

6 (II)limitable and Non-Derogable Rights, Judicially Sanctioned Whipping and the Future of Punishment in All Setting in Zimbabwe

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1 Introduction

The central legal problem which this article seeks to investigate relates to the constitutionality of pieces of legislation permitting corporal punishment in different settings. At the heart of this inquiry is the question whether corporal punishment remains constitutional, especially in light of Zimbabwe's obligations at international and domestic law. To begin with, Zimbabwe is a state party to international human rights instruments that have been interpreted to require the abolition of corporal punishment in all settings. In addition, the Constitution of Zimbabwe Amendment (No 20) Act, 2013 (Constitution) entrenches illimitable rights that protect everyone against corporal punishment in the criminal justice system, the schools and the family home. Nonetheless, corporal punishment remains rampant in all settings and in the criminal justice system is even explicitly sanctioned and implemented by the state machinery.

Against this background, the article analyses the scope of Zimbabwe's legal obligations in relation to corporal punishment under international and domestic law. With regards to legal obligations at the domestic level, the article argues that corporal punishment can be categorised in one of two ways and each categorisation carries different consequences for the future of the practice in Zimbabwe. First, corporal punishment may be viewed as a violation of the illimitable and non-derogable rights to human dignity and the freedom from torture or cruel, inhuman or degrading treatment or punishment. If this categorisation is correct, then corporal punishment has to be abolished in all settings as required by the Constitution. To determine the correctness of this approach, it is necessary to track down the history of the abolition of corporal punishment in Zimbabwe and the extent to which it should inform current approaches to the practice.

The second categorisation of corporal or physical punishment only kicks in if the first one is rejected by the courts or considered to be an extreme way of analysing the legality and constitutionality of the practice. Accordingly, corporal punishment can be categorised as a violation of the child's rights to freedom from violence (from public and private sources) and freedom from abuse or maltreatment. These rights are limitable and can be limited by a law of general application permitting corporal punishment and serving a legitimate government purpose in various settings. For corporal punishment to be viewed as a reasonable, necessary and justifiable limitation of the right to freedom from violence or abuse, it is necessary to engage in limitations analysis under section 86(1)-(2) of the Constitution. Relying on international law and the jurisprudence of treaty monitoring bodies, this article starts with an analysis of the term 'corporal punishment' and argues that much of the debate around the practice arises from the lack of conceptual clarity on what is meant by this term.

Afterwards, the article tracks down the history of judicially sanctioned whipping in Zimbabwe and demonstrates that domestic courts have always classified it as a violation of the constitutional prohibition of torture or cruel, inhuman or degrading treatment or punishment.

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More recently, the Constitutional Court of Zimbabwe, in *S v. Chokuramba*,¹ characterised judicially sanctioned whipping as a violation of illimitable and non-derogable rights to human dignity and freedom from inhuman or degrading treatment. The Court also partly relied on the child's right to freedom from all forms of violence from private and public sources. The holding of the Court and the rights upon which it was premised are discussed in some detail in section 4 of the article. In section 5, the article analyses the implications of both the judgment and other recent developments for the total abolition of corporal punishment in the education sector. This includes an engagement with the provisions of the Education Amendment Bill, which seeks to completely abolish the administration of corporal punishment on primary and secondary school learners.

The abolition of corporal punishment raises considerations that are fundamentally different from those that feature in our analysis of the practice in the judicial and education systems. Parents, for instance, have the rights to freedom of religion, culture and beliefs. These rights are both individual and collective in nature. As part of the associational dimension of these rights, parents are allowed to guide and direct their children in the way they see fit and this may include the use of corporal punishment as a correctional method on children. Further, the article analyses the implications of these parental rights and responsibilities for the abolition of corporal punishment in the family home, foster homes, day care institutions and other similar settings. Section 6 concludes the discussion and recommends that corporal punishment should be abolished in all settings in Zimbabwe in light of the state's legal obligations and the recommendations it has accepted from both treaty monitoring bodies and the Universal Periodic Review.

2 Conceptualising Corporal Punishment: Lessons from Developments at the International Plan

The psychological images created when reference is made to the term 'corporal' or 'physical' punishment vary from one person, society or culture to another. As such, many of the arguments for or against the practice could be addressed if there is a conceptual or practical clarity about what is meant by the term 'corporal punishment'. This definitional problem has stood in the way of progress or law reform. The Committee on the Rights of the Child (CRC Committee), in its General Comment 8, extensively defined 'corporal' or 'physical' punishment as:

any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ("smacking", "slapping", "spanking") children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child.²

The presence of physical force calculated to cause some degree of pain or discomfort, however slight, is an essential ingredient of corporal punishment. In a sense, corporal

¹ CCZ 10/19 (Justice for Children Trust and Zimbabwe Lawyers for Human Rights as *amicus curiae*)

² CRC Committee General Comment No. 8 (2006), The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment, para. 11. *See also* General comment No. 13 (2011), The Right of the Child to Freedom from All Forms of Violence, para. 24.

punishment is narrower than the term ‘physical violence’. The latter term includes, among other things, fatal and non-fatal physical violence. In the view of the CRC Committee, “physical violence includes: (a) *all corporal punishment* and all other forms of torture, cruel, inhuman or degrading treatment or punishment; (b) physical bullying and hazing by adults and by other children; (c) forced sterilization, particularly for girls; (d) violence in the guise of *treatment* and (e) deliberate infliction of disabilities on children for the purpose of exploiting them for begging in the streets or elsewhere”.³ Though the Convention on the Rights of the Child, 1989 (CRC)⁴ does not specifically mention ‘corporal punishment’, at the international level, corporal punishment is a particular form of physical violence which falls under the broad category of treatment that is viewed as cruel, inhuman and degrading.

First, there is no universal definition of the nature of beatings that constitute legitimate forms of corporal punishment and those that do not. When we talk about ‘corporal punishment’, what are we referring to? Apart from the usual beatings to which children are subjected daily, there are such practices as pulling the child’s ears or hair (wherever located); letting the child ‘stay’ in a drum full of cold or hot water; using one’s hands to physically and seriously assault the child; stepping on the child’s head or neck or any part of the body as the child lies face up or down on the ground; throwing the child in mid-air and letting them drop on the ground; letting the child either run until they collapse or carry heavy objects for long spells of time; applying painful products such as chili on the child’s genitals or pulling such genitals (especially in the case of a male child); severely twisting any part of the child’s body; and many more.

The multiple manifestations of physical punishment referred to above are intended to demonstrate that the mental pictures that are created by reference to the phrase ‘corporal punishment’ are as many as the manifestations of the practice themselves. This definitional problem poses serious challenges at the practical level. Even if the state were to define, with mathematical precision, what it means by ‘corporal punishment’ or ‘moderate and reasonable chastisement’, it would have to assume an additional burden of monitoring whether each parent, guardian or school teacher is administering the correct version or measure of corporal punishment and even then whether its administration is being done proportionally. These difficulties alone may justify a universal departure from the use of corporal punishment to ensure that there is no debate on what is moderate and what is not; what versions of violence are reasonable and what are not; whose standards are applied; and who determines penal severity in the context of the schools and the family.

Under international law, states assume important obligations that have implications for the protection of children from multiple forms of violence. This is particularly evident from Article 19(1) of the CRC, among other provisions, which requires states “to take all legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, or maltreatment while in the care of parents”. In the recommendations following the second day of general discussion, the CRC Committee encouraged states parties to “enact or repeal, as a matter of urgency, legislation in order to prohibit all forms of violence, however light, within the family and in schools, *including as a form of discipline*, as required by the provisions of

³ General Comment No. 13, *supra* note 2, para. 22.

⁴ Adopted by the United Nations General Assembly (Resolution 44/25) 20 November 1989 and entered into force on 2 September 1990 in accordance with Article 49.

the Convention”.⁵ This suggests the total abolition of corporal punishment in all settings – the family home, day care or such other institutions, the school and the courts.

One of the questions that emerge is whether corporal punishment constitutes violence? According to the CRC Committee, the duty “to protect the child from all forms of physical or mental violence ... does not leave room for any level of legalised violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate... measures to eliminate them”.⁶ Article 37 of the CRC also imposes on states parties the duty to ensure that “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”. In its General Comment No. 1, the CRC Committee observed that corporal punishment is incompatible with the CRC as it undermines the need to provide to the child education in a manner that is consistent with their inherent dignity.⁷

The CRC Committee characterised corporal punishment as a violation of the child’s right to freedom from cruel, inhuman and degrading treatment or punishment.⁸ To the CRC Committee, national laws should “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”.⁹ This caveat applies to all forms of violence and does not leave room for any level of legalised violence against children no matter how less severe and no matter what context. On the whole, corporal punishment has been conceptualised as a violation of the non-derogable and illimitable rights to human dignity and freedom from violence in international law. From an African perspective, the African Charter on the Rights and Welfare of the Child, 1990 (African Children’s Charter)¹⁰ requires state parties to eliminate harmful social and cultural practices affecting the dignity of the child, for instance the use corporal punishment in homes.¹¹

In its Concluding Observations on Zimbabwe,¹² the CRC Committee expressed deep concern that corporal punishment remains legal and widely practised in the family, in schools and in other settings.¹³ It recommended, in line with its initial concluding observations,¹⁴ that the government should to take practical measures to reform legislative provisions and policies that allow the administration of ‘reasonable’ or ‘moderate’ corporal punishment; and urging the state party to: “(a) repeal or amend, as necessary, all legislation and administrative regulations to explicitly prohibit corporal punishment as a correctional or disciplinary measure in all settings; (b) sensitize and educate parents, guardians and professionals working with and for children, particularly teachers, on the harmful effects of corporal punishment and

⁵ CRC Committee, Day of general discussion on violence against children within the family and in schools, Report on the twenty-eighth session, September/October 2001, CRC/C/111, paras. 701–745. *See also* General Comment No. 8, *supra* note 2, paras. 7, 8 and 18.

⁶ General Comment No. 8, *supra* note 2, para. 18.

⁷ CRC Committee General Comment No. 1, *The aims of education* (17 April 2001, CRC/GC/2001/1), para. 8. *See also* General Comment No. 8, *supra* note 2, para. 7.

⁸ General Comment No. 8, *supra* note 2, paras. 7, 12 and 18.

⁹ General Comment No. 13, *supra* note 2, para. 17.

¹⁰ Adopted by the Organisation of African Union (OAU) now the African Union (AU) (OAU Doc. CAB/LEG/24.9/49) in 1990 and entered into force on 29 November 1999 in terms of Article 47.

¹¹ Article 21(1) of the African Children’s Charter.

¹² CRC Committee Concluding observations on the second periodic report of Zimbabwe (7 March 2016) CRC/C/ZWE/CO/2 (hereinafter Concluding Observations 2).

¹³ *Ibid.*, para 42.

¹⁴ Concluding observations of the Committee on the Rights of the Child: Zimbabwe (7 June 1996) CRC/C/15/Add.55 (hereinafter Concluding Observations 1), para. 31.

the need to end the culture of silence on cases of violence against children; and (c) promote positive, non-violent and participatory forms of child-rearing and discipline in all settings, including through providing teachers and parents with training on alternative disciplinary measures”.¹⁵ During the Universal Period Review, the same sentiments were expressed with recommendations for the abolition of corporal punishment in all settings in full compliance with international human rights obligations.¹⁶ However, it is noted from the discussion below that since the late 1980s, though, the Zimbabwean apex Court appears to have inclined towards compliance with international standards and human rights obligations.

3 The History of Corporal Punishment in Zimbabwe

Historically, our courts classified corporal punishment as a violation of the constitutional prohibition of torture or cruel, inhuman or degrading treatment or punishment. The Zimbabwean Supreme Court in *S v. Ncube*¹⁷ and *S v. Ndhlovu*¹⁸ declared the practice of judicial whipping on adults to be ‘inhuman and degrading’, and the conclusion was reached in a separate case that dealt with judicially sanctioned whipping in *S v. A Juvenile*, where Gubbay JA described it as “an antiquated and inhuman punishment which blocks the way to understanding the pathology of crime”.¹⁹ In *S v. Juvenile*,²⁰ the Supreme Court sitting as a Constitutional Court held by a majority of three to two justices that corporal punishment inflicted upon male juvenile offenders in terms of the Criminal Procedure and Evidence Act was inconsistent with the prohibition of torture or cruel, inhuman or degrading treatment or punishment under section 15(1) of the old Constitution. Gubbay CJ registered the Court’s abhorrence of corporal punishment in the following terms:

[J]udicial whipping in any form must inevitably tend to brutalise and debase both the punished and the punisher alike. It causes the latter, and through him society, to stoop to the level of the offender. *It marks a total lack of respect for a fellow human, be he adult or juvenile. It treats members of the human race as non-humans. By its very nature it is extremely humiliating to the recipient ... [J]udicial 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 ...* Irrespective of any precautionary conditions which may be imposed, it is a procedure subject to ready abuse in the hands of a sadistic or overzealous official appointed to administer it. It is within his power to determine the force of the beating. *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. The main categories of exception appear to be some former British colonies and some States where *shari’a* (Islamic law) is practised.²¹

In the same judgment, Khosa JA, concurring, had the following remarks to make:

Speaking for myself, I think any law which compels a person, against his will, to expose his posterior to the gaze of total strangers while blindfolded and strapped to a wooden bench degrades and debases that person, and if this is done for the sole purpose of subjecting him to whipping, then it also dehumanises him. *Even if corporal punishment were to be administered without the victim taking his clothes off, the mere idea of inflicting physical pain as a form of punishment corresponds, in my view with torture and the lex talionis –*

¹⁵ Concluding Observations 2, *supra* note 13, para. 43.

¹⁶ UN General Assembly, Human Rights Council, Report of the Working Group on the Universal Periodic Review to Zimbabwe (28 December 2016) A/HRC/34/8, para. 132.81.

¹⁷ 1987 (2) ZLR 263 (S). The Court further held that “whipping ... [is] a punishment which in its very nature is both inhuman and degrading”.

¹⁸ 1988 (2) SA 702 (ZSC).

¹⁹ 1990 (4) SA 151 (ZS) 168-169B.

²⁰ 1989 (2) ZLR 61 (SC).

²¹ 90G-91C, emphasis added.

*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.*²²

After these powerful remarks and the undiplomatic judicial abhorrence of corporal punishment they demonstrated, Parliament intervened to make corporal punishment ‘lawful’ through a 1990 amendment to the Constitution. The amendment, which became section 15(3) of the Lancaster House Constitution (LHC), provided that no moderate corporal punishment administered by prison officials, parents or those acting in *loco parentis*, shall be held to be in contravention of the right to freedom from torture or cruel, inhuman or degrading treatment or punishment as provided for in section 15(1) of the same Constitution.²³ Section 15(3)(b) of the LHC provided that “[n]o moderate corporal punishment inflicted in execution of the judgment or order of a court, upon a male person under the age of eighteen years as a penalty for breach of any law; shall be held to be in contravention of subsection (1) on the ground that it is inhuman or degrading”. The effect of the amendment was to nullify the judgments that had abolished corporal punishment in the criminal justice system and to ensure that the practice continued to be used as a sentencing option for crimes committed by male children.

4 Conceptualising Corporal Punishment and Illimitable Rights under the ‘New’ Constitution

It is imperative to emphasise, from the onset, that the rights to dignity and freedom from cruel, inhuman or degrading treatment are absolute and when violated do not require an enquiry into whether the violation is necessary, reasonable, fair or justifiable in an open and democratic society.²⁴ Section 86(3)(b)-(c) provides that no law may limit and no person may violate the rights to human dignity and the freedom from torture or cruel, inhuman and degrading treatment. Accordingly, the only outstanding question is whether corporal punishment violates the child’s rights to human dignity or to freedom from degrading treatment. When delineating the scope of illimitable rights, it is not necessary in the event of a violation of such rights to determine whether or not the violation is justifiable or reasonable. As Bekker CJ would have it:

[O]nce one has arrived at the conclusion that corporal punishment *per se* is impairing the dignity of the recipient or subjects him to degrading treatment or even to cruel or inhuman treatment or punishment, it does not in principle matter to what extent such corporal punishment is made subject to restrictions and limiting parameters, even of a substantial kind — even if very moderately applied and subject to very strict controls, *the fact remains that any type of corporal punishment results in some impairment of dignity and degrading treatment.*²⁵

The rights to human dignity and the freedom from cruel or inhuman or degrading treatment are illimitable. If corporal punishment has historically been characterised as violating these rights, it is impermissible to now depart from this characterisation just because the rights in issue are said to be illimitable and non-derogable. Given that the “new Constitution has dropped the amendment to the old Constitution that permitted the meting out of corporal punishment upon male juveniles, and has gone on to strengthen certain provisions of the Declaration of Rights, for instance, by promulgating s 86(3)(c) that says that no law may permit violations of the right not to be tortured or subjected to cruel, inhuman or degrading

²² *Ibid.*, at 101E-G, emphasis added.

²³ See section 15(3)(a) and (b) of the Constitution.

²⁴ For the criteria used to determine whether corporal punishment is a necessary, fair, reasonable and justifiable limitation of constitutional rights, see section 86(2) of the Constitution.

²⁵ *Ex parte Attorney General, Namibia*, at 97C-E.

treatment or punishment”,²⁶ there is little doubt that the Constitution outlaws corporal punishment. This finding is further supported by provisions guaranteeing freedom from all forms of violence from public or private sources and equal treatment of all persons regardless of, among others, sex or age.

In *S v. Chakuramba*, a 15 year old juvenile appeared before a magistrates court on the charge of rape. The juvenile entered the plea of not guilty where after he was tried and convicted of the crime of rape in accordance with section 65 of the Criminal Law (Codification and Reform) Act.²⁷ In mitigating the sentence, regard was had to the age of the accused and the fact that he was still a school pupil. The magistrates court imposed a sentence of corporal punishment in terms of section 353(1) of the Criminal Procedure and Evidence Amendment Act (CPEA). On review by the High Court, Justice Muremba declared the provisions of the section unconstitutional in light of section 53 of the Constitution of Zimbabwe which provides for the right not to be tortured or to be subjected to cruel, inhuman or degrading treatment or punishment. Section 167(3) provides that the Constitutional Court “must confirm any order of invalidity made by another court before that order has any force”. This should be read with section 175(1) of the Constitution which provides that “[w]here a court makes an order concerning the constitutional invalidity of any law, the order has no force unless it is confirmed by the Constitutional Court”. As a result of these provisions, the High Court had to refer the matter to the Constitutional Court for confirmation.

In *S v. Chokuramba*,²⁸ the Constitutional Court of Zimbabwe had to decide whether or not judicial corporal punishment imposed on male juvenile offenders is consistent with the Constitution. The matter came before the Constitutional Court as an application for the confirmation of the High Court’s decision that judicial corporal punishment inflicted on male children in execution of a sentence for any offence amounts to cruel, inhuman and degrading punishment within the meaning of section 53 of the Constitution. The applicant had approached the court *a quo* arguing that section 353(1) of the CPEA²⁹ unconstitutionally violated his section 53 right. Section 353(1) provides that “[w]here a male person under the age of eighteen years is convicted of any offence the court which imposes sentence upon him may ... sentence him to receive moderate corporal punishment, not exceeding six strokes”. The holding of the apex Court was mainly premised on the rights to human dignity and the freedom from torture or cruel, inhuman or degrading treatment or punishment. Its findings on each of the stipulated rights are discussed below.

4.1 Corporal Punishment and Human Dignity

In its analysis of the relationship between corporal punishment and inhuman or degrading treatment, the Constitutional Court emphasised the importance of human dignity, both as a founding value and an illimitable right of the child offender.³⁰ From the onset, it emphasised

²⁶ Mafusire J in *S v. Mufema and Others* HH409-15, 7.

²⁷ Chapter 9:23 of the Laws of Zimbabwe.

²⁸ Constitutional Court Application No. CCZ 29/15, Judgment No. CCZ 10/19.

²⁹ Chapter 9:07.

³⁰ To this end, the Constitutional Court started by making reference to *S v. Ncube and Others* 1987 (2) ZLR 246 (S) at 267B-D, where it was held as follows: “The *raison d’être* underlying section 15(1) is nothing less than the dignity of man. It is a provision that embodies broad and idealistic notions of 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. Punishments 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.”

that the reason behind the constitutional prohibition of torture or inhuman or degrading punishment is to ensure the protection human dignity, and bodily and psychological integrity, which are some of the most important values of the new constitutional order.³¹ The Constitutional Court underlined that the protection of human dignity and bodily and psychological integrity remain central to the definition of inhuman or degrading treatment or punishment. This meant that courts had to rely on human dignity when interpreting legislation, especially given that the Constitution unequivocally super-entrenches human dignity as a founding value.³²

In the context of crime and punishment, the protection of human dignity imposes particular obligations on the state with regards to the nature and purpose of sentences imposed on all offenders. Thus, the fact that human dignity is inherent implies that “a person must be punished as a person” and cannot be punished as if they are non-human.³³ Correspondingly, the state bears an obligation to avoid prescribing or imposing punishments which, by nature, purpose and effect, “constitute a humiliating assault on the inherent dignity of the person being punished”.³⁴ The constitutional duties to respect and protect every individual’s right to dignity means that persons who commit crimes should not be sentenced in a manner that impairs their sense of self-worth.³⁵ Malaba DCJ, for the Court, emphasised the centrality of dignity in sentencing in the following terms:

The fundamental principle is that a person does not lose his or her human dignity on account of the gravity of an offence he or she commits. Even the vilest criminal remains a human being with inherent dignity meriting equal respect and protection (per BRENNAN J in *Furman v Georgia* 408 US 238 (1972) at 273). The fact that he or she has committed a crime of a serious nature does not mean that he or she has lost the capacity to act with self-respect and respect for others in the future ... He or she remains entitled to the equal respect of his or her dignity as a human being, regardless of the gravity of the crime he or she committed. A humane penal system is one that is based on the principle that a human being must not be treated only as a means but always as an end for the purposes of punishment.³⁶

In the final analysis, the Constitutional Court was at pains to underscore the idea that the manner in which corporal punishment is administered is “inherently degrading to the victim’s human dignity”.³⁷ In the Court’s view, “[j]udicial corporal punishment does not respect the inherent dignity of the male juvenile offender”. For purposes of this article, it is important to reiterate that the Court read the right to dignity together with the right to freedom from inhuman or degrading treatment, thereby underlining the significance of an analytical approach that avoids treating rights as if they are discrete silos. In terms of this approach, the interpretation of all rights, including the prohibition of inhuman or degrading treatment, should be consistent with human dignity, both as a right and a value.

4.2 Corporal Punishment and Freedom from Torture or Cruel, Inhuman or Degrading Treatment or Punishment

The Constitutional Court commenced the analysis by observing that the right to freedom from torture or cruel, inhuman or degrading treatment is not subject to any limitation. In other words, the current Constitution does not have any provision that is similar to section 15(3)(b)

³¹ S v. Chokuramba, at 13.

³² *Ibid.*, at 18.

³³ *Ibid.*, at 20.

³⁴ *Ibid.*

³⁵ *Ibid.*, at 21.

³⁶ *Ibid.*, at 23–24.

³⁷ *Ibid.*, at 26–27.

of the former Constitution. As shown above, this provision stipulated that corporal punishment was an exception to the right to freedom from torture or cruel, inhuman or degrading treatment or punishment and allowed courts, parents or teachers to administer corporal punishment on male children. To the Court, the fact that corporal punishment is not explicitly mentioned in the Constitution as a limitation or exception to the section 53 right meant that courts can review the legislation that authorises it to determine whether or not moderate corporal punishment imposed in terms of section 353 of the Act on male juveniles convicted of any offence amounts to inhuman or degrading punishment within the meaning of section 53 of the Constitution. In the Court's view, the current Constitution bestows on "courts the sacred trust of protecting fundamental human rights and freedoms by declaring whether or not any punishment ... is inhuman or degrading to assist the Legislature in passing laws that are just and humane".³⁸ In a way, the Court emphasised that while Parliament has the sole prerogative to make, amend and repeal laws, questions relating to the determination of the constitutionality of such laws have to be answered by the judiciary.

Malaba DCJ (as he then was) held that section 53 of the Constitution is not only aimed at punishments that are cruel, inhuman or degrading but also those that are grossly disproportionate to the seriousness of the offence.³⁹ To be inconsistent with section 53, the punishment should be so disproportionate "that no-one could possibly have thought that the particular offence would have attracted such a penalty – the punishment being so excessive as to shock or outrage contemporary standards of decency".⁴⁰ In deciding whether corporal punishment constitutes degrading treatment, the Constitutional Court relied mainly on the manner in which the punishment is administered. It held that "[f]orcibly subjecting one person to the total control of another for the purposes of beating him or her is inherently degrading to the victim's human dignity".⁴¹

Given that judicial corporal punishment involves blindfolding the child offender and "strapping his body to the bench to ensure that he remains motionless and helpless when he is caned on the buttocks", this practice humiliates and degrades the offender.⁴² In the Malaba DCJ's view, "[t]he mere anticipation of a stroke is within the parameters of the inhuman and degrading elements of judicial corporal punishment. Corporal punishment is not simply about the actual pain and humiliation of a caning, but also about the mental suffering that is generated by anticipating each stroke".⁴³ Subjecting male child offenders to corporal punishment in the manner stipulated in section 353 of the CPEA treats them as if they are non-humans and makes them mere objects of state action.⁴⁴ Against this background, corporal punishment was adjudged to be inherently (that is by nature, intent and effect) inhuman and degrading to the child offender.⁴⁵ The fact that it violates the non-derogable and illimitable rights to dignity and to freedom from inhuman or degrading treatment means that precautionary measures that accompany its administration does not detract from its nature,

³⁸ *S v. Chokuramba*, at 12. See also *S v. A Juvenile* at 101B-C.

³⁹ *Ibid.*, at 22.

⁴⁰ *Ibid.*, at 22. The Court was following the test applied in *S v Ncube and Others* at 265C.

⁴¹ *S v. Chokuramba*.

⁴² *Ibid.*, at 26–27. See also Korsah JA in *S v. A Juvenile*, at 101F, holding that any law which allows a person to be blindfolded and strapped to a wooden bench degraded and debased that person, and, if it is meant o that the person is subjected to a beating, is also dehumanises him.

⁴³ *Ibid.*, at 27.

⁴⁴ *Ibid.*, at 27. For comparative jurisprudence, see *S v Williams*, para. 90.

⁴⁵ *Ibid.*, at 28.

purpose and effect.⁴⁶ This approach is arguably correct because it is not necessary, when delineating the scope of illimitable rights, for the courts to determine whether or not the violation of such rights is justifiable or reasonable.

4.3 Corporal Punishment and Freedom from Violence

In *S v. Chokuramba*, the Constitutional Court made compelling remarks about the linkages that exist between human dignity, the right to freedom from inhuman or degrading treatment and the right to bodily and psychological integrity, particularly the sub-right to freedom from all forms of violence from private and public sources. Section 52(a) of the Constitution provides that “[e]very person has the right to bodily and psychological integrity, which includes the right to freedom from all forms of violence all forms of violence from public or private sources”. The Court began by emphasising that the interpretation of the right to dignity and the freedom from violence has a bearing on the meaning and reach of the right to freedom from inhuman or degrading punishment.⁴⁷ Malaba DCJ, as he then was, emphasised that judicially sanctioned whipping constituted violence in the following terms:

Judicial corporal punishment by nature involves the use of physical and mental violence against the person being punished. Direct application of acts of violence on the body of a person would naturally cause physical and mental pain and suffering to the victim. In the case of a punishment for crime, the infliction of the pain and suffering is intended to be severe to achieve the purposes of the punishment. The infliction of the punishment in the circumstances would inevitably involve one human being assaulting another human being under the authority and protection of the law. Forcibly subjecting one person to the total control of another for the purposes of beating him or her is inherently degrading to the victim’s human dignity.⁴⁸

At a very general level, the Court insisted that it is a matter of principle “that violence must not be used to enforce moral values or to correct behaviour. Section 52(a) of the Constitution prohibits the use of any form of violence as a means of achieving the objectives of punishment of a person convicted of an offence.⁴⁹ Highlighting the interconnectedness between the constitutional prohibition of violence and freedom from inhuman or degrading punishment, the Court observed that “[a]ny punishment which involves the infliction of physical and mental violence on the person being punished to cause him or her pain and suffering in execution of a sentence for an offence is an inhuman and degrading punishment”.⁵⁰ In its analysis, the Court referred to foreign jurisprudence in which courts largely characterised corporal punishment as institutionalised violence permitted by the law. The Court extensively referred to *Tyrer v. United Kingdom*,⁵¹ a decision in which the European Court of Human Rights held that “the institutionalised character of the violence was further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender”.⁵² At the domestic level, the Court predominantly relied on *S v. A Juvenile* where Chidyausiku CJ made the following compelling remarks about corporal punishment as institutionalised violence:

⁴⁶ *Ibid.*, at 28. See also *S v. A Juvenile* at 91A where Gubbay JA held that “[i]rrespective of any precautionary conditions which may be imposed, it is a procedure subject to ready abuse in the hands of a sadistic or overzealous official appointed to administer it. It is within his power to determine the force of the beating”.

⁴⁷ *S v. Chokuramba*, at 14.

⁴⁸ *Ibid.*, at 26.

⁴⁹ *Ibid.*, at 27.

⁵⁰ *Ibid.*, at 28.

⁵¹ [1978] EHRR 1.

⁵² See *S v. Chokuramba*, at 30.

It is a type of institutionalised violence inflicted on one human being by another. The only difference between it and street violence is that the inflictor assaults another human being under the protection of law. He might, during the execution of the punishment, vent his anger in a similar manner on his victims as the street fighter does. But, as I have pointed out above, the degree of force he elects to use is of his own choosing. Because this institutionalised violence is meted out to him, the victim's personal dignity and physical integrity are assailed. In the result the victim is degraded and dehumanised. In a street fight he can run away from his assailant or he can defend himself. The juvenile offender cannot because he is tied down to the bench.⁵³

More importantly, the Court insisted that the Constitution imposes on the state the duty to protect the right to bodily and psychological integrity from all forms of violence from public and private sources. The Court insisted, wrongly in my view, that the right to freedom from all forms of violence “does not leave room for any level of legalised violence against male juveniles convicted of offences”. In the Court’s ‘mind’, it is not possible for the state to enforce the prohibition of violence and perform its duty to protect the rights to physical integrity and human dignity of the male child offender when the same state “inflicts pain and suffering on the juvenile through corporal punishment”.⁵⁴ There is a conceptual challenge associated with this claim. It is that the right to freedom from violence is not an absolute right and can be limited by a law of general application that serves a legitimate government purpose.⁵⁵ Accordingly, it was incorrect for the Court to hold that it is not possible for the state to justify limitations of the right to freedom from physical and psychological violence while at the same time sanctioning the imposition of corporal punishment on male child offenders convicted of certain crimes.

That corporal punishment amounts to violence appears to be beyond question, especially because of the clear jurisprudence from foreign courts and treaty monitoring bodies. The unavoidable question here is whether corporal punishment achieves its objective of instilling discipline in children. Behavioural scientists have argued that “anyone who attempts to modify a young person’s behaviour by inflicting severe physical punishment is providing an aggressive model from which the individual may learn aggressive means of responding in interpersonal situations. Although because of fear of retaliation the individual may not display aggression at the time of punishment, he may model his behaviour on that of the punisher when he wishes to cope with or control the behaviour of others.”⁵⁶ In one of their studies, Naker and Sekitoleko found that corporal punishment has behavioural consequences whereby many children who experience it bully other children, or as adults use domestic violence as the use of corporal punishment teaches them that violence is an acceptable way of imposing their views on someone less powerful than themselves.⁵⁷

5 The Future of Corporal Punishment in All Settings in Zimbabwe

At a very general level, the abolition of judicial corporal punishment raises issues about the legitimacy or justifiability of the practice in such other settings as the schools, day care institutions and the family home. Even if the Court made the decision in a completely different setting, the judgment has resuscitated the discussion over the necessity of corporal punishment and acts as a pressure device for the state to consider revising its approach to the

⁵³ *S v. A Juvenile* at 73F-G.

⁵⁴ *S v. Chokuramba*, at 38.

⁵⁵ Section 52(a) read with section 86(2) of the Constitution.

⁵⁶ D. van Zyl Smit and L. Offen. ‘Corporal Punishment: Joining Issue’, 8 *SACC* (1984) 69, at 72–73.

⁵⁷ See generally D. Naker and D. Sekitoleko, ‘Creating a Good School Without Corporal Punishment, *Raising Voices* (2009) 9–13. See also UNICEF Uganda, *Creating Safer Schools: Alternatives to Corporal Punishment* (2008) 5 available at: <https://www.unicef.org/uganda/Alternatives_to_VAC_160812.pdf>.

practice. One of the main issues that arise from the judgment is whether the Constitutional Court's interpretation of corporal punishment as a violation of illimitable and non-derogable rights to dignity and freedom from inhuman or degrading punishment also applies to the use of corporal punishment in other settings. If it does, then the Court's holding acts as a ray of hope that the practice will soon be abolished in all settings to ensure that children fully enjoy their right to be protected from inhuman or degrading punishment. Accordingly, whilst the judgment is not related to the education sector, it is likely to have far reaching implications for the use of corporal punishment to instil discipline in learners at primary and secondary schools.

5.1 Envisioning the Abolition of Corporal Punishment in Schools and Other Similar Settings

The partial reliance, by the Constitutional Court, on the manner in which judicial corporal punishment is administered to justify its abolition raises questions on whether the courts will also hold that corporal punishment in the schools is administered in an inhuman or degrading manner as well. Courts in other jurisdictions in the sub-region have held that using corporal punishment to instil discipline in students violates the constitutional prohibition of cruel, inhuman or degrading treatment or punishment. Describing the nature of corporal punishment in the school setting, Mohammed AJA held that even if its use is well regulated, it “remains an invasion on the dignity of the students sought to be punished. .. It is also equally degrading to the student sought to be punished, notwithstanding the fact that the head of the school who would ordinarily impose the punishment might be less of a stranger to the student concerned than a prison official who administers strokes upon a juvenile offender pursuant to a sentence imposed by a Court.”⁵⁸ Closer to home, the issue of whether corporal punishment is inhuman or degrading was touched upon by the Constitutional Court of South Africa in *S v. Williams*.⁵⁹ Langa J, as he then was, observed that “the issue of corporal punishment [in] schools is by no means free of controversy” and that “the practice has inevitably come in for strong criticism”. In his world, the “culture of authority which legitimates the use of violence is inconsistent with the values for which the Constitution stands”.⁶⁰ These foundational values include human dignity, equality and the protection of fundamental human rights and freedoms. As stipulated in the Constitution,⁶¹ Zimbabwean courts can partly draw inspiration from these and other foreign judgments to abolish corporal punishment in the education sector on the basis that it violates illimitable and non-derogable rights.

At the domestic level, the High Court has already abolished, without explaining the constitutional basis of its holding, corporal punishment in the schools and the family home. In *Pfungwa and Another v. Headmistress Belvedere Junior Primary School and Others*,⁶² the applicants filed for a declaratory order on the basis of the right to dignity (section 51 of the Constitution) and freedom from torture or inhuman or degrading punishment (section 53 of the Constitution), claiming that corporal punishment in schools and in the home was constitutionally impermissible. They launched proceedings on the basis of section 85(1)(d) of the Constitution which allows public interest litigation. The application revolved around a

⁵⁸ Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State 1991 (3) SA 76 (NmSC) at 93H-I. See also Campbell and Cosans v. United Kingdom (1980) 3 E.H.R.R. 531 at 556.

⁵⁹ 1995 (3) SA 632 (CC).

⁶⁰ *Ibid.*, para. 52.

⁶¹ Section 46(1)(e) of the Constitution provides that “[w]hen interpreting this Chapter, a court, tribunal, forum or body ... may consider relevant foreign law”.

⁶² High Court Harare (unreported case HH 148-17, HC 6029/16) [2017] ZWHHC 148 (03 March 2017).

teacher employed by the first respondent's school, who had used a thick rubber pipe to assault a seven year-old child for her mother's failure sign her reading homework. The child suffered deep red bruises on her back, and was so traumatised that she refused to go to school the following day.

The applicants argued that no one, whether a school, a teacher or a parent at home should inflict corporal punishment on children. They argued that corporal punishment constituted physical abuse of children and that the practice caused physical trauma or injury to children. In part, they also claimed that corporal punishment in school was dangerous in that it was administered indiscriminately without any measure or control over the teachers.⁶³ The High Court held that the applicants' case was sustained and it had a lot of substance, especially in light of the extensive reference the court made to the Constitution; case law from Zimbabwe and the region; expert evidence; and regional and international human rights instruments to which Zimbabwe is a party.⁶⁴ In addition, the Court held that the applicants' argument was so convincing that it "was left with no option but to lean in their favour".⁶⁵ Finally, the Court held that it was "satisfied that the application was not without merit" and referred the matter to the Constitutional Court for confirmation.⁶⁶ Unfortunately, the judgment is so short and very thin on the law that it is difficult to understand the legal reasons behind the High Court's holding. At the moment, there is no final word on the abolition of corporal punishment in the schools and the family home, especially given that the Constitutional Court has not confirmed the order of the High Court to this effect.

In addition to relying on legislation permitting the use of corporal punishment,⁶⁷ primary and secondary schools have drawn authority to whip delinquent male children from Ministerial Circular P35. The Circular outlines the circumstances in which corporal punishment can be resorted to, from insubordination to indecency and many others. Nonetheless, even the Circular indicates that the Ministry is moving towards total abolition and calls on school heads and superintendents or housemasters, in the case of boarding schools, to "strive to cultivate a school climate where pupils will/can develop internal discipline which is not initiated by fear of punishment". In Ministerial Circular P35, the Ministry of Education likened corporal punishment to a physical fight in which the pupil is not allowed to fight back. The child has to endure the agony, pain and deprivation of human dignity in silence. This emerging direction is followed up in the Education Amendment Bill. The preambular part of the Education Amendment Bill provides that its purpose is to amend the Education Act⁶⁸ to achieve various objectives that include, among others, the right to human dignity (section 51 of the Constitution); the right to freedom from physical or psychological torture or cruel or inhuman and degrading treatment or punishment (section 53 of the Constitution); and the right to equality and non-discrimination (section 56 of the Constitution). The Bill further provides that it is intended to amend certain provisions of the Education Act so that it complies with various provisions of the Constitution.

From a law reform perspective, the legislative reference to the illimitable and non-derogable rights to human dignity and freedom from torture or inhuman or degrading punishment, the very rights that have been historically relied upon by the Courts to justify the abolition of

⁶³ *Ibid.*, at 2.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, at 3.

⁶⁶ *Ibid.*

⁶⁷ See section 241 of the Criminal Law (Codification and Reform) Act and section 68 of the Education Act.

⁶⁸ Act [Chapter 25:04].

corporal punishment in other settings, clearly indicates that law makers wish to bring to an end the practice of corporal punishment in the education sector. This line of thought is confirmed in the substantive provisions of the Education Amendment Bill. Clause 15 of the Bill inserts section 68A into the Education Act and empowers the responsible minister to make regulations governing the discipline of pupils. Section 68A provides that the “regulations and any disciplinary policy shall not permit any treatment which (i) does not respect the human dignity of a pupil or amounts to physical or psychological torture, or to cruel, inhuman or degrading treatment or punishment”.⁶⁹ It further provides that the regulations and any disciplinary policy of a school should clearly stipulate the way in which any punishment may be administered.⁷⁰

The Education Amendment Bill also seeks to ensure that disciplinary measures are “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”.⁷¹ Apart from emphasising aspects of clarity, proportionality, reasonableness and the best interests of the child in implementing disciplinary measures, the Bill also explicitly provides that “under no circumstance is a teacher allowed to beat a child”.⁷² If the Bill ultimately becomes law, this provision will announce an end to the practice of corporal punishment in the education sector. This will signify the end of an era for one of the practices that have divided lawyers, educators, the general public and state functionaries. More importantly, however, the impending reforms are squarely anchored on the illimitable and non-derogable rights to human dignity and freedom from inhuman or degrading treatment or punishment. To this end, the Bill is framed in absolute language to ensure that there is no room for the administration of corporal punishment under any circumstances. This puts away possibilities for debate on whether or not one version of corporal punishment is moderate, reasonable and proportionate to the offence for which the child is charged.

5.2 Envisioning the Abolition of Corporal Punishment in the Family Home, Day Care Institutions, Foster Homes and Other Similar Settings

The abolition of corporal punishment in the family home and other settings raises different considerations and much of the analysis concerning human dignity and inhuman or degrading punishment may not necessarily apply. For instance, there are no state functionaries present during the administration of corporal punishment and the person administering it is less of a stranger to the child than in the criminal justice system. It may also be safe to assume that a great majority of parents worldwide do not administer corporal punishment in a manner that matches the manner in which it is administered by correctional officers. In addition, the entire atmosphere of official procedure that attends the punishment in the criminal justice system is evidently absent in the family context, and the majority of parents presumably administer it with what they consider to be a genuine desire to redeem children from delinquent paths and life courses. These considerations may raise questions about whether or not whipping children in the family context amounts to an invasion of the rights to human dignity and freedom from inhuman or degrading punishment.

To begin with, it may be necessary to recall that parents have the right to freedom of conscience as protected in the Constitution. Section 60(1) (a) provides that “[e]very person

⁶⁹ Draft section 68(A)(2)(a)(i) and (ii) of the Education Act.

⁷⁰ Draft section 68(A)(2)(b) of the Education Act.

⁷¹ Draft section 68A(3) of the Education Act.

⁷² Draft section 68A(5) of the Education Act.

has the right to freedom of conscience, which includes freedom of thought, opinion, religion or belief'. In addition, section 60(3) of the Constitution provides as follows:

Parents and guardians of minor children have the right to determine, in accordance with their beliefs, the moral and religious upbringing of their children, provided they do not prejudice the rights to which they are entitled under this Constitution, including their rights to education, health, safety and welfare.

This provision, it is arguable, 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. The Constitution guarantees the parents the right to participate in a religious life of their choice (which may include the duty not to spare the rod or spoil the child), and section 60(3) provides that in upbringing their children according to their religious precepts provided that they do not infringe certain rights of the child. It is also arguable that if the law prevents parents from raising their children according to their religious practices they adhere to, it would have failed in fulfilling one of its purposes which is to serve the people and to meet their legitimate aspirations which, in this case, is to prevent children from misbehaving.

Similarly the Constitution entitles everyone to practice the cultural life of their choice as set out in section 63 of the Constitution. Generally, Zimbabwean cultures and traditions prescribe that a wayward child should be spanked in order for them to grow up rightfully as disciplined members of society. This line of thought supposes that corporal punishment should be meted out on juveniles to enable them to grow into adults who fit into their society as opposed to nurturing criminals and delinquents.

Courts in other jurisdictions have had occasion to analyse the relationship between parents' cultural and religious identity rights and children's right to freedom from violence. In *Christian Education South Africa v. Minister of Education*,⁷³ the Constitutional Court of South Africa found the law prohibiting corporal punishment in schools to be a reasonable and justifiable infringement of parents' right to religious freedom. Parents with children learning at a private boarding school had argued that their right to religious freedom allows them to authorise school authorities to chastise them in light of their Christian values. A unanimous Constitutional Court held as follows:

It should be observed, further, that special care has been taken in the text expressly to acknowledge the supremacy of the Constitution and the Bill of Rights. Section 31(2) ensures that the concept of rights of members of communities that associate on the basis of language, culture and religion, cannot be used to shield practices which offend the Bill of Rights. These explicit qualifications may be seen as serving a double purpose. The first is to prevent protected associational rights of members of communities from being used to "privatise" constitutionally offensive group practices and thereby immunise them from external legislative regulation or judicial control. This would be particularly important in relation to practices previously associated with the abuse of the notion of pluralism to achieve exclusivity, privilege and domination. The second relates to oppressive features of internal relationships primarily within the communities concerned, where section 8, which regulates the horizontal application of the Bill of Rights, might be specially relevant' ... *Prohibiting the parent's right to freedom of religion and culture is not the primary, but secondary object of prohibiting corporal punishment. It is an incidental result of a general application of the child's right not to be subjected to violence from private sources.*⁷⁴

The prohibition of violence is a very useful instrument in determining the approach to be adopted by the courts with regards to corporal punishment administered by private and public

⁷³ 2000 (4) SA 757 (CC).

⁷⁴ *Christian Education South Africa*, paras. 26–27.

bodies, especially given the emphatic protection it accords to every child's right to bodily and psychological integrity. Internationally corporal punishment is regarded as violence against children and as a breach of children's fundamental human rights and freedoms. Arbour, the United Nations High Commissioner for Human Rights, places corporal punishment within the meaning of violence against children. She argues that "[v]iolence against children is a 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. Legalised violence against children in one context risks tolerance of violence against children generally."⁷⁵ This approach is consistent with that adopted by international treaty bodies such as the Committee on the Rights of the Child.

Perhaps the most compelling arguments against corporal punishment have been made by the Committee on the Rights of the Child. The Committee highlights that the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (Articles 19, 18, 37) and imposes on states parties the obligation to move quickly to prohibit and eliminate corporal punishment and underlines the importance of legislative and other awareness raising and educational measures that promote the use of non-violent forms of raising children.⁷⁶ Apart from being an obligation under the CRC, addressing and eliminating corporal punishment of children is identified as a key strategy for reducing and preventing all forms of violence in societies.⁷⁷ The Committee has reiterated that there are no exceptions to be made when interpreting the phrase 'all forms of violence':

The Committee has consistently maintained the position that all forms of violence against children, *however light*, are unacceptable. 'All forms of physical or mental violence' does not leave room 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 and or socially acceptable.⁷⁸

More importantly, the Committee characterises corporal punishment as an infringement of both the right to freedom from violence and the illimitable right to dignity, an interpretation that was followed by the apex Court in *S v. Chokuramba*. In the context of corporal punishment, the concept of state intervention in the private family arises from two strands. First, it arises from the need to protect children against the unreasonable exercise of the rights responsibilities and powers that attach to the office of parenthood. The abuse of these responsibilities and powers may be perpetrated by parents, guardians, caregivers, family members or anyone exercising responsibilities and rights. Thus, state intervention is primarily intended to ensure that the state protects and promotes children's rights at the family level. When it comes to corporal punishment, the prohibition of violence implies that the state, not parents or caregivers, generally has the ultimate power and duty to draw the boundary between justifiable corporal punishment that constitutes 'moderate chastisement' and abusive corporal punishment that constitutes violence which cannot be constitutionally justified.

More importantly, and this is the second strand, state intervention in violence related issues arises from the recognition that family relations are characterised by gross inequality and it is

⁷⁵ United Nations Human Rights Office of the High Commissioner, 'Violence against children', available at <<http://www.ohchr.org/EN/NewsEvents/Pages/ViolenceAgainstChildren.aspx>>.

⁷⁶ General Comment No. 8, *supra* note 2, para. 2.

⁷⁷ General Comment No. 8, *supra* note 2, para. 3.

⁷⁸ General Comment No. 13, *supra* note 2, para 13. *See also* General Comment No. 8, *supra* note 2, para. 18.

therefore necessary for the state to intervene in order to promote the rights and interests of vulnerable persons, whether women or children. In the main, this strand also challenges the traditional distinction between that which belongs to the state (the public sphere) and that which belongs to the family (the private sphere).⁷⁹ To this end, the drafters of the Constitution recognised that the public/private dichotomy and family privacy marginalises children's rights as these concepts construct the family as an institution outside both the state and public law.⁸⁰ As Montgomery would have it, this constitutes a realisation that family privacy has operated to "perpetuate structures of disadvantage by hiding them from public scrutiny", and this demonstrates why it is important to draw "lines of intervention" to protect the rights and interests of defenceless members of the family.⁸¹ Families should merely have as much privacy and parents just as much autonomy as the state, through the law, confers on them.

The inclusion of the phrase 'private sources' in section 52(a) renders it compelling with regards to violence in the family home. In the case of *S v. Baloyi*,⁸² the Constitutional Court of South Africa held in respect of domestic violence that "the specific inclusion of private sources emphasises that serious threats to security of the person arise from private sources ... and has to be understood as obliging the state directly to protect the right of everyone to be free from private or domestic violence".⁸³ Sachs J stated that the prohibition of violence obliges the state to take appropriate steps to reduce violence in public and private life and that, coupled with the special duty to protect children, it represents "a powerful requirement on the state to act".⁸⁴ He further observed that what distinguishes family violence from other kinds of crime "is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished".⁸⁵ These remarks are mainly applicable to children, who are victims of ongoing corporal punishment in the family home, day care institutions and other similar settings. It would not be difficult to show that corporal punishment harms children as "[t]he physical, emotional and psychological scars of violence can have severe implications for a child's development, health and ability to learn".⁸⁶

Perhaps the strongest argument in favour of finally banning the use of physical punishment entirely is that social attitudes have been changing radically over the last century. As such, it is now difficult to justify the law protecting adults from assaulting each other, whilst allowing adults to assault their smaller and more vulnerable offspring. Children, especially boys, are the only persons in the country whose right to physical and psychological integrity and to protection from all forms of inter-personal violence is not yet supported by the law and

⁷⁹ For a detailed discussion of the public/private distinction and the need to adopt a more guarded approach, see A. Boniface, *Revolutionary Changes to the Parent-Child Relationship in South Africa, with Specific Reference to Guardianship, Care and Contact*, thesis submitted in partial fulfilment of the degree of Doctor Legum in the Faculty of Law, University of Pretoria (2007) 393–397.

⁸⁰ J. Goldstein, A. Freud and A. Solnit, *Before the Best Interests of the Child* (1980) 4.

⁸¹ See J. Montgomery, 'Children as Property', *Modern Law Review* (1988) 323, at 332. At 328, the author argues in the following terms: "Clearly there must be a safety net, and no non-interventionist stance can be absolute. Children must be protected against parents who fail to consider their interests but the definition of their interests is not to be given by the state in all cases. In a liberal democracy, the thresholds which justify state intervention should be defined by those interests which the children of that society have in common, not by a relatively narrow paradigm of the family created by part of that society only."

⁸² 2002 (2) SA 425 (CC) para. 11.

⁸³ *S v. Baloyi* (Minister of Justice and Another Intervening) 2002 (2) SA 425 (CC) para. 11.

⁸⁴ *Ibid.*, para. 47.

⁸⁵ *Ibid.*

⁸⁶ United Nations Human Rights Office of the High Commissioner, *supra* note 75.

cultural practices.⁸⁷ Furthermore, research shows that physical punishment is less effective than other forms of discipline, but also that its use is associated with long-term negative psychological effects.⁸⁸

When parents use physical punishment as a form of discipline, they indicate to their children that violent and aggressive behaviour is an acceptable method of dealing with stressful situations, thereby reinforcing violent behaviour in society.⁸⁹ Arguably, the law should “send out a clear message about what behaviour is unacceptable in families or what we, as a society, feel about violence”.⁹⁰ Unfortunately, and especially in the African context, the use of corporal punishment is often justified on the basis of the right to culture and references to biblical values, thereby building a culture of violence that we should be moving away from. The practice of corporal punishment continues to subsist regardless of the fact that it is inconsistent with numerous fundamental rights enshrined in international and domestic human rights instruments.

6 Conclusion

Generally, corporal punishment can be characterised as a violation of the illimitable and non-derogable rights to human dignity and freedom from inhuman and degrading treatment. The Zimbabwean Constitution makes no specific mention of corporal punishment as an exception to the rights to dignity and freedom from torture or cruel, inhuman or degrading treatment or punishment. In light of this deliberate omission of corporal punishment as an exception to these absolute rights and regional or international human rights instruments that have characterised corporal punishment as a violation of human dignity, physical integrity and self-esteem, it is difficult within the wording of the Constitution to justify the continued use of corporal punishment against children. In the criminal justice context, the courts have already held that judicially sanctioned whipping is unconstitutional because it violates the illimitable rights to human dignity and freedom from inhuman or degrading punishment.

It remains to be seen whether the Constitutional Court will also extend its reasoning to corporal punishment in other settings. If it does, it would have followed the path prescribed by international human rights instruments and decisions of courts in other jurisdictions. In Israel, for instance, the Supreme Court, in *Plonit v. Attorney General*,⁹¹ handed down a decision prohibiting all forms of corporal punishment of children and eliminating the defence of reasonable force. The Court found that corporal punishment as an educational method not only fails to achieve its goals, it also causes physical and emotional damage to the child which may leave their mark on him or her in adulthood.⁹² The Court concluded that any type of corporal punishment “distances us from our goal of a society free of violence”. In Namibia, Berker CJ, dissenting, also once observed that even if very moderately applied the fact remains that any type of corporal punishment results in some impairment of dignity and degrading treatment.⁹³

⁸⁷ Cf. with the views of the United Kingdom Commission on Children and Violence in its 1995 report, at 15, available at <<https://gulbenkian.pt/uk-branch/publication/children-and-violence/>>.

⁸⁸ E. Gershoff, *Corporal Punishment by Parent and Associated Child Behaviour and Experience: A Meta-Analytic and Theoretical Review* (2002) 544.

⁸⁹ *Supra* note 87, 46–55.

⁹⁰ Northern Ireland Office of Law Reform (2001), 42.

⁹¹ 54 (1) PD 145 (Criminal Appeal 4596/98).

⁹² *Ibid.*, para. 6.

⁹³ *Ex Parte Attorney General* 1991 (3) SA 76 (NmSc) para. 90.

Apart from the illimitable rights to dignity and freedom from inhuman or degrading punishment, the right to freedom from violence is a central element of calls for total abolition of corporal punishment in all settings. At the heart of this approach is the fact that the Constitution anticipates parents and the state to protect children from all forms of punishment that are degrading and indignifying. The central values of human dignity and freedom do not seem to anticipate or require the use of physical force to achieve scholarly correction, the rehabilitation of the offender or children's respect for their parents. Accordingly, the unconstitutionality of the punishment does not lie in the severity or size of the stick with which it is administered, but strictly in its inconsistency with the scope of the applicable constitutional rights. In addition, it matters not whether or not corporal punishment is administered in the family home or the school or the prison. The debate should not be about the place where the crime is committed, it should be about the wrongfulness and unconstitutionality of the crime itself, wherever and however committed.

There are other compelling practical arguments against the use of corporal punishment in the family home, the education sector and other similar settings. The first is the availability of alternatives to 'treating' and 'redeeming' children from delinquent paths by putting them on the other end of the 'stick'. There are other ways to enforce discipline, motivate a child and condition behaviour than to resort to violence and the infliction of physical pain. Using a whip constitutes violence and may send wrong signals about the acceptability of force and assault as methods for resolving differences. Every child has a right to be and to feel to be safe in all environments, including the schools and the family home. It is important for society to step up efforts to ensure safe school and home environments for children, especially given that many violations take place in the private sphere and that the Declaration of Rights also directly governs private relationships.⁹⁴

Another argument relates to the lack of guidelines on the extent of permissible force teachers and parents should use when inflicting corporal punishment. Without these guidelines, it is difficult to distinguish between unrestrained assault on children and moderate chastisement to encourage respect for instructions given by adults. Besides, parents and teachers are not trained on the permissible level of restraint to be exercised when inflicting physical punishment. To make matters worse, there is no standard instrument to be used to administer corporal punishment in the schools and the family home. Even if the state were to produce a standard instrument, the instrument will necessarily be lifted to different levels and be used with different degrees of force, thereby subjecting children to different levels of punishment even if the number of 'strokes' the child receives is the same. Assuming that it is possible to address these differences, the state will still have to monitor whether every teacher or parent administers corporal punishment in the manner prescribed in the legislation and the relevant regulations. Abolishing corporal punishment in all settings will address all of these challenges.

The final question we may need to ask is whether corporal punishment in the schools and the family achieves its intended purposes. Arguably, corporal punishment is not effective in the long run as hurting children does not alter their underlying attitudes, values and beliefs. It may turn out that positive parenting achieves better results than subjecting the child to excruciating pain in the hope that the child will heed the advice given during after the whipping. As Mushohwe would have it:

⁹⁴ Section 45(2) of the Constitution.

Children merely need discipline which refers to teaching them self-control, how to consider alternatives for behaving in a particular manner, motivation for acting differently, understanding the consequences of wrongful behaviour and developing an awareness of what they ought to be doing right. Discipline as opposed to corporal punishment ideally should emphasize positive reinforcing of good behaviour and positive/negative reprimanding of bad behaviour without using physical punishment. Such child discipline should also be done in addition to an ongoing process of trying to solve the root causes of children engaging in unwanted behaviour, such as stressful or abusive family situations and poverty among others.⁹⁵

Furthermore, the focus of the analysis should be on the potential effect of the practice on the child, from physical injury to psychological suffering and the culture of violence that the practice appears to promote. More importantly, the legitimacy of the practice should be interrogated from the lens of the rights of the child not to be subjected to abuse or degrading treatment and to have his or her best interests protected in all settings. Once this approach to the practice is adopted, it becomes imperative to shelve all contestations based on the parent's or guardian's right to religion or culture as our focal point becomes the rights of the child who is invariably 'on the other end of the stick' and not on the rights of the person or institution administering corporal punishment.

⁹⁵ B. Mushohwe, 'A Ray of Hope for the Outlawing of Corporal Punishment in Zimbabwe: A Review of Recent Developments', 3 *University of Zimbabwe Student Law Review Journal* (2017) 1, at 10.