of 1977, was unconstitutional, violated the right to dignity and amounted to cruel, inhuman and degrading treatment. In reaching that decision, the court noted international trends, which highlighted a reform of the justice systems in many jurisdictions from retribution and vengeance to correction, prevention and respect for human rights.[368] The court also noted the worrisome levels of institutionalised violence by the State, which it considered incompatible with the Constitution.[369] The court stressed that children were vulnerable hence the obligation on the State to protect them. Clarifying the State obligation, the court remarked that:

> 'One would have thought that it is precisely because a juvenile is of a more impressionable and sensitive nature that he should be protected from experiences which may cause him to be coarsened and hardened. If the State, as a role model par excellence, treats the weakest and the most vulnerable among us in a manner which diminishes rather than enhances their self-esteem and human dignity, the danger increases that their regard to a culture of decency and respect for the rights of others will be diminished.'[370]

The above finding by the court, as shall be seen in the discussion of decisions that followed, was central in the determining the legality of the practice in the schools and the home setting. Although, *S v Williams*[371] judgment addressed institutionalised physical punishment of children by the State, it recognised the vulnerability of children

[367] *1995 3 SA 322 CC.*
[368] *S v Williams 50.*
[369] *S v Williams* 51.
[370] *S v Williams* 47.
[371] *1995 3 SA 322 CC.*

and the fundamental duty of the state to protect them. Skelton submits that Langa J 'foreshadowed the judgment that was to emanate from the Constitutional Court five years later on corporal punishment in schools.'[372] The *Williams* judgment was followed with the enactment of the South African School Act[373] and the Abolition of Corporal Punishment Act.[374] Not only, did the judgment contribute to the prohibition of physical punishment in judicial administration, it went even further to become a guideline in the determination of the constitutionality of the practice in the home setting in South Africa.

(**b) Corporal punishment as discipline in the schools**

Veriava submits that during the Apartheid regime, corporal punishment in the schools was an integral part of the South African educational system.[375]The notion that 'order must prevail or chaos will reign' in schools, perpetuated physical disciplining of children.[376] The adoption of constitutional democracy brought with it a significant shift from an authoritarian regime to a regime that respect human rights as enshrined in the Bill of Rights. The break from a past associated with violence and authoritarianism was first tabled in *S v Williams* case discussed above. As such, the school environment would not escape the constitutional scrutiny. In the case of *Christian Education South Africa v Minister of Education*[377] the court was tasked to determine the constitutionality of the legislated banning of corporal punishment in schools vis-a-vis parent's right to freedom of religion under section 15 of the Constitution. The applicants claimed that section 10 of the South African Schools Act,[378] which prohibited corporal punishment in schools, violated their right in the sense that it made it unlawful for parents to authorise teachers to physically punish their children within the school environment, even within private schools.[379]

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[372] Skelton (2015) *Acta Juridica 343.*
[373] 84 of 1996.
[374] 33 of 1997.
[375] F Veriava *Promoting effective enforcement of the prohibition against corporal punishment in South African schools* 2014 PULP 4.
[376] IJ Oosthuizen and MH Smit *Aspects of educational law* 2019.
[377] *Christian Education South Africa v Minister of Education 2000 4 SA 757 CC.*
[378] 84 of 1996.
[379] S 10 of the South African Schools Act prohibits the administration of corporal punishment in the schools.

The parents sought an exemption from the application of section 10 of the Schools Act to accommodate their Christian beliefs. The Constitutional Court upheld the prohibition and refused to grant an exemption to Christian schools. In reaching its decision, the court considered the rights of the parents to religious freedom, and found that the law did limit those rights. The court considered the parents' right to religion against the rights of children in its limitation analysis, and determined that the limitation was reasonable and justifiable. Nevertheless, the court made it clear that the matter before it did not involve the constitutionality of corporal punishment in the family home. By so doing, the court left open the constitutionality of the practice in the family home.

The Court noted the unique difference between parental discipline and school discipline. It observed that parental discipline involved 'the intimate and spontaneous atmosphere of the home' as opposed to 'the detached and institutional environment of the school.'[380] The court observed the significance of social factors such as the extent of traumatic child abuse and the painful historical events of South Africa when 'the claims of protesting were met with force rather than reason'.[381] Sachs J stated that the State has a constitutional duty to take steps to diminish the amount of public and private violence in society.[382] The court held that South Africa's ratification of the CRC meant that it undertook to take all appropriate measures to protect the child from violence, injury or abuse. The court stressed the importance of constitutional recognition of the best interests of the child being of paramount importance and the need for children to be protected from injurious consequences of their parents' religious practices.[383]

4.2 Corporal punishment in the family home

The two cases discussed above avoided directly addressing parental chastisement in the home. Mahery submits that the first attempt to ban corporal punishment in the home was through a clause in Children's Bill,[384] which expressly provided for outlawing

[380] *Christian Education CC* para 48.
[381] *Christian Education CC* para 48.
[382] *Christian Education CC* para 40.
[383] *Christian Education CC* para 41.
[384] S 139 of the Children's Amendment Bill [B19-2006]

the practice.[385] Unfortunately, the clause suffered a stillbirth and never made it to the final stages of law reform, which gave birth to the Children's Act.[386]Nevertheless, the momentum kept on growing and in 2014, the Minister of Social Development at that time, Ms Bathabile Dlamini, made a statement to the effect that the nation was making efforts to come up with a plan banning corporal punishment in the home environment.[387] The undertaking was also highlighted in South Africa's periodic reports to the Committee on the Rights of the Child[388] and the Committee of Experts on the Rights and Welfare of the Child.[389] The Committees in their concluding observations requested South Africa to 'expedite the adoption of legislation to prohibit corporal punishment in the home'.[390]

Lake and Jamieson, writing in 2016, published findings that nearly 85% of parents used physical punishment and 33% used a belt or stick to discipline a child.[391]The statistical evidence reflects how acceptable and widespread the practice is within the society. Mezmur asserts that a genuine challenge to the constitutionality of corporal punishment came through the 'sphere of court decisions' in the *YG v S* case.[392] The Gauteng High Court declared the common law defence of moderate or reasonable chastisement unconstitutional.

4.2.1 High Court ruling: *YG v S*

The matter began in Johannesburg Magistrate Court as a trial of assault, with the accused facing two charges of assault with intent to cause grievous bodily harm. The

[385] P Mahery 'Pursuing the crafting of a legislative ban on corporal punishment in the home' 2018 *Stellenbosch Law Review* 124-145.
[386] 38 of 2005.
[387] *Department of Social Development Media Statement (03-06-2014).* The Minister said that 'children are impressionable and when those in positions of authority use violent means to encourage discipline, the children understand this as saying violence is permissible when trying to persuade others to act in a certain way. This is why we are going to forge ahead with banning corporal punishment even in the home environment.'
[388] South Africa Periodic report on the United Nations Convention on the Rights of the Child. Reporting period: January 1998-April 2013 para 134.
[389] South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child. Reporting period: January 2000-April2013 para 145.
[390] Committee on the Rights of the Child: Concluding observation on the second periodic report of South Africa UN Doc CRC/C/ZAF/CO/2 30 September 2016 para 34(a).
[391] L Lake & L Jamieson 'Using a child right approach to strengthen the prevention of violence against children' 2016 (106) 12 *South African Medical Journal* 1168.
[392] Mezmur 2018 *Speculum Juris* 77.

first charge involved the accused's vicious kicking and punching of his 13-year-old son whom he accused of watching pornographic material on a family iPad and the second charge related to appellant's assault of his wife. YG claimed the defence of reasonable or moderate chastisement during trial for the first charge (right to parental authority to chastise children). He claimed that his Muslim religion forbids pornography and it provided for parental power to discipline children. He remarked that, 'I just intended to discipline him out of concern to show him in the future what is right and what is wrong.'[393] The Magistrate found the accused guilty. Aggrieved by the outcome YG appealed at the High Court challenging the conviction.

When the matter came before the Gauteng High Court, Keightley J raised the question of the constitutionality of the defence mero motu. She therefore postponed the proceedings, formed a full bench with another judge, and invited amici curiae to file arguments. The amici curiae who were invited and played an important role in the litigation culminating in prohibition of corporal punishment, where the Freedom of Religion South Africa (hereafter FORSA),[394] and the Centre for Child Law (hereafter CCL).[395]

In her ruling, Keightley J began by acknowledging South Africa's jurisprudence on the rights of the child under the Constitution. She pointed out that the jurisprudence was a result of section 28 of the Constitution and the ratification of the CRC.[396] The learned judge referred to the case of *S v M*[397] where the Constitutional Court indicated that the CRC had 'become the international standard against which to measure legislation and policies, and has established a new structure, modelled on children's rights.'[398] The court said that compliance with international standards meant 'a change of mindset' to one that matches the new Constitutional vision.[399] The court was privy to the fact that findings were made in respect of juvenile justice, nevertheless, it proceeded to observe

[393] *YG v S* para 4.
[394] FORSA represented the interests of millions or religious and non-religious parents in South Africa who supports corporal punishment in the home.
[395] CCL were representing the Children's Institute, the Quaker Peace Centre and the Sonke Gender Justice amici curiae who argued for the prohibition of the practice in all settings.
[396] *YG v S* para 45.
[397] *2008 (3) SA 232 (CC).*
[398] *YG v S* para 45.
[399] *YG v S* para 45.

that the *S v M* case establishes general principles of application. Keightley J borrowed the emphatic observation of Sachs J where he said that:

> 'Every child has his or her own dignity, if a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as mere extension of his or her parents, umbilically destined to sink or swim with them…Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear and avoidable trauma.'[400]

The above quotation highlights that the court views children 'as their own constitutional beings, holding constitutional rights in their own respect, not through parents.'[401] The autonomy concept requires a court to consider and uphold the self-standing dignity of children when dealing with child related matters. The court stressed that constitutional protection viewed together with South Africa's ratification of the CRC establishes a solid framework for the protection of children as envisaged in the Children 's Act.[402]

Having established the framework for protection of children, the court also observed relevant national legislative provisions dealing with the subject in South Africa. The judge noted that children were entitled to protection in terms of the Children's Act[403] and the Domestic Violence Act.[404] Section 1 of the Domestic Violence Act definition of a complainant includes children in any domestic relationship with the respondent. The Act defines violence broadly and includes physical abuse, emotional and psychological abuse, intimidation, and any other form of abusive conduct causing

[400] *YG v S* para 46.
[401] *YG v S* para 61.Court's emphasis.
[402] *YG v S* para 48-50.
[403] 38 of 2005.
[404] 116 of 1998.

harm or the imminent threat of harm to the health, safety or well-being of the complainant. From the definition, it is clear that corporal punishment in other words is merely violence wrapped in a dignified cloth.

The learned judge went on to discuss relevant international law applicable to the subject of corporal punishment. She indicated that South Africa's ratification of the CRC meant that it was bound to comply with the CRC's articles 19(1), 28(2) and 37, which afforded children protection against corporal punishment.[405]The court referred to the Committee of the Rights of Children general comments. She emphasised that General comment 8 states that corporal punishment is incompatible with the CRC and constitutes cruel and degrading treatment.[406]In addition , she expressed that General comment 13 addressed the extent and intensity of violence meted on children and was instructive to States to put national laws which in 'no way erode the child's absolute right to human dignity and physical and the psychological integrity by describing some forms of violence as legally or socially acceptable.'[407] The court proceeded to consider the concluding observations made by the CRC Committee in 2016 with regard to South Africa's report.[408] The CRC Committee indicated that it was concerned that corporal punishment remained unbanned and widely practiced in the home.[409]

The court also took note of the regional African Committee of Experts on the Rights and Welfare of the Child (ACERWC) 2014 observations[410] where it was recommended that South Africa should prohibit corporal punishment in the home and provide parental education and training on positive disciplining. The ACERWC further instructed South Africa to realign its national laws specifically those that permitted the practice.[411]

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[405] *YG v S* para 53; Article 19(1) protection against violence, Article 28(2) respect of child human dignity and Article 37 protection against torture or other cruel, inhuman or degrading treatment or punishment.
[406] *YG v S* para 54; CRC General Comment No.8 (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment.
[407] *YG v S* para 55; CRC General Comment No.13 (2011) The right of the child to freedom from all forms of violence.
[408] *YG v S* para 56; CRC/C/ZAF/CO/2 (27 October 2016).
[409] *YG v S* para 56.
[410] YG v S para 57; Concluding recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Republic of South Africa Initial Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child at para 35.
[411] *YG v S* para 57.

The court also made an interesting observation of the Department of Social Development Draft Policy that the Minister submitted as part of her submissions before the court stating that:

> 'Hitting a child is assault, but previously, parents who hit their children had a special defence of reasonable chastisement. That defence is not part of the South African law anymore. This put hitting of children on the same footing as hitting an adult.'[412]

The court, responding to the submission above, made it clear that the Minister's claim was not founded on any legal basis. As such, in the absence of clear legislation providing for the outlawing of the defence of reasonable or moderate chastisement, the common law remained intact. The court's finding is important in that it reaffirms the doctrine that common law provisions cease to be law by way of legal reform and not 'through disuse by silent consent of the whole community'.[413]

The learned judge proceeded to assess the relevance of statutes, constitution and international law on the constitutionality of the common law defence of reasonable or moderate chastisement. Keightley J observed that the Children's Act, Domestic Violence Act and the Constitution require parents to protect children rights.[414] The court said that parental power, which authorised physical punishment of children, is antithetical to the child-focused model of rights enshrined in the Constitution of South Africa.[415] The court however conceded that holding that the practice was against the Constitution was not enough given that the defence in a sense gave some recognition to the protection and well-being of the child. This meant that the defence required a detailed examination against the relevant constitutional provisions.

The court noted and rejected claims by FORSA (one of the amici curiae) that the defence entitled parents to use corporal punishment to discipline children and that a declaration of constitutional invalidity would not be in the best interests of the child.[416]

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[412] *YG v S* para 58.
[413] *Green v Fitzgerald and Others 1914 AD* 88 at 111.
[414] *YG v S* para 61.
[415] *YG v S* para 64.
[416] *YG v S* para 65-66.

Addressing FORSA's claim above, Keightley J held that there were no strict guidelines on what constitute reasonable chastisement and, that the physical and psychological robustness of children were not the same.[417] Furthermore, the court emphasised that moderate chastisement on the thigh or buttocks was likely to cause harm on sensitive children whilst the same treatment may be harmless to a robust child.[418]

The court also considered that the practice was inherently arbitrary. Keightley observed that in *S v Williams and Christian Education* cases the arbitrary nature of physical punishment was one of the major factors that the court considered in its constitutional inquiry.[419] The court reasoned that the defence of moderate chastisement involves a measure of violence and degradation or loss of dignity of a child. The judge recognised that violence infringed section 12(2) which provide for protection from violence from public or private sources and 12(1) (c) right to bodily and psychological integrity. [420]She also observed that subjecting a child to physical punishment infringed section 28(1) (d) which provides special protection for children to be protected from among other things degradation.[421] Having established the connection between section 28 (1) (d) and the right to dignity, the court indicated that dignity was foundational to the existing constitutional dispensation in South Africa.

In addition, Keightley J pointed out that the defence involves unequal treatment of children with adults.[422] Moreover, the court noted that section 9(1) of the Constitution entitles children to equal protection and section 9(3) provides for the right no to be discriminated based on age.[423] The court reiterated that reasonable chastisement failed to protect children from assault in circumstances where adults would be protected if subjected to the same level of force.[424] The court found that unequal treatment associated with moderate chastisement amounted to irrational differentiation.[425] Consequently, the learned judge accepted the CCL submission that

[417] *YG v S* para 67.
[418] *YG v S* para 67.
[419] *YG v S* para 68.
[420] *YG v S* para 69-70.
[421] *YG v S* para 71-74.
[422] *YG v S* para 75.
[423] *YG v S* para 75
[424] *YG v S* para 75.
[425] *YG v S* para 76.

the defence violated the rights of children under section 9(1) and (3) of the Constitution.[426]

The court concluded its determination of the constitutionality of corporal punishment in the home by weighing the interests of the parents in continuing to retain the defence and the interests of the children who continued to be on the receiving end of corporal punishment, as required in term of section 36. The court noted that the defence failed to pass constitutional muster, in that its limitation of children rights discussed above was not justified given that positive parenting was an available less restrictive means to achieve child disciplining.[427] The court noted that finding corporal punishment to be unconstitutional was not a rejection of the concept of child disciplining, parents could continue, in the absence of the defence, provided they did not use corporal punishment.[428]

The court took into consideration FORSA's concern that taking away the defence exposed well-meaning parents to criminal conviction for assault. Keightley J reasoned that the fear was 'out of step' with the underlying objectives of the Children's Act, which promotes positive parenting. The judge also considered the FORSA submission that criminalisation of the defence-violated section 15, the right to religious freedom of parents and section 31, the right of religious communities. The court dismissed the claim that religious rights were infringed and stated that FORSA could have made a better case had they sought religious exemption as opposed to a wholesale retention of corporal punishment in the home.[429] Keightley J remarked that:

> 'Children rights are not subordinated to the religious views of the parents…. It is so that [religious parents] may have to consider changing their mode of discipline, but in view of the importance of the principles of the best interests of the child, this is a justifiable limitation on the rights of parents.'[430]

[426] *YG v S* para 76.
[427] *YG v S* para 85.
[428] *YG v S* para 80.
[429] *YG v S* para 82-83.
[430] *YG v S* para 84.

The judgment developed the common law by finding the defence to be unconstitutional, and thus effectively prohibiting corporal punishment in Gauteng. It also led to an application to the Constitutional Court, which shall be discussed below. However, the judgment attracted a lot of positive and negative criticism from various scholars. Lenta asserts that the judgment was correct to find the common law defence of moderate chastisement unconstitutional.[431] He submits that the judgment managed to give sound arguments in finding that mild and moderate forms of corporal punishment administered by loving parents is morally wrongful and infringes the rights indicated above.[432] Mezmur writing in 2018, on the implications of the judgment, submits that the judgment noted the country's level of child violence and its 'synergy and link with corporal punishment'.[433] He also emphasises that the banning of the common law defence of moderate chastisement was a touchstone for protection of children against all forms of violence in South Africa.[434]

Despite the positive implications, Lenta goes at length in his article to point out that the judgment has 'a justification deficit'. He argues that the court's, attempt to address the issue of the court's jurisdiction and the doctrine of separation of powers with regard to development of common law, reduced the quality of the justification of the unconstitutionality of corporal punishment. He points that only paragraph 67 -84 proffer the reasons as to why the practice is unconstitutional.[435] He further submits that the court's assertion that moderate physical punishment is violence without giving a definition or empirical evidence to that effect fails to give a logical answer on the declaration of unconstitutionality to parents who have relied on the practice to discipline children.[436] He argues that this creates legitimacy-related anxiety.[437] Parents are not in a position to understand what constitutes violence and why they can no longer rely on the practice any longer. Lubaale writing in 2019 submits that in *YG v S,*[438] the court could not draw a distinction between harmful and harmless physical

[431] P Lenta 'The reasonable corporal punishment defence struck down: YG v S' 2018 *South African Law Journal* 205-219.
[432] Lenta (2018) *South African Law Journal* 209.
[433] Mezmur (2018) 32 *Speculum Juris* 92.
[434] Mezmur (2018) 32 *Speculum Juris* 92.
[435] Lenta (2018) *South African Law Journal* 209.
[436] CCL amici availed empirical evidence through an expert affidavit from Prof Shanaaz Matthews highlighting the physical, emotional and psychological effect of corporal punishment in Eastern Cape.
[437] Lenta (2018) *South African Law Journal* 219.
[438] 2018 (1) SACR 64 (GJ).

punishment.[439] She further finds that by failing to distinguish physical punishment, the court took an individualistic approach, overlooking the relational nature of rights in the family.[440]

4.3 Constitutional Court ruling: Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others

FORSA, an amicus in the YG v S appeal case, proceeded to lodge an application in the Constitutional Court. This was necessitated by two reasons, firstly the parties in the High Court appeal case failed to challenge the declaration of unconstitutionality of corporal punishment. Secondly, the reason that the High court order was only binding to the Gauteng High Court jurisdiction meant that the common law defence of moderate chastisement remained valid throughout South Africa except Gauteng. This means that only children in Gauteng would enjoy the right to be protected from all forms of violence from public or private sources.

The court deliberated on FORSA's change of role from an amicus to a party in litigation. Mogoeng CJ stressed that change of role is permissible based on consideration of justice and as such, legal technicalities and senseless constraints that hinder the delivery of justice must not be entertained.[441] This means that legal principles should aid attainment of a just, equitable and definitive outcome as opposed to scupper the process of seeking justice.[442]This finding by the Constitutional Court on changing legal capacity from a friend of a court to a litigant is a confirmation of broad standing rules in South Africa,[443] which promotes child rights institutions to challenge infringement of child rights without fear of having to face the standing hurdle. The CCL amici subsequently gained the respondent capacity in the constitutional matter. The Constitutional Court invited submissions from Global Initiative to End all Corporal

[439] EC Lubaale 'Reconceptualising discipline to inform an approach to corporal punishment that strikes a balance between children's rights and parental rights' 2019 (20) 1 *Child Abuse Research: A South African Journal* 36-50.
[440] Lubaale 2019 (20) 1 *Child Abuse Research: A South African Journal* 37.
[441] *FORSA* para 19.
[442] *FORSA* para 20.
[443] *University of Witwatersrand Law Clinic v Minister of Home Affairs 2008 (1) SA 447 CC and Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd 2006 (6) SA 103 CC.*

punishment of Children, Dullah Omar Institute for Constitutional Law, Governance and Human rights, and Parent Centre as a new amicus curiae.

Mogoeng CJ in passing judgment for a unanimous court first considered the historical background of corporal punishment in South Africa. Relying on scholarly work, he adopted Burchell and Milton's assertion that physical punishment of a child was a long-established part of civilisation aimed to achieve admonitory purposes and educational discipline.[444] The court further noted that some parents rely on moderate chastisement 'under the guise of religion' which advances the notion that child misbehaviour is a sign of being possessed with evil spirits which require exorcism through physical pain. The claim that parents must correct what is evil in the child through administering pain had been part of the South African case law for years.[445] The historical background helps in understanding the practice, and how it should be examined under constitutional democracy.

The judge then proceeded to identify the issues in the *FORSA* matter. He noted that the court was called to determine whether the common law defence of reasonable or moderate chastisement was unconstitutional. Mogoeng CJ, in navigating the legal question before the court, reiterated that it was not necessary to explain all the constitutional rights involved when one key constitutional or right may achieve the same finding.[446]In their submissions, FORSA attempted to distinguish reasonable or moderate parental corporal punishment from assault.[447] FORSA conceded that not every parent physically punished his or her children for religious or cultural considerations. The court acknowledged that some parents verbally reprimanded children and emphasised that the conduct had the same traumatising and brutal effect like corporal punishment.[448]

[444] *FORSA* para 7.
[445] *R v Hopley (1860) 2 F & F 202*, cited in *R v Janke 1913 TPD 382 at 385*. The court reiterated that parents may correct evil in children by exerting moderate and reasonable chastisement if it is within the child's power of endurance, administered with an instrument fit for the purpose and is not exerted for the gratification of passion, rage and in an excessive manner.
[446] *FORSA* para 29-31.
[447] *FORSA* para 32.
[448] *FORSA* para 32-34.

In justifying its finding that corporal punishment is unconstitutional, the court unanimously relied on section 12 (1) (c) of the Constitution, which provides for freedom from all forms of violence from either public or private sources.[449] The court acknowledged that that there were several constitutional rights infringed by the practice. The learned judge pointed that the determination of the constitutionality of the common law defence of reasonable chastisement demanded a detailed examination of criminal law where it originates. He noted that in simple terms, physical punishment of children would amount to assault but because of the defence, parents were exempted from criminal liability.[450] Having assessed the criminal law definition of assault and the meaning of violence, the court found that corporal punishment amounts to violence. The court reasoned that the practice was characterised by use of force or threat by parents to make children remember to restrain from misbehaviour.[451] Mogoeng CJ also observed that the use of force to the body of a child by a parent with intent to cause displeasure, discomfort, fear or hurt constituted a legally excusable assault.[452]The court viewed the practice in the constitutional mirror and found that the mischief which the Constitution sought to address in section 12 (1) (c), was to prohibit all forms of violence emanating from public or private sources.[453]

The court also explained assault in relation to corporal punishment. Mogoeng CJ emphasised that the South African law provided that application of force on the body of another, touching included, depending on its location and deductible meaning and a threat thereof constitutes assault.[454]The court reiterated that corporal punishment was 'an escape route' for parents from prosecution or conviction. Resultantly, the court observed that corporal punishment was inconsistent with the values the constitution stood for. Francke writing in 2021, queries the Constitutional Court approach of failing to take into account the maxim culpa poena par esto (let the punishment fit the

[449] *FORSA* para 36.
[450] *FORSA* para 37.
[451] *FORSA* para 40.
[452] *FORSA* para 41.
[453] *FORSA* para 42.
[454] *FORSA* para 43.

crime).[455] He submits that the court should have decided on the current sentencing law if a parent is found to be criminally guilty and convicted for assaulting a child.[456]

The court stressed that section 12(1) (c) of the Constitution (freedom from violence from public or private sources) prohibited the practice in South Africa. In his assessment, Mogoeng CJ asserts that the practice meets the threshold of violence hence the determination that it infringed the right to freedom from all forms of violence. The court proceeded to state that the practice infringed the right to dignity enshrined in section 10 of the Constitution (dignity). The judge emphasised that right to dignity occupies an important place in the architectural design of the Constitution.[457] This means that dignity requires renouncing humiliation and degradation of children and giving them the autonomy that they were denied during the Apartheid regime.[458] The court observed that child autonomy meant rights and entitlements. As such, chastisement impaired their dignity as individual beings with constitutional rights. [459]The court noted that children are vulnerable and the state is obliged to respect, protect and promote and fulfil their best interests enshrined in section 28. The judge went further to find that the practice infringed the best interests, which is important in all matters involving children.

The court relied on section 36 to justify its limitation of the common law defence of reasonable or moderate chastisement. The learned judge noted that the common law reasonable or moderate defence is a law of general application and it has the authority to limit rights in the Bill of Rights. The court held that, the defence limited the right to dignity, and freedom from all forms of violence. Mogoeng CJ considered the nature of corporal punishment in the home, and made a comment that it involved an intimate administration of physical punishment by a parent unlike the abolished institutionalised administration, which was cold, detached and implemented by a stranger.[460] The court

[455] D Francke 'Parents who assault their children –the inconsistency of applying s 297(4) of the Criminal Procedure Act' 2021 *De Rebus* 20-22.
[456] S 51(2) of the Criminal Law Amendment Act 105 of 1997 provides that if one is found to be criminally guilty and convicted for assault with intent to cause grievious bodily harm, the parent faces a minimum of ten years imprisonment. Francke argues that the current sentencing law is grossly disproportionate concerning assault committed by parents in the course of disciplining their children.
[457] *FORSA* para 45.
[458] *S v M* para 18-19.
[459] *FORSA* para 46
[460] *FORSA* para 51.

pointed out that parents have the primary responsibility to raise their children.[461] The court, however, clarified that the High court ruling meant that the religious and culturally ordained ways of disciplining children were no longer acceptable.[462] Nevertheless, the court held that parents remained spared from criminal conviction because of the de minimis rule.[463]The learned judge pointed that the rule could not wholly insulate the parent from criminal liability but that this did not provide enough legal logic to stop abolishing the defence.[464] The positive to be drawn from the rule is that parents where somehow spared from being prosecuted for the minutest well-intentioned infractions.

The court addressed the submissions of FORSA, which advanced the claim that the practice must be retained. Firstly, the court stated that the claim that the practice must be retained on a cultural or religious basis constituted an over-generalisation and was a recipe for widespread excessive administration of violence or child abuse.[465] The court however, observed that corporal punishment in the home could achieve positive results if done properly.[466] To substantiate the concession, Mogoeng CJ relied on the Global Initiative to End All Corporal Report, which indicates that many countries have kept the defence, and only few have prohibited it. [467]Secondly, the court held that the defence infringed section 28(2), which states that the child best interests are of paramount importance when considering the rights of children in any matter. The court took into account that children are vulnerable and given the nature of the practice, they were likely to continue to suffer from injurious punishment without reporting their parents to authorities.[468]

The court emphasised that corporal punishment amounted to assault of children and as a result it could be said that the disadvantages of retaining the practice outweighed the benefits. Thirdly, the court stated that the State and the judiciary has an obligation

[461] *FORSA* para 51.
[462] *FORSA* para 52.
[463] *FORSA* para 52.
[464] *FORSA* para 52.
[465] *FORSA* para 54.
[466] *FORSA* para 54.
[467] *FORSA* para 54.
[468] *FORSA* para 55.

to respect, protect and fulfil a child's section 28 protections.[469] The court took judicial notice of the utilisation of physical punishment by parents for a historically long period, however, it expressed that the right is not enshrined in the Constitution.[470] Dismissing FORSA's claim that 'right to parentship' was grounded in South Africa's international obligations, the court held that international law and the Constitution did not recognise right to discipline.[471]

The court paid very little attention to expert evidence, despite efforts by the CCL amici to assist the Court with evidence supporting the prohibition of practice. The learned judge stated that empirical evidence was not conclusive on the potential harmful effect of moderate from excessive punishment.[472]The court tried in vain to explain the difference between moderate punishment and assault. Mogoeng CJ, in his attempt to distinguish the two, remarks that 'no research is required to verify this reality. It is as obvious as the side of the road on which South Africans drive their vehicles'.[473] Even though the learned judge queried empirical evidence, he acknowledged that positive parenting was the best approach to discipline children.[474] One can respectfully submit that the Court erred and deviated from the established principle and norm that courts deal with evidence when adjudicating on matters before them. Given the sensitivity of the subject of corporal punishment, it is paramount that the court ought to have given attention to evidence to justify its decision. As highlighted above, failure by the Courts to justify their decision amounts to 'justification deficit', which leave parents with more questions than answers.

Despite apparently disregarding expert evidence, which strongly highlighted that positive parenting was a less restrictive means to discipline children, the court proceeded to follow the logic of the CCL amici positive parenting submission.[475]The failure to acknowledge evidence by the Constitutional Court and the subsequent

[469] *FORSA* para 56-57.
[470] *FORSA* para 63.
[471] *FORSA* para 64.
[472] *FORSA* para 64.
[473] *FORSA* para 68.
[474] *FORSA* para 64-68.
[475] *FORSA* para 67-69.

finding that parents must now shift from physical parenting to positive parenting is divorced from judicial accuracy and inclined to judicial sensationalism.

Although the *FORSA* judgment succeeded in banning corporal punishment in the home in South Africa by finding that the practice is unconstitutional, there has been considerable criticism of the judgment from the academic fraternity. Writing in 2020, Lenta asserts that the apex court judgment is narrower and shallower than the High court.[476] He notes that paragraph 30 of the judgment where the court held that 'where one or more key constitutional rights or principles could help to properly dispose of an issue…' indicates the court's judicial minimalism approach. The approach deliberately avoids theoretical depth and covers only the key constitutional rights or principles.

The judgment is based on the right of everyone not to be subjected to violence from either public or private sources and the right to dignity. The former constituting the primary right and the latter being of secondary consideration. By giving much consideration to section 12(1)(c), Lenta argues that the court ended up saying little or nothing about parents religious and cultural rights despite that the rights were implicated. He submits that the ruling is shallow considering that it fails to give detailed theoretical arguments and erroneously uses the word 'chastisement' as a synonym of physical punishment. He refers to paragraph 47-48 of the judgment where the court briefly deliberated on corporal punishment as an infringement of the children's dignity. The court was at pains to concede that corporal punishment may achieve good results if managed well and questioned the empirical evidence, which prove psychological harm.[477] Lenta concludes that the judgment lacks persuasive justification on why parental liberty must be curtailed. By so doing, the court missed the opportunity to communicate to parents the full extent of the wrongfulness of the practice.[478]

Skelton argues that in *YG v S*,[479] the High court took a bold step by referencing international hard and soft law as the core reason for the prohibition of corporal

[476] P Lenta 'Corporal punishment and the costs of judicial minimalism' 2020 *South African Law Journal* 185 -200.
[477] *FORSA* para 54.
[478] Lenta (2020) *South African Law Journal* 200.
[479] *2018 (1) SACR 64 (GJ).*

punishment in the home.[480] Nevertheless, she questions the *FORSA* judgment's failure to discuss the CRC and ARCWC despite the CCL amici's detailed submissions on international law dealing with corporal punishment of children. She also submits that the Constitutional Court failure to reference international law indicates a worrying shift by the court away from its commitment to apply international children rights arguments.

Ellerbeck, weighing in on the other side of the argument, submits that the ruling's narrow interpretation of violence which was based on a single dictionary definition was the basis on which section 12(1) (c) was stretched to cover reasonable or moderate chastisement.[481] She asserts that had the court considered the position that parliament is vested with legislative powers and the fact that the Children's Act Amendment Bill was about to be tabled, it would have been just to refer the matter to representatives of the people of South Africa to have their say on retention of the common law defence. Given the criticism of the judgment from both the pro-corporal and anti-corporal punishment camps, it is clear that despite the court ruling prohibiting the parental legal defence, the Constitutional Court judgment leaves a lot of questions unanswered, which is unfortunate given the value-laden nature of the subject.

4.4 Conclusion

The South African case law arguments underpinning the ban of corporal punishment in the home highlight that corporal punishment infringes the constitutional rights to dignity, equality, freedom from all forms of violence and the best interest of the child. The South African jurisprudence on prohibition of corporal punishment is a product of the constitutional democracy regime, which imagines children as rights holders.[482] Section 28(2) of the Constitution provides that 'a child's best interests are of paramount importance in every matter concerning the child'. The provision through litigation has been the anchor for the development of child law and implementation of

[480] A Skelton 'Incorporating the CRC in South Africa' in Ursula Kilkelly, Laura Lundy & Broach Byrne (eds) *Incorporating the UN Convention on the Rights of the Child Intersentia* 2021 (22-23).
[481] D Ellerbeck 'Spanking judgment What does it say and could the court have found differently' *23 October 2019* available at https://forsa.org.za
[482] JS Khampepe 'Keynote address: Centre for Child law 20 year conference 5 December 2018' 2019 *De Jure Law Journal* 488-495.

children rights.[483] Khampepe, writing extra-curially, submits that constitutional provisions that were meaningless have been given meaning through litigation.[484] The establishment of institutions like the Centre for Child Law have significantly contributed to the stirring of the concept of 'imagining children constitutionally'.[485] The judicial ban in South Africa shows the effectiveness of litigation as a tool for law reform. Khampepe asserts that public interest litigation ventilates the contents of rights enshrined in the Constitution.[486] This mean that constitutional rights on their own could not bar corporal punishment, however through litigation the rights become a reality in children's lives. Sloth –Nielsen points out that parliamentary abolition remained a sceptical route with uncertain prospects.[487] This view is evidence enough that, had it not been through litigation challenging the defence of reasonable or moderate punishment children would have remained subjected to the practice.

Despite several efforts to include a clause prohibiting corporal punishment in the home in the Children's and the Children Amendment Act, the parliament have stalled the efforts of reforming national laws, which perpetuate corporal punishment.[488] The South African experience is a clear indication that in the quest to protect children all legal routes at one's disposal must be explored. This research has shown that litigation challenging the constitutionality of common law or legislative provisions does not only have the potential to ban physical punishment but also sets the wheels of law reform rolling. However, judicial decisions must be backed with law reform to create legitimacy.[489] Mezmur argues that 'judicially based prohibition, in the absence of subsequent law reform, fails to articulate the message that the first purpose of the prohibition of corporal punishment in the home setting should be educational not punitive'.[490] The *YG v S* and the *FORSA* judgments confirm the position that children

[483] Khampepe 2019 *De Jure Law Journal* 488-489.
[484] Khampepe (2019) *De Jure Law Journal* 489.
[485]Khampepe (2019) *De Jure Law Journal* 494.
[486] Khampepe (2019) *De Jure Law Journal* 494.
[487] Sloth-Nielsen (2019) 245-264.
[488] Clark (2020) *South African Law Journal* 343.
[489] Khampepe (2019) *De Jure Law Journal* 494 emphasizes the point that litigation wins must not be a once of thing, but must be supported with engagement and follow-ups to respective departments and authorities to ensure comprehensive law reforms. She also stresses that litigation and court decisions can only take us to better jurisprudence however, greater and immediate measures sometimes are found within the government. Given the nature of corporal punishment in the home, it is undeniable that without explicit law reform banning the practice, the work remains half-done.
[490] Mezmur (2018) *Speculum Juris* 83.

are autonomous beings endowed with inherent dignity like all human beings. As shown above in the courts' legal arguments, constitutional and international law framework provide for protection and autonomy of children a view that has been conceptualised as 'imagining children constitutionally' in South Africa. In *YG v S*, the learned judge emphasised that in abolishing corporal punishment, where 'the process of doing so through legislation is not well advanced' the courts have a duty to develop common law where it infringes constitutional rights.[491] The South African jurisprudence shows that the Constitution is the most important instrument which empowers courts to lay down the law even in circumstances where the decision maybe be unfavourable to the public. The *FORSA* case declaration of unconstitutionality which succeeded in prohibiting corporal punishment in the home, despite the reasoning deficits in the judgment, inspire hope and adds impetus for the prohibition of the practice in other jurisdictions like Zimbabwe.

[491] YG v S para 85.

Chapter 5

5.1 Conclusion: Assessment of whether arguments in South Africa will be persuasive in Zimbabwe

This dissertation has explored the prospects of litigation in the prohibition of corporal punishment in the home in Zimbabwe. In the absence of explicit domestic legislation banning the practice, litigation is important to prevent infringement of children's constitutional protections.[492] South Africa is known globally for delivering on judicial review and on the other hand, the Zimbabwean courts are considered captured and are subject to political whims.[493]The South African judicial prohibition of corporal punishment in the home lays down principles and arguments, despite there being some reasoning deficits, particularly in the *FORSA* judgment. However, the *FORSA* judgment is obviously not binding on Zimbabwe, but it might be persuasive. The Zimbabwean constitutional challenge of the practice and determination will depend on how the matter is presented and how it is contextualised. This chapter discusses whether the arguments in the South African *FORSA* case discussed in Chapter 3 will influence the Zimbabwean constitutional challenge, and proffers reasons why the case is important to consider.

It is important to point that the South African litigation ending corporal punishment in the home was rooted in the Constitution. Hofisi argues that the South African Constitution and the Zimbabwe Constitution are founded on similar constitutional provisions.[494] The Zimbabwean new Constitution provides that courts may consider foreign law when interpreting constitutional provisions.[495]Skelton, writing in 2009, asserts that the developing jurisprudence in the area of child rights gives an opportunity to African countries to learn from each other.[496]Sloth-Nielsen corroborates Skelton's view on shared jurisprudence. She submits that the SADC region's courts have a history of declaring laws legitimising corporal punishment unconstitutional.

[492] Corporal punishment infringes right to dignity, personal security, freedom from torture or cruel or degrading treatment or punishment, equality and non-discrimination, rights of the children particularly right to be protected from maltreatment, neglect or any form of abuse and the child's best interests.
[493] D Hofisi 'The Constitutional Courts of South Africa and Zimbabwe: a contextual analysis' 2021 (35) *Speculum Juris* 55-69.
[494] Hofisi 2021 (35) 1 *Speculum Juris* 55.
[495] S 46(e) of the Constitution of Zimbabwe.
[496] A Skelton 'The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments' (2009) 9 *African Human Rights Law Journal* 500.

[497]She further observes that the courts in Namibia, South Africa and Zimbabwe have consistently borrowed 'each other's decisions for support'.[498] This means that there is a realistic possibility that Zimbabwe courts are likely to rely on some or all of the South African arguments in determining the constitutionality of the practice in the home.

A detailed analysis of Chapter 3 and 4, which deal with the Zimbabwean and South African jurisprudence, show that the two neighbouring nations' jurisprudence on child rights although is similar to a larger extent, there have also been significant differences on how they approach 'interpretive solutions or argumentation models beyond legal rationale and geo-cultural borders'.[499] Hofisi confirms the view that the two countries, although they have a lot in common, they have 'different jurisprudential trajectory'.[500] In Zimbabwe, the jurisprudence on corporal punishment shows that the courts have been consistent in finding the practice to be unconstitutional on the basis that it infringes right to dignity and the evolving standards of decency (decency test). South African courts have developed child jurisprudence on the largely on the child best interests' concept, although also recognising children's autonomy. Nevertheless, both countries' courts agree that corporal punishment infringes dignity and freedom from all forms of violence either from public or private sources. In addition, both jurisprudences have found that the practice amounts to inhumane and degrading treatment or punishment.

Lollini argues that the 'phenomenon of borrowing precedent and interpretive solutions or argumentation models' is more common in 'legal systems that have adopted new constitutional texts'.[501] As indicated earlier in Chapter 3, children rights (s19,81) provisions, section 52 right to personal security and section 53 which provide for freedom from torture or cruel, inhuman or degrading treatment or punishment are all new constitutional texts. Lollini submits that borrowing from other Constitutional Courts is vital in that it creates international legitimacy, and shows an awareness of the courts that new constitutional texts demand a period of legal and cultural learning.[502] In short,

[497] Sloth-Nielsen (2019) 263.
[498] Sloth-Nielsen (2019) 264.
[499] A Lollini 'Legal argumentation based on foreign law: An example from case law of the South African Constitutional Court' 2007 (3) *Utrecht Law Review* 60-74.
[500] Hofisi 2021 (35) 1 *Speculum Juris* 55.
[501] Lollini 2007 (3) *Utrecht Law Review* 63.
[502] Lollini 2007 (3) *Utrecht Law Review* 63-65.

the phenomenon of borrowing foreign constitutional rulings enlarges the Zimbabwean Superior court interpretive parameters. In addition, the judiciary has not been spared from globalisation. As a result, 'horizontal communication between constitutional systems is growing and it is developing outside of international community towards a constitutional community' [503]

The South African apex court in *FORSA* case addressed the issue of standing. The Constitutional Court confirmed an already standing legal position in its jurisdiction that an amicus curiae acting in the public interest may institute constitutional litigation. In Zimbabwe, the legal standing concept has greatly improved since the adoption of the new Constitution. It will be possible for a civil society organisation to file a constitutional challenge in the public interest, without identifying a victim. However, there has never been a case particularly in child rights litigation, where an amicus instituted proceedings at the appeal stage, challenging common law or a legislative provision. The South African Court holding on standing actually gives a green light to litigators in Zimbabwe to expand their standing lens. This means that if a case is lost at the High court level, the amicus curiae may institute appeal proceedings under the public or strategic litigation banner. Another important feature of the South African *YG v S* ruling is the conduct by the court to raise the constitutionality of the common law defence mero motu. The Zimbabwean Courts has been very conservative and have remained stuck to the rigid principle that court must decide issues raised by parties as opposed to courts creating issues in litigation. With regard to child rights, Zimbabwe might take the opportunity to learn and enrich its jurisprudence by adopting the flexible South African approach that enhances child justice.

The South African Constitutional Court in *FORSA* found that corporal punishment violates the right to dignity and freedom from all forms of violence either from public or private sources. The Zimbabwean Constitution also contains the same provisions. As such, there is a substantial likelihood that the Superior courts in Zimbabwe may consider the South African case law in determining the constitutionality of the practice in the home. As indicated in Chapter 3, Zimbabwean jurisprudence from the LH constitution era to the new Constitution era have consistently held that corporal

[503] Lollini 2007 (3) *Utrecht Law Review* 74.

punishment violates the right to human dignity. It remains to be seen whether the court will interpret physical punishment of children in the home as violation of dignity.

In navigating the question of whether the common law defence of reasonable or moderate chastisement was unconstitutional, the South African Constitutional Court chose to approach the subject from a criminal law perspective. In Zimbabwe, the defence of reasonable chastisement has its roots in the Criminal Codification Act and the Children's Act. The Courts in Zimbabwe may take a leaf from the South African book, given that the two countries' criminal law has shared roots from the same Cape of Good Hope colonial law. In the event that the Courts in Zimbabwe elect to borrow the South African approach, the bench will likely find that corporal punishment in the home meet all the elements of the crime of assault. However, it remains the court's discretion to determine which degree of corporal punishment amounts to assault. The court may consider international law standard which does not distinguish between light or mild physical punishment. It will be interesting to see how the Zimbabwean courts will determine which acts of corporal punishment falls under the de minims doctrine, and the applicable sentence that fits a parent who is found guilty and convicted for assaulting a child. The South African Constitutional Court has left the sentencing subject open, despite finding that corporal punishment matches the elements of the crime of assault.

The *FORSA* judgment, although it prohibited corporal punishment in the home, beams an interesting light on the South African Constitutional Court's approach, which may be favourable or unfavourable to the Zimbabwean bench. Mogoeng CJ, chose to ignore empirical evidence and the relevant international law. As earlier discussed in Chapter 4, that the *FORS*A ruling suffers from legal deficiencies in that it tried to pander too much to parents and over-emphasised the biblical dimension. Even though in academic circles this may be viewed as one of the weaknesses of the judgment, the judges in the Superior courts in Zimbabwe may adopt that approach given that it suits very well with Zimbabwe's conservatism and deep allegiance to religion.

Although Zimbabwe is a cultural relativist country with its social norms and values coupled with legislation that tolerates the practice in the home,[504] the Constitution provides that children are rights bearers like adults and the latter are currently legally protected from violence in the home, thus children do not deserve less protection. In fact, the fact they are children increases the need to protect them from all forms violence that threatens their growth, development and survival. The South African Court in dealing with the legal, social and constitutional issue of whether reasonable or moderate chastisement is constitutionally acceptable upheld the doctrine of Constitutionalism. Despite their probable concern that there would be a public outcry given the nature of the issue before it, the Court laid down the law as enshrined in the Constitution. Thus, the court affirmed the legal position that the Constitution is the supreme law of the land. Social, cultural and legislative dictates, which perpetuate physical punishment in the home stand to be challenged in the courts and where they fail to pass constitutional muster, they can be declared invalid. There has been a shift in social and cultural concepts in Zimbabwe, the region and the globe. The most significant shifts relative to the subject of child discipline, is the rejection of corporal punishment and the propagation of the doctrine that children are autonomous beings with individual rights like adults. The Constitutional and international law framework substantiates the view that children are right bearers, as such, they are not less deserving of having their dignity protected.

The best interest principle which is at the centre of the realisation, promotion and development of child law and child rights jurisprudence emphasises that in all decisions involving a child, their best interests are of paramount importance. The research has shown that physical punishment is associated with fear, pain, humiliation of children as such that cannot be said to constitute the best interests of a child. Therefore, parents' right to guide their children through disciplining them is not infinite and abolishing the common law reasonable or moderate chastisement defence is well within confines of the constitutional and international law framework.[505]

[504] Dziva (2019) *Child Abuse Research: A South African Journal* 28-35.
[505] C Godsoe 'Redefining parental rights: The case of corporal punishment' 2017 *Constitutional Commentary* 280-305.

As mentioned above the Constitution and the international law framework provide for children's right not to be subjected to any form of violence in any setting including the home, and this includes corporal punishment. The protection that the frameworks afford to children, in the absence of law reform, can only be made meaningful through litigation, which has proved to be an effective route to enforce rights. Constitutional norms and international law do not expressly bar corporal punishment, however, they instead militate towards the prohibition of the practice,[506] and state obligations to prohibit the practice have been elucidated through soft international law such as general comments. The dissertation has shown that corporal punishment of children in the home infringes several human rights in the Constitution. The Zimbabwean parliament, despite repeated calls by regional and international child rights bodies, have avoided law reforms to ban physical punishment, litigants have no other option except to challenge the common law defence of reasonable or moderate chastisement in the courts.

Lubaale asserts that South Africa is celebrated for absolute abolition of physical punishment in the home. She points that the absolute abolition approach upholds the concept of children's rights. Lubaale compares the South African approach to the Canadian approach, which rejected total abolition and elected partial abolition approach. The Canadian court in the case of *Canada Foundation for Children, Youth and the Law v Canada (Attorney General)*[507] ruled that corporal punishment in the home is not degrading, inhuman or harmful. Lubaale argues that Canadian ruling undermines the concept of children rights. The court said that the force used by parents need not exceed a reasonable standard. Some might describe the case as a win-win situation for both parents and children, in that parents retained their authority to discipline children as opposed to state dictating to parents on how to discipline children. Despite striking a balance between children best interests' rights and the best interests of the family unit, the Canadian case is described by Lubaale as an unsettling decision given that the reasonable standard approach is uncertain in nature. Furthermore, there is no clear distinction between severe injury and mild use of force.

[506] Godsoe (2017) *Constitutional Commentary* 299.
[507] *2004 SCC4.*

The lack of uniformity in enforcement results in prosecution of parents where the assault does not warrant such or vice versa.

Apart from South Africa, the absolute ban approach was earlier on upheld by the Israel Court in the case of *Plonit v Attorney General*.[508] The Supreme Court in Israel ruled that the defence of reasonable chastisement was unconstitutional and against Israel's UNCRC international obligations. The South African and Israel similar approach in abolishing physical punishment in the home confirms the CRC position that the practice must be done away with no matter how light or mild it is. The Zimbabwean courts will probably consider the Canadian judgment as a possible approach, so litigators will have to convince the Court why the approach of the South African and Israeli courts is preferable. Although the Canadian approach strikes a balance between children and parental rights, the Zimbabwean superior court in *S v Chokuramba*[509] preferred the South African or Israel approach in banning corporal punishment in the judicial system. Whether the courts will apply, the same approach will depend on how the matter is presented and contextualised within the Zimbabwean constitutional democracy. Lessons from the Zimbabwean Superior Courts jurisprudence on the subject of physical punishment highlight that the practice is viewed as unconstitutional on the basis that it violates dignity, personal integrity, freedom from all forms of violence either public or private sources and the children rights in the Constitution.[510]

The issue of corporal punishment in the home in Zimbabwe is not a new subject altogether. It was first addressed in the High court in both Pfungwa and *Chokuramba* cases. The High court in the two mentioned cases, held that the practice was unconstitutional in that it violates right to dignity and freedom from torture, cruel, inhuman or degrading punishment. The court observed that the practice constitutes violence. Noticeably the South African Constitutional Court also held that corporal punishment amounted to violence. Unfortunately, on review of the *S v Chokuramba* High court ruling, the Constitutional Court avoided an exploration of whether the

[508] *54 (1) PD 145 (Criminal Appeal 4596/98) Supreme Court of Appeal.*
[509] *S v Chokuramba CCZ 10/19.*
[510] *S v Chokuramba CCZ 10/19; Pfungwa & Another v Headmistress of Belvedere Junior Primary School & Others HH-148-17.*

practice in the home withstand constitutional scrutiny if challenged. The failure to entertain the issue in the Constitutional Court indicates that the Zimbabwean Apex court rules of procedure still give so much weight to procedure as opposed to substantive nature of the issues before the court. To some extent, this is understandable given that the Constitution is still fairly new, hence judges are cautiously crafting the jurisprudence.

The dissertation attempted to answer the question whether if there were prospects of success through litigation in prohibiting corporal punishment in the home in Zimbabwe. The Constitutional and international law framework, coupled with the case law arguments and judgments discussed in this research, have shown that physical punishment in the home infringes several constitutional protections discussed in this research. A discussion of the *Pfungwa* case in Chapter 3 has shown that litigation banning the practice succeeded on the basis that it cited the relevant arguments indicated above. Should corporal punishment in the home be challenged through litigation, the courts are likely to find the practice unconstitutional.

To bring the curtain down, litigants are recommended to craft their challenge of corporal punishment in the home by making arguments that highlight that the practice is arbitrary, lack uniformity in the degree of punishment, amounts to unequal enforcement of the law (some parents may end up being prosecuted and some not), infringes dignity and the child best interests. The CRC, ACRWC and Constitution of Zimbabwe affords children rights and protection. Parental and children's rights will have to subjected to the limitations test to determine if positive parenting is a less restrictive means to achieve child disciplining in the home. Should litigation succeed in bringing absolute prohibition of corporal punishment in the home in Zimbabwe, the ruling will add impetus to the alignment of child law, with the implementation and enforcement of the repeated observations and recommendations of the CRC and ACRWC. Although, litigation is an important step in the matrix of prohibiting the practice, it cannot be understated that Zimbabwe needs to align laws that authorise the practice with the Constitution. Achieving absolute prohibition would be an enormous step towards creation of a Zimbabwe Fit for Children.

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