REPORTABLE (10)

THE STATE V WILLARD CHOKURAMBA
JUSTICE FOR CHILDREN'S TRUST INTERVENING AS *AMICUS CURIAE*
ZIMBABWE LAWYERS FOR HUMAN RIGHTS INTERVENING AS *AMICUS CURIAE*

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC, GWAUNZA JCC,
HLATSHWAYO JCC, MAVANGIRA JCC, BHUNU JCC,
UCHENA JCC& MAKONI AJCC
HARARE, NOVEMBER 12, 2015&APRIL 3, 2019

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MALABA DCJ:

INTRODUCTION

The constitutional matter before the Constitutional Court ("the Court") for determination is whether s 353 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the Act") is constitutionally invalid. The section authorizes the imposition of a sentence of moderate corporal punishment on a male person under the age of eighteen years who is convicted of any offence. The matter came to the Court by way of the procedure for confirmation of orders concerning the constitutional invalidity of any law or any conduct of the President or Parliament made by another court.

The High Court made an order declaring s 353 of the Act constitutionally invalid on the ground that it contravenes s 53 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 ("the Constitution"). The section protects the fundamental right of every person not to be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment. The protected right is absolute and non-derogable. The High Court held that judicial corporal punishment inflicted on a male juvenile in execution of a sentence for any offence of which he is convicted is an inhuman and degrading punishment within the meaning of s 53 of the Constitution.

Under the Constitution, the Court is the only tribunal with the power to make a final and binding decision on the question of the constitutionality of an Act of Parliament or conduct of the President or Parliament. An order concerning the constitutional invalidity of a law or conduct of the President or Parliament made by another court has no force unless it is confirmed by the Court. The involvement of the Court in the process of determination of the constitutionality of

the law or the conduct of the President or Parliament through confirmation proceedings is mandatory.

In the determination of the question whether the law or the conduct of the President or Parliament held by another court to be constitutionally invalid is indeed so, the Court is not bound by the other court's order of invalidity. It must satisfy itself, upon the interpretation and application of the constitutional provisions allegedly contravened by the legislation or the conduct concerned, that the court *a quo* came to the correct decision concerning its invalidity.

THE ISSUES FOR DETERMINATION

The main issue for determination is whether or not s 353 of the Act contravenes s 53 of the Constitution. There are two other questions that need to be determined for the Court to be able to answer the main question. The first of the other questions relates to the meaning of the phrases "inhuman punishment" and "degrading punishment". The second question is whether judicial corporal punishment amounts to "inhuman" or "degrading" punishment or both.

The Court holds that judicial corporal punishment is, by its nature, intent and effect an inhuman and degrading punishment within the meaning of s 53 of the Constitution. The Court also holds in respect of the main question that s 353 of the Act is inconsistent with s 53 of the Constitution. The order of the High Court concerning the constitutional invalidity of s 353 of the Act is confirmed. The detailed reasons for the decision now follow.

CONFIRMATION OF CONSTITUTIONAL INVALIDITY PROCEDURE AND POWERS OF THE COURT

Orders of constitutional invalidity made by different courts would have potential negative effects on legal certainty and the comity existing between the Court and the other highest organs of the State. The power to confirm any orders of constitutional invalidity of any law or conduct of the President or Parliament ensures that the Court, as the highest Court in all constitutional matters, controls declarations of constitutional invalidity made against the Legislature or executive acts of the other highest organs of the State. The purpose is to ensure that judicial review does not have the effect of unduly frustrating the activities of the President in the performance of his or her duties as Head of State and Government and the Commander-in-Chief of the Defence Forces or the activities of Parliament.

The need for legal certainty means that a litigant raising a constitutional issue that results in a declaration of constitutional invalidity by another court cannot subsequently abandon or dispose of the confirmation proceedings outside the judicial process. This is particularly relevant where litigants who initially raise a constitutional issue in the court *a quo* subsequently settle the dispute. See *Pharmaceutical Manufacturers Association of SA and Anor: In re Ex parte President of the RSA and Ors* 2000 (2) SA 674 (CC) paras 55-56; *Lawyers for Human Rights and Anor* v *Minister of Home Affairs and Anor* 2004 (4) SA 125 (CC) para 24; *Khosa* v *Minister of Social Development* 2004 (6) SA 505 (CC) para 35; Max du Plessis *et al* "*Constitutional Litigation"* Juta (2013) p 95.

The court which makes an order of constitutional invalidity has to ensure that the order reaches the Court for confirmation. Rule 31(1) of the Constitutional Court Rules, Statutory Instrument No. 61 of 2016 ("the Rules") imposes a duty on the registrar or clerk of a court which has made an order of constitutional invalidity in terms of s 175(1) of the Constitution to file with

the registrar of the Court, within fourteen days of the making of the order, a copy of the record of proceedings including the court order for confirmation in Form CCZ 5.

It is important that the rule be strictly complied with to ensure that the orders that need to be confirmed are brought to the attention of the Court timeously. This is of particular importance in cases where litigants are not represented. See *S* v *Manyonyo* 1999 (12) BCLR 1438 (CC) para 8.

Confirmation proceedings are in the nature of review. That does not mean that confirmation of an order of constitutional invalidity is a foregone conclusion – *Phillips and Anor* v *Director of Public Prosecutions and Ors* 2003 (3) SA 345 (CC) para 8. The Court proceeds on the basis of the record of proceedings in the court *a quo*. It is necessary that all evidence relating to the alleged inconsistency of the law or conduct of the President or Parliament with the Constitution be heard by that court. It is also necessary for a court hearing a matter in which the constitutionality of legislation is raised to afford the Minister responsible for the legislation the opportunity to intervene in the proceedings.

The Court must first decide the question whether the constitutional validity of the law or conduct of the President or Parliament in respect of which the order of invalidity was made was a matter properly before the court *a quo* for determination, regard being had to the circumstances of the case: *Zantsi* v *Council of State, Ciskei and Ors* 1995 (4) SA 615 (CC) para 8.

The order of constitutional invalidity must be clear and state in specific terms the provisions of the law or the exact conduct of the President or Parliament declared constitutionally invalid. The Court must not be left to speculate as to what provision of the law or

the exact conduct of the President or Parliament has been found to be inconsistent with the Constitution.

The Court is empowered to confirm an order of constitutional invalidity only if it is satisfied that the impugned law or conduct of the President or Parliament is inconsistent with the Constitution. It must conduct a thorough investigation of the constitutional status of the law or conduct of the President or Parliament which is the subject-matter of the order of constitutional invalidity. The Court must do so, irrespective of the finding of constitutional invalidity by the lower court and the attitude of the parties.

Thorough investigation is required, even where the proceedings are not opposed or even if there is an outright concession that the law or the conduct of the President or Parliament which is under attack is invalid. The reason for this strict requirement is that invalidity of the law or the conduct of the President or Parliament is a legal consequence of a finding of inconsistency between the law or the conduct in question and the Constitution. Inconsistency is a matter of fact, on the finding of which the court *a quo* and the Court may differ.

The Court has power to refuse confirmation of the order of the court *a quo*. That is so if the Court is convinced that the law or the conduct of the President or Parliament which is the subject-matter of the order of constitutional invalidity is not inconsistent with the Constitution. In that case the order of invalidity is of no force or effect. The impugned law or conduct of the President or Parliament will stand as constitutionally permissible. The order of the court *a quo* will remain stillborn.

The Court can confirm the order of constitutional invalidity. It may decline to hear the matter, particularly in cases where the law which is the subject-matter of the order of constitutional invalidity has since been repealed.

THE BACKGROUND FACTS AND THE PROVISIONS OF THE LEGISLATION, THE CONSTITUTIONALITY OF WHICH IS IMPUGNED

The order of constitutional invalidity of s 353of the Act was made by the High Court in the following circumstances.

On 26 September 2014 the respondent, who was fifteen years old, was sentenced by a Regional Magistrate's Court to receive moderate corporal punishment of three strokes with a rattan cane. He had been convicted of the offence of rape committed on a girl aged fourteen years. The sentence to receive moderate corporal punishment was imposed on the juvenile on the authority of s 353(1) of the Act.

Section 353 of the Act provides as follows:

"**353 Corporal punishment of male juveniles**

(1) Where a male person under the age of eighteen years is convicted of any offence the court which imposes sentence upon him may—

(*a*) in lieu of any other punishment; or

(*b*) in addition to a wholly suspended sentence of a fine or imprisonment; or

(*c*) in addition to making an order in terms of subsection (1) of section *three hundred and fifty-one*;

sentence him to receive moderate corporal punishment, not exceeding six strokes.

(2) Subject to subsection (3), corporal punishment in terms of this section shall be inflicted in private.

(3) The parent or guardian of a person sentenced to corporal punishment in terms of this section shall have the right to be present when the punishment is inflicted, and the court shall advise the parent or guardian, if present when the sentence is imposed, of his right to be present when it is inflicted.

(4) Corporal punishment shall not be inflicted in terms of this section unless a medical practitioner has examined the person on whom it is to be inflicted and has certified that he is in a fit state to undergo the punishment.

(5) If a medical practitioner has certified that a person on whom corporal punishment is to be inflicted in terms of this section is not in a fit state to receive the punishment or any part of it, the person who was to have inflicted the punishment shall forthwith submit the certificate to the court that passed the sentence or to a court of like jurisdiction and the court may thereupon, if satisfied that the person concerned is not in a fit state to receive the punishment or any part of it, amend the sentence as it thinks appropriate.

(6) Subject to this section, the manner in which and place at which corporal punishment shall be inflicted, and the person who shall inflict it, shall be as prescribed."

In the case of *S* v *A Juvenile* 1989 (2) ZLR 61 (S) the Supreme Court, sitting as a Constitutional Court, held by a majority decision that moderate corporal punishment inflicted on a male juvenile in execution of a sentence for any offence of which he had been convicted was an inhuman and degrading punishment within the meaning of s 15(1) of the former Constitution of Zimbabwe ("the former Constitution").

Section 15(1) of the former Constitution provided that "no person shall be subjected to torture or to inhuman or degrading punishment or other such treatment". The ruling in *S* v *A Juvenile supra* followed the decision of the Supreme Court in *S* v *Ncube and Ors* 1987 (2) ZLR 246 (S). In that case, the Supreme Court held by a unanimous decision that corporal punishment inflicted in execution of a sentence imposed by a court on an adult male person

convicted of any offence was an inhuman and degrading punishment within the meaning of s 15(1) of the former Constitution.

In 1990 the State inserted s 15(3)(b) into the former Constitution through s 5 of Act No. 30 of 1990 (Amendment No. 11). Section 15(3)(b) provided that:

> "**15 Protection from inhuman treatment**
>
> (3) No moderate corporal punishment inflicted —
>
> *(a)* …
>
> (*b*) 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."

With s 15(3)(b) of the former Constitution in place, s 353 of the Act was enacted in 1990, authorizing the imposition of a sentence of moderate corporal punishment not exceeding six strokes on a male juvenile convicted of any offence.

Consistent with s 353(6) of the Act, the manner in which moderate corporal punishment imposed in terms of the section was to be inflicted on the male juvenile offender and the person who was to inflict it were prescribed by Statutory Instrument No. 308 of 1993 ("the Regulations").

The Regulations require specific precautionary measures to be taken before and during the administration of the sentence of moderate corporal punishment. These are that:

(1) The sentence of corporal punishment shall be administered by an officer designated in writing for that purpose by the Director of Prisons;

(2) Corporal punishment shall be administered with a rattan cane, one meter long and not more than ten millimeters in diameter;

(3) A sentence of corporal punishment shall not be carried out unless –

(a) a pair of calico shorts; and

(b) a vest; and

(c) a kidney protector;

are worn by the juvenile offender during the administration of strokes.

(4) Strokes shall be administered on the buttocks of the juvenile offender and on no account shall the strokes –

(a) be administered on the back of the offender;

(b) be administered on the same spot; or

(c) exceed the number imposed by the court.

(5) A sentence of corporal punishment shall be administered as soon as possible after it has been imposed by a court.

(6) Corporal punishment shall not be administered unless –

(a) a medical officer or State-registered nurse; and

(b) the officer in charge or any other officer to whom the officer in charge may assign the duty;

are present during the administration of the punishment, to ensure that the punishment is administered in strict accordance with the Regulations.

(7) The medical officer, nurse or officer in charge may at any time during the administration of corporal punishment intervene and prohibit the remainder of the sentence from being administered if, in his or her opinion, the punishment is likely to cause more serious injury than is contemplated in the sentence.

The Regulations are silent on the position the male juvenile offender must take when the strokes are being administered. The position was described in *S* v *Ncube and Ors supra* at 263B-C in these words:

> "The scene is best described thus: Once the prisoner is certified fit to receive the whipping, he is stripped naked. He is blindfolded with a hood and placed face down upon a bench in a prone position. His hands and legs are strapped to the bench, which is then raised to an angle of 45 degrees. The aforementioned calico square is tied over his buttocks and the kidney protector secured above his buttocks at waist level. The prisoner's body is then strapped to the bench."

The Constitution came into effect on 22 May 2013 in respect of matters relating to the protection of fundamental human rights and freedoms enshrined in *Chapter 4*. The Constitution does not have a provision similar to s 15(3)(b) of the former Constitution. It has in *Chapter 4*s 53 which, like s 15(1) of the former Constitution, enshrines the protection of the fundamental right

of any person not to be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.

Absent a provision in terms similar to those of s 15(3)(b) of the former Constitution in the Constitution, courts could now exercise the power of judicial review to determine the question whether moderate corporal punishment imposed in terms of s 353 of the Act on a male juvenile convicted of any offence amounts to inhuman or degrading punishment within the meaning of s 53 of the Constitution. In other words, the supreme law of the land has bestowed on the courts the sacred trust of protecting fundamental human rights and freedoms by declaring whether or not any punishment imposed by the laws of the country is inhuman or degrading to assist the Legislature in passing laws that are just and humane -*S* v *A Juvenile supra* at 101B-C.

The substantive finding that judicial corporal punishment constitutes inhuman or degrading punishment would provide the basis for the determination of the primary question on the constitutional validity of s 353 of the Act. Section 353 of the Act is, of course, the source of the authority for the imposition of a sentence of moderate corporal punishment on male juveniles convicted of any offence.

It was not for the court *a quo* to go outside its mandate and determine questions of constitutional validity of other types of moderate corporal punishments. Questions of constitutional validity of moderate corporal punishment inflicted on juveniles in schools and in homes by their parents, legal guardians or persons *in loco parentis* did not fall to be determined by the court in the automatic review proceedings. The court *a quo* was exercising review powers

in respect of the constitutionality of legislation authorizing the imposition of a sentence of moderate corporal punishment on a male juvenile convicted of an offence.

Submissions made on the correctness or otherwise of the decision of the court *a quo* on matters that were not for its determination are not relevant to the determination of the issues before the Court. Nothing further shall be said about matters relating to the constitutionality of corporal punishment administered in schools and by parents, legal guardians or persons *in loco parentis*. It is trite that courts are generally loath to determine issues not brought before them.

THE INTERPRETATION OF SECTION 53 OF THE CONSTITUTION AND HUMAN DIGNITY

Section 53 of the Constitution occupies a central place in the scheme of constitutional protection of fundamental human rights and freedoms enshrined in *Chapter 4*of the Constitution.

The assessment of the purpose of the protection of a fundamental human right or freedom takes into account the values and principles on which a democratic society is based. It is clear from a consideration of the value system underpinning the Constitution that the object and purpose of s 53 of the Constitution is to afford protection to human dignity, and physical and mental integrity, which are some of the most fundamental values.

Section 3 of the Constitution recognises human dignity as one of the values and principles on which Zimbabwe is founded. As a foundational value, human dignity gives rise to all fundamental rights and forms the essence of each of them. The Constitution underscores the national commitment to the protection of the interests of the individual, supported by human

dignity as a foundational value. The principle of the inherent dignity of the individual provides the foundation for other human rights and freedoms enshrined in the Constitution.

The right not to be subjected to inhuman or degrading punishment is closely related to the right to respect for human dignity enshrined in s 51 of the Constitution. The section provides that every person has inherent dignity in their private and public life and the right to have that dignity respected and protected. The right not to be subjected to inhuman or degrading punishment is also closely related to the right protected by s 52(a) of the Constitution. The section provides that every person has the right to bodily and psychological integrity, which includes the right to freedom from all forms of violence from public or private sources.

Unlike the other fundamental rights enshrined in *Chapter 4*of the Constitution, which protect the person in respect of social, economic, cultural and political activities, the rights enshrined in ss 51, 52(a) and 53 of the Constitution protect the person as such. The interpretation of the provisions of ss 51 and 52(a) of the Constitution have a bearing on the meaning of s 53. The provisions recognise the principle of human dignity and non-violence.

Section 86(3) of the Constitution makes it clear that both the right not to be subjected to inhuman or degrading punishment and the right to the inherent dignity which must be respected and protected are non-derogable. The section provides that no law may limit these rights and no person may violate them. The rights are not only inherent and inalienable; they are also inviolable. In *S* v *Ncube and Ors supra* at 267B-D it is stated:

> "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 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. 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 civilization advances."

Section 46 of the Constitution is the interpretative provision. It makes it mandatory for a court to place reliance on human dignity as a foundational value when interpreting any of the provisions of the Constitution which protect fundamental human rights and freedoms. This is because human dignity is the source for human rights in general. It is human dignity that makes a person worthy of rights. Human dignity is therefore both the supreme value and a source for the whole complex of human rights enshrined in *Chapter 4* of the Constitution. This interdependence between human dignity and human rights is commented upon in the preambles to the *International Covenant on Economic, Social and Cultural Rights (1966)* and the *International Covenant on Civil and Political Rights (1966)*. The preambles state in express terms that human rights "derive from the inherent dignity of the human person". They all refer to "… the inherent dignity … of all members of the human family as the foundation of freedom, justice and peace in the world". The rights and duties enshrined in *Chapter 4* of the Constitution are meant to articulate and specify the belief in human dignity and what it requires of the law.

A court is required to do any or all of the things specified under s 46 of the Constitution. It must -

(*a*) give full effect to the right or freedom enshrined by the provision. In this case the Court must give full effect to the right not to be subjected to inhuman or degrading punishment;

(*b*) promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in s 3. In this case, the values of human dignity and physical and mental integrity must be promoted;

(*c*) take into account international law and all treaties and conventions to which Zimbabwe is a party;

(*d*) pay due regard to all the provisions of the Constitution, in particular the principles and objectives set out in *Chapter 2*; and

(*e*) may consider relevant foreign law.

The objectives set out in *Chapter 2*, to which a court interpreting the State's obligations under the Constitution and any other law must have regard, ensure a just, fair and balanced development of society. The objectives guide the State and all institutions and agencies of Government at every level in formulating and implementing laws and policy decisions that will lead to the establishment, enhancement and promotion of a sustainable, just, free and democratic society in which people enjoy prosperous, happy and fulfilling lives. The interpretation must take into account the fact that protection of fundamental rights and freedoms enshrined in *Chapter 4* of the Constitution and promotion of their full realization and fulfilment is one of the objectives the State is required under *Chapter 2* to pursue. The exercise of the legislative power of the State is constitutionally limited and guided by the obligation to protect and promote fundamental rights and freedoms. Part of the driving force behind the elevation of the concept of human dignity to its central role in international and domestic law following the Second World

War was a desire to enshrine legal recognition of the fact that the State exists for the benefit of the human being and not the human being for the benefit of the State. See C O Mahony "There is no such thing as a right to dignity" – *International Journal of Constitutional Law* Vol 10, Issue 2, 30 March 2012.

Section 53 of the Constitution has the meaning that springs from the evolving standards of decency that mark the progress of a maturing society. Itis in terms similar to those of provisions of International Human Rights Instruments. As such, it is proper, when interpreting s 53 of the Constitution, to have regard to international human rights norms for assistance.

Whilst s 46 of the Constitution enumerates specific things a court, tribunal, forum or body must do when interpreting any provision in *Chapter 4* of the Constitution, the matters listed are in addition to all other relevant factors that are to be taken into account and considered in the interpretation of a constitution. The appropriate approach to be adopted in the interpretation of a provision of a constitution guaranteeing a fundamental human right or freedom is the purposive, broad, progressive and values-based approach. The Court must adopt an interpretation of s 53 of the Constitution that promotes the respect for the inherent dignity of the male juvenile when he is subjected to punishment for an offence of which he has been convicted.

Article 1 of the *Universal Declaration of Human Rights (1948)* recognises the inherence of dignity in every human being and declares that all human beings are born free and equal in dignity and rights. The *International Covenant on Civil and Political Rights* (1976) ("the *ICCPR*") recognises human dignity as the foundation or source of every fundamental human right and freedom.

Article 4 of the *African Charter on Human and Peoples' Rights* provides that "human beings are inviolable". Article 5 provides that:

> "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

The *United Nations Convention on the Rights of the Child (1989)* ("the *CRC*") emphasizes inherent dignity in a number of places. Significantly, Article 37(a) lays down the right of the child not to be subjected to cruel, inhuman or degrading treatment or punishment. This provision is designed to protect both the inherent dignity and the physical and mental integrity of the child. Article 37(c) requires States Parties to treat children convicted of offences "with humanity and respect for the inherent dignity of the human person".

The *Committee on the Rights of the Child* in General Comment No. 8 recognises the right of every person to respect by others for his or her inherent dignity and physical integrity and equal protection of the law. In para 16 the General Comment states that: "The dignity of each and every individual is the fundamental guiding principle of international human rights law.".

The centrality of the protection of human dignity and physical and mental integrity in the definition of inhuman or degrading punishment becomes clear.

Courts must understand and rely on human dignity in the exercise of jurisdiction because the Constitution unequivocally espouses human dignity as a foundational value.

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. Respect for human dignity during the enforcement of a penalty must be guaranteed.

It is important to put into perspective the meaning of the concept of "human dignity", as used in the Constitution, without attempting to give a comprehensive definition of the concept. Dignity, as a concept, has various meanings that have different connotations. It is generally defined as an honour accorded to a person for a specific reason. A person may be accorded the honour because of respect for the rank he or she occupies in society. The common definitive feature is that dignity would attach to a person because of status. In that sense, it denotes both the status of an individual and the bearing that is associated with that status.

Human dignity is different. It is a special status which attaches to a person for the reason that he or she is a human being. It is the fact of being human that founds human dignity. Human dignity is therefore inherent in every person all the time and regardless of circumstances or status of the person. All human beings are equal, in the sense that each has inherent dignity in equal measure. What this means is that 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. In fact, human dignity demands respect. In other words, every human being merits equal respect for his or her inherent dignity regardless of social, economic and political status.

A human being is a social person. He or she relates to others as a member of society. Society has its own rules or norms that define rights and duties in terms of which members relate

to each other for the common good and social order. In its social context, human dignity requires that the individual respects himself or herself (self-respect) by internalising the values of the society in which he or she lives and must accord others equal respect. The others are required in turn to accord the person's inherent dignity equal respect. There is interdependence. Arising from this is the communitarian understanding of inherent dignity with its emphasis on mutual interdependence.

The reciprocal nature of human dignity is evident in its curtailment of self-degradation and its limiting effect on the exercise of rights to accommodate the rights of others or the common good. Equal respect for the inherent dignity of the other person means refraining from doing anything under the guise of the exercise of one's rights which would injure his or her rights. Injuring another person's rights shows no respect for his or her dignity as a human being, because rights are derived from human dignity and human dignity is the essence of every fundamental right.

In *S* v *Makwanyane* 1995 (3) SA 391 (CC) at para 328 O'REAGAN J said:

> "Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in *Chapter 3*."

The right to have the inherent dignity respected and protected means that a person must be punished as a person. He or she cannot be punished as if he or she is a non-human. It means that the State should not prescribe or impose a punishment which by its nature and effect constitutes a humiliating assault on the inherent dignity of the person being punished.

The obligation to respect and protect the inherent dignity of every person means that the inherent dignity of a person being punished for a crime must remain intact or unimpaired notwithstanding the infliction of the punishment. Punishment must be provided in a way that is consistent with and respects the inherent dignity of the offender.

WHAT IS INHUMAN OR DEGRADING PUNISHMENT?

In *S* v *Ncube and Ors supra* at 267D-G it is stated:

> "The precise meaning of the words 'inhuman' and 'degrading' must now be considered: 'Inhuman' is defined in the Oxford English Dictionary as:
>
> > 'Destitute of natural kindness or pity; brutal, unfeeling, cruel; savage, barbarous.'
>
> And to 'degrade' as:
>
> > 'To lower in estimation, to bring into dishonor or contempt; to lower in character or quality; to debase.'
>
> Barnett, in *The Constitutional Law of Jamaica* (1977) at 391, deals with s 17(1) of the Jamaica Constitution, which is in similar terms to s 15(1), and sums up its purport as follows:
>
> > 'It seems that "inhuman" is limited to such action as by its very nature is barbarous, brutal or cruel and not merely such treatment as results from want of pity or human feeling, and "degrading" connotes treatment which is calculated to, or in all probability will (not merely might), destroy the human qualities and character of the recipient.'"

It is clear that the punishment has to meet the minimum standard to be described as inhuman or degrading before it can be said to be in violation of the fundamental right protected by s 53 of the Constitution.

On the face of it, s 53 of the Constitution is aimed primarily at the nature or effect of punishment. Its immediate purpose is to protect every person from inhuman or degrading punishment. Section 53 is not aimed at punishments which are in their nature inhuman or degrading only. It also extends to punishments which are "grossly disproportionate"; those which are inhuman or degrading in their disproportionality to the seriousness of the offence. The test is that the punishment should be such 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. *S* v *Ncube and Ors supra* at 265C.

It must follow from the purposive interpretation of s 53 of the Constitution that inhuman or degrading punishment for any offence is punishment which, by its nature or effect, invades human dignity. To be inhuman is to act towards another person without feelings of pity or sympathy as a fellow human being when circumstances demand such humane conduct. It is to treat the other person as if he or she is a mere object. A punishment, the method of the infliction of which involves the use of violence to cause severe physical and mental pain and suffering, would, by contemporary standards of decency and prevailing ideas on the meaning of human dignity, constitute inhuman punishment. It is a punishment that brutalises the person being punished and the one punishing alike. It violates the physical and mental integrity of the person being punished.

A punishment, the infliction of which involves debasement or humiliation of the person in his or her own esteem or self-respect, does not comport with human dignity. It constitutes degrading punishment, as it exposes the person to disrespect and contempt from fellow human beings superintending the administration of the punishment. A punishment is degrading when it

has the effect of arousing in the person being punished feelings of fear, anguish or inferiority. It is a punishment which inflicts an ignominious disgrace on the offender.

Punishment which is inhuman will often be degrading as well, but there is a somewhat lesser likelihood of punishment which is degrading being also inhuman. See *S* v *Ncube and Ors supra* at 264H.

There is no doubt that it is the Legislature that has the power under the Constitution to create crimes and prescribe punishments for them. In the exercise of the power to prescribe punishments for crimes the Legislature is bound by s 44 of the Constitution. The section provides that in its capacity as an institution of Government the Legislature must respect, protect, promote and fulfil the rights and freedoms set out in *Chapter 4*of the Constitution. The Legislature is also required under *Chapter 2* of the Constitution to adopt as the objective of the exercise of legislative power the protection of the fundamental rights and freedoms.

The Legislature must not enact a law that authorises the infliction of inhuman or degrading punishment within the meaning of s 53 of the Constitution. The law must prescribe punishments for crimes which comport with human dignity.

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. Commission of an offence is a result of an exercise of freedom of choice to

act in a manner proscribed by a societal norm. That in itself means that the person has the rational capacity to choose to act in a manner approved by the societal norm which is consistent with self-respect and respect for the inherent dignity of others. 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.

DOES JUDICIAL CORPORAL PUNISHMENT AMOUNT TO INHUMAN OR DEGRADING PUNISHMENT?

Mr. Uladi, *Mrs. Zvedi* and *Mr. Mpofu* argued that the punishment as prescribed under s 353 of the Act does not amount to inhuman or degrading punishment. The contention was that the precautionary measures required by the Regulations to be taken before and during the administration of moderate corporal punishment take it out of the ambit of punishments prohibited by s 53 of the Constitution.

Mr. Biti and *Mr. Hofisi* argued that, notwithstanding the precautionary measures required to be taken before and during the administration of the punishment, judicial corporal punishment is inherently an inhuman and degrading punishment. The contention was that the punishment is so because it involves in its infliction the use of physical and mental violence to consciously cause acute pain and suffering on the person being punished. They argued that the infliction of judicial corporal punishment impacts on the human dignity and physical integrity of the person being punished.

Mr. Biti and *Mr. Hofisi* supported their contention that the sentence of moderate corporal punishment, imposed in terms of s 353 of the Act, is inhuman and degrading punishment within the meaning of s 53 of the Constitution by reference to the majority decision in *S* v *A Juvenile* case *supra*, foreign decisions, and comments from regional and international human rights bodies. The contention was that the common thread in the jurisprudence of the bodies referred to is the holding that, regardless of the precautionary measures, similar to those prescribed by the Regulations, judicial corporal punishment is by nature, intent and effect inherently an inhuman and degrading punishment.

Counsel were agreed that the decision whether a punishment amounts to inhuman or degrading punishment within the meaning of s 53 of the Constitution is a product of value judgment. There are standards to be taken into account and applied in the exercise of the value judgment. The making of the value judgment requires objectivity to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the people as expressed in their national institutions and the Constitution. Further, regard must be had to the emerging convergence of values in the civilised international community. (*Ex parte Attorney-General, Namibia In Re Corporal Punishment by Organs of the State* 1991 (3) SA 76 (Nm. SC) at 861.)

Value judgment, in the context of the determination of questions on the application of s 53 of the Constitution, cannot mean subjective judgment in the sense of expression of personal views by individual Judges on corporal punishment, generally influenced by their own historical experiences and perhaps religious beliefs.

The constitutionality of the punishment must be assessed in the light of the values which underlie the Constitution to decide whether it amounts to inhuman or degrading punishment. It must be assessed in the light of the effect it has or is likely to have on the values of human dignity and physical integrity of the persons being punished. The question must always be whether the type of punishment prescribed by statute by its nature and effect, or by the consideration of the method of infliction or amount of force applied, impairs the human dignity and physical integrity of the person being punished.

Section 53 of the Constitution preserves the basic concept of humanity by ensuring that the power to impose punishment is exercised within the limits of civilised standards. See *S* v *A Juvenile supra* at 77G. In *S* v *Magondo and Anor* 1969 (1) PH H58 (N) LEON J opined that: "a whipping is not only an assault upon the person of a human being but also upon his dignity as such".

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.

There is no doubt that blindfolding the male juvenile offender and strapping his body to a bench to ensure that he remains motionless and helpless when he is caned on the buttocks by the

officer administering the strokes ordered by the court would inevitably arouse in him the feelings of fear, anguish and inferiority which humiliate and debase his self-respect. The 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. A human being must not be treated as a means to an end. He or she is a subject with inherent dignity to be respected and protected. Measures prescribed for his or her punishment for crime must take him or her as an end in himself or herself and not as an object. Treating the male juvenile offender in the manner prescribed under s 353 of the Act as punishment for any crime is to treat him as if he is a non-human. It makes him a mere object of State action.

The *Committee on the Rights of the Child*, in General Comment No. 8 para 11, defines corporal punishment as "any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light". The Committee held that corporal punishment takes many different forms, one of which is caning with a rattan cane. It concluded that such physical form of punishment is "invariably degrading". The beating of one person by another with an intention of causing him or her pain and suffering invariably humiliates the victim. The principle is 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.

It is important to state that *General Comment No. 8* pertains, *inter alia*, to Article 37(a) of the *CRC*. It aims "to highlight the obligation of all States Parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of

children …". It emphasises eliminating corporal punishment of children as "a key strategy for reducing and preventing all forms of violence in societies".

Judicial corporal punishment in the execution of a sentence for crime has long been adjudged to be by nature, intent and effect an inhuman and degrading punishment. It does not respect the inherent dignity of the person being punished. The precautionary measures prescribed to accompany its administration do not detract from its nature and effect, which are evidence of its invasion of human dignity and *ipso facto* violation of the non-derogable right protected by s 53 of the Constitution.

Looked at from the perspective of the effect of the punishment on the human dignity and physical integrity of the person being punished, it becomes clear that the precautions prescribed are of no consequence to the determination of the question whether judicial corporal punishment prescribed under s 353 of the Act amounts to inhuman or degrading punishment within the meaning of s 53 of the Constitution.

There has been a convergence of minimum standards to be applied in the determination of the question under discussion. There has also been a growing consensus in the jurisprudence of regional and international bodies that have determined the question whether judicial corporal punishment is inhuman or degrading punishment that it is by nature, intent and effect an inherently inhuman and degrading punishment. Any 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.

Article 7 of the *ICCPR* states that:

> "No-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

In 1992 the United Nations *Human Rights Committee* adopted General Comment No. 20, relating to Article 7. The *Committee* said:

> "The prohibition in Article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition must extend to corporal punishment, … offered as a punishment for a crime… ."

In General Comment No. 13 of 1999, the United Nations *Committee on Economic, Social and Cultural Rights* said that:

> "… corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preambles to the *Universal Declaration of Human Rights* and both *Covenants*: the dignity of the individual."

In *Tyrer* v *United Kingdom* [1978] EHRR 1 at 11 para 33, the European Court of Human Rights decided that a system of judicial corporal punishment for male juvenile offenders in use in the United Kingdom violated Article 3 of the *European Convention on Human Rights* ("the *ECHR*"). Article 3 of the *ECHR* states that "no-one shall be subjected to torture or to inhuman or degrading treatment or punishment".

Tyrer, aged fifteen years and a resident of the Isle of Man, pleaded guilty on 7 March 1972 before the local juvenile court to unlawful assault occasioning actual bodily harm to a senior pupil at his school. He was sentenced to three strokes of the birch in accordance with relevant legislation. He appealed against the sentence to the High Court of Justice of the Isle of Man. His appeal was dismissed on 28 April 1972. He was birched later in the afternoon of the

same day. He was made to take down his trousers and underpants and bend over a table. He was held by two policemen whilst a third administered the punishment, pieces of the birch breaking at the first stroke. The birching raised, but did not cut, *Tyrer's* skin and he was sore for about ten days.

An application was lodged with the Commission, complaining that the judicial corporal punishment suffered constituted a breach of Article 3 of the *ECHR*. In its Report the Commission expressed the opinion that judicial corporal punishment, being degrading, violated Article 3 of the *ECHR* and that consequently its infliction upon *Tyrer* was unconstitutional.

The European Court of Human Rights decided that the punishment violated Article 3 of the *ECHR* because the very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, the European Court of Human Rights deemed it to be institutionalized violence, that is, violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. It went on to hold that the institutionalized 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.

The European Court of Human Rights held that the punishment of *Tyrer*, whereby he was treated as an object in the power of the authorities, constituted an assault on precisely that which it is one of the main purposes of Article 3 of the *ECHR* to protect, namely a person's inherent dignity and physical integrity.

Although *Tyrer* did not suffer any severe or long-lasting physical injury, the European Court of Human Rights held that the punishment amounted to a degrading punishment within the meaning of Article 3 of the *ECHR*. The European Court of Human Rights based its decision on the objective assessment of the corporal punishment inflicted on *Tyrer* in the light of the effect it had on his dignity as a human being and on his physical integrity.

Tyrer's case *supra* was cited with approval in *S* v *A Juvenile supra*. DUMBUTSHENA CJ, commented on the decision of the European Court of Human Rights in *Tyrer's* case *supra* and its implications on the determination of the question whether judicial corporal punishment authorised by s 330(1) of the Criminal Procedure and Evidence Act [*Chapter 59*] contravened s 15(1) of the former Constitution. At 73F-G the learned CHIEF JUSTICE said:

> "It would be strange were we to come to a contrary view because, as I see it, the circumstances described above are present in any judicial corporal punishment. It is a type of institutionalized 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 institutionalized violence is meted out to him, the victim's personal dignity and physical integrity are assailed. In the result the victim is degraded and dehumanized. 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."

Unlike the European Court of Human Rights, which found in *Tyrer's* case *supra* that the judicial corporal punishment inflicted on the male juvenile offender amounted to degrading punishment only, the majority in *S* v *A Juvenile supra* held that judicial corporal punishment amounted to inhuman and degrading punishment. GUBBAY JA (as he then was) at 91A-Bsaid:

> "I am, however, prepared to go further than the European Court of Human Rights and hold 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. After all, that is precisely what it is designed to achieve. It may cause bleeding and scarring and at the very least bruises and swellings. 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."

Caning invades the integrity of the human body. It is an inhuman punishment which blocks the way to understanding the pathology of crime. It has been abolished in many countries of the world as being incompatible with the contemporary concepts of humanity, decency and fundamental fairness. According to Rule 17:3 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* 1985 ("the *Beijing Rules*"), "Juveniles should not be subjected to corporal punishment".

KORSAH JA in *S* v *A Juvenile supra* at 101F held that any law which allows a person to be blindfolded and strapped to a wooden bench degraded and debased that person, and that if it was done for the sole purpose of subjecting him to a caning, then it also dehumanized him. HIS LORDSHIP opined that:

> "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 constituted an inhuman approach to punishment".

In the case of *Ex parte Attorney-General, Namibia supra* the Supreme Court of Namibia considered the question whether s 294 of the Namibian Criminal Procedure Act, 51 of 1977, contravened Article 8 of the Constitution of Namibia. Section 294 made provision for the imposition of a sentence of moderate correction of caning not exceeding seven strokes on a male person under the age of twenty-one years convicted of any offence. The provisions of subss (2) to (5) of s 294were in terms similar to those of s 353 of the Act. Section 36 of the Namibian

Prisons Act 8 of 1959 and ss 2, 3 and 4 of Regulation 100 of the Namibian Prisons Regulations provided for the manner of the administration of the sentence of corporal punishment which was similar to that provided for under our Regulations.

Article 8 of the Constitution of Namibia provides:

> "**8. Respect for human dignity**
>
> (1) The dignity of all persons shall be inviolable.
>
> (2) (a) In any judicial proceedings or in any other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
>
> (b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

By a unanimous decision, the Supreme Court of Namibia held that judicial corporal punishment as practiced in that country constituted inhuman and degrading punishment. Speaking through MAHOMED AJA (as he then was) the court said at 87B-I:

> "The provisions of art. 8(2)(b) are not peculiar to Namibia; they articulate a temper throughout the civilised world which has manifested itself consciously since the Second World War. Exactly the same or similar articles are to be found in other instruments. (See for example art. 3 of the European Convention for the Protection of Human Rights and Freedoms, art. (1)(1) of the German Constitution; art. 7 of the Constitution of Botswana; art. 15(1) of the Zimbabwean Constitution.)
>
> In the interpretation of such articles there is strong support for the view that the imposition of corporal punishment on adults by organs of the State is indeed degrading or inhuman and inconsistent with civilised values pertaining to administration of justice and the punishment of offenders. This view is based substantially on the following considerations:
>
> (1) Every human being has an inviolable dignity. A physical assault on him sanctioned by the power and authority of the State violates that dignity. His status as a human being is invaded.

(2) The manner in which the corporal punishment is administered is attended by, and intended to be attended by, acute pain and physical suffering 'which strips the recipient of all dignity and self-respect'. It 'is contrary to the traditional humanity practiced by almost the whole of the civilised world, being incompatible with the evolving standards of decency'. (*S* v *Ncube & Others supra* at 722B-C).

(3) The fact that these assaults on a human being are systematically planned, prescribed and executed by an organised society makes it inherently objectionable. It reduces organised society to the level of the offender. It demeans the society which permits it as much as the citizen who receives it.

(4) It is in part at least premised on irrationality, retribution and insensitivity. It makes no appeal to the emotional sensitivity and the rational capacity of the person sought to be punished.

(5) It is inherently arbitrary and capable of abuse leaving as it does the intensity and the quality of the punishment substantially subject to the temperament, the personality and the idiosyncrasies of the particular executioner of that punishment.

(6) It is alien and humiliating when it is inflicted as it usually is by a person who is a relative stranger to the person punished and who has no emotional bonds with him.

There is an impressive judicial consensus concerning most of these general objections."

HIS LORDSHIP went on to say at 90C-91A:

"If corporal punishment upon adults authorised by judicial or quasi-judicial authorities constitutes inhuman or degrading punishment in conflict with art. 8(2)(b) of the Constitution, can it successfully be contended that such a punishment is nevertheless lawful where it is sought to be inflicted upon juvenile offenders in consequence of a direction from such a similar judicial or quasi-judicial authority? …

It would seem to me that most of the six objections against corporal punishment in general, to which I previously referred, would be of equal application to both adults and juveniles. Juveniles also have an inherent dignity by virtue of their status as human beings and that dignity is also violated by corporal punishment inflicted in consequence of judicial or quasi-judicial authority.

The manner in which corporal punishment is administered upon a juvenile is also intended to result in acute pain and suffering which invades his dignity and the self-

> respect of the recipient. Such punishment is also potentially arbitrary and open to abuse in the hands of the person administering the punishment. Both the punisher and the juvenile sought to be punished are also equally degraded. The juvenile is also alienated by such punishment. Corporal punishment upon juveniles in consequence of judicial or quasi-judicial direction also has a retributive element with scant appeal to the rational, and emotional sensitivities of the juvenile."

In *S* v *Williams and Ors* 1995 (3) SA 632 (CC) the Constitutional Court of South Africa had referred to it a matter which was a consolidation of five different cases. The cases involved six juveniles who had been convicted of offences by different magistrates and sentenced to receive "moderate correction" of a number of strokes with alight cane. The issue for determination was whether the sentence of juvenile caning pursuant to the provisions of s 294 of the South African Criminal Procedure Act, 51 of 1977, was consistent with s 11(2) of the Constitution of the Republic of South Africa.

> Section 11(2) of the Constitution of the Republic of South Africa provides that:
>
> "… no person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subjected to cruel, inhuman or degrading treatment or punishment."

According to the provisions of s 294 of the South African Criminal Procedure Act, 51 of 1977, a caning could not be imposed "if it was proved that the existence of some psychoneurotic or psychopathic condition contributed towards the commission of the offence". A caning had to be carried out "by such person and in such place and with such instrument as the court" determined. In practice, a cane was used.

The maximum number of strokes that could be imposed at any one time was seven. Juvenile caning was inflicted over the buttocks, which had to be covered with normal attire. A parent or guardian had a right to be present. No caning could be carried out unless a district

surgeon or an assistant district surgeon certified that the juvenile was "in a fit state of health to undergo the whipping". (See *Williams and Ors supra* at 637F-638A.)

At 644C-645C of *Williams and Ors supra* LANGA J (as he then was) said:

> "In determining whether punishment is cruel, inhuman or degrading within the meaning of our Constitution, the punishment in question must be assessed in the light of the values which underlie the Constitution.
>
> The simple message is that the State must, in imposing punishment, do so in accordance with certain standards; these will reflect the values which underpin the Constitution; in the present context, it means that punishment must respect human dignity and be consistent with the provisions of the Constitution.
>
> There is unmistakably a growing *consensus* in the international community that judicial whipping, involving as it does the deliberate infliction of physical pain on the person of the accused, offends society's notions of decency and is a direct invasion of the right which every person has to human dignity. This *consensus* has found expression through the Courts and Legislatures of various countries and through international instruments. It is a clear trend which has been established.
>
> Corporal punishment has been abolished in a wide range of countries, including the United Kingdom, Australia(except in the State of Western Australia), the United States of America, Canada, Europe and Mozambique, among others. In Lesotho, restrictions have been imposed by the courts on the whipping of people over thirty years. Although the Constitution of Botswana contains a provision preserving the application of judicial corporal punishment in its criminal justice system, the practice has been severely criticised by the Judiciary. The remarks of AGUDA JA in *S* v *Petrus and Another* ([1985] LRC (Const.) 699 at 725g-726b) are apposite to the present enquiry:
>
> > 'First, it must be recognised that certain types of punishment or treatment are by their very nature cruel, inhuman or degrading. Here once more I must cite with approval what Professor Nwabueze says in his book (*ibid*):
> >
> > "Any punishment involving torture … or the infliction of acute pain and suffering, either physical or mental, is inherently inhuman or degrading."'"

Article 5 of the *American Convention on Human Rights*("*ACHR*")prohibits any torture, or cruel, inhuman, or degrading punishment or treatment. In the case of *Winston Caesar* v *Trinidad and Tobago* 2005 Inter-Am. Ct. H.R. (Ser. C) No. 123 (Mar. 11, 2005) the Inter-

American Court of Human Rights emphasised that the prohibition of inhuman and degrading punishment or treatment had reached the status of a "peremptory norm of international law". It based this conclusion on a reading of international human rights instruments as well as on regional case law. Coming to the conclusion that corporal punishment imposed on *Caesar* for the offence of attempted rape amounted to inhuman and degrading punishment in contravention of Article 5 of the *ACHR*, the Inter-American Court of Human Rights took into account the institutionalized nature of the violence against *Caesar*, his humiliation and his severe physical and psychological suffering. The Inter-American Court of Human Rights ruled that Trinidad and Tobago's Corporal Punishment Act, on the authority of which fifteen strokes of the cat-o'-nine-tails had been imposed on *Caesar*, contravened Article 5.

See also *Prince Pinder* v *Bahamas* Case 12.5/3, Inter-Am. C.H.R. Report No. 79/07, OEA/Serv.L./V/11.130, doc. 22, rev. 1 (2007).

Those who argued in support of judicial corporal punishment did so on three grounds.

The first ground was that the precautionary measures required by the Regulations to be taken before and during the administration of the sentence of moderate corporal punishment take it out of the category of inhuman and degrading punishments. The flaw in the contention lies in the attempt to overlook the essence of judicial corporal punishment. One cannot simply wish away the fact that judicial corporal punishment is what it is because it involves the use of institutionalized violence to inflict acute physical and mental pain and suffering on the person being punished. The punishment remains an invasion on human dignity.

In *Ex parte Attorney-General, Namibia supra* at 92D-GMAHOMED AJA (as he then was) said:

> "I have little doubt that these and other similar provisions appearing in the relevant statutes and regulations which I have referred to in the earlier part of this judgment are intended to ameliorate the harshness and the severity of corporal punishment upon juveniles. They do not, however, in my view, meet the basic objection to all corporal punishment inflicted upon citizens in consequence of a sentence imposed by a judicial or quasi-judicial authority. Such punishment remains an invasion on human dignity; an unacceptable practice of inflicting deliberate pain and suffering degrading to both the punished and the punisher alike. Even in the case of juveniles, it remains wide open to abuse and arbitrariness; it is heavily loaded with retribution with scant appeal to the sensitivity and rational responses of the juvenile. It is inconsistent with the basic temper and the letter of the Namibian Constitution.
>
> The differences between adults and juveniles which appear from the relevant statutes and regulations, with respect to the manner in which corporal punishment is administered, are in my view insufficient to convert punishment which is degrading or inhuman for adults into punishment which is not so degrading and inhuman in the case of juveniles."

The State is under the constitutional obligation to protect the right to physical integrity of every person against violence. Section 52(a) of the Constitution is a clear and emphatic rejection of use of all forms of physical and psychological violence against any person. The prohibition of all forms of physical and mental violence does not leave room for any level of legalised violence against male juveniles convicted of offences. There is no way the State can claim to be enforcing these rights and performing its obligation of protecting the physical integrity and human dignity of a male juvenile offender when it inflicts pain and suffering on the juvenile through corporal punishment, in execution of a sentence for any offence of which he has been convicted. Compliance with the values protected by ss 51, 52(g) and 53 of the Constitution requires that the State be consistent with the inherent dignity of a male juvenile offender in the enforcement of penalties against him.

If the State, as a role model, treats the weakest and the most vulnerable in society in a manner which diminishes rather than enhances their self-esteem and invades their human dignity, the danger increases that their regard for a culture of decency and respect for rights of others will be diminished. See the *Williams and Ors* case *supra* at 647C.

BRANDIES J observed, in a dissenting opinion in *Olmstead* v *United States* 277 US 438 (1928) at 485, that the Government should be "the potent, the omnipresent teacher. For good or for ill it teaches the whole people by its example". By the example of the infliction of judicial corporal punishment on male juvenile offenders, the message the Government gives to citizens is that the use of violence to achieve what one wants is socially acceptable conduct.

The second ground on which it was argued that s 353 of the Act is constitutionally valid is that judicial corporal punishment protects male juveniles convicted of crimes from going to prison.

The contention that judicial corporal punishment saves a male juvenile offender from imprisonment does not show that the punishment does not amount to inhuman or degrading punishment. It is a fallacious argument. The use of unauthorized means cannot be justified on the basis of the legitimate objective sought to be achieved.

Section 53 of the Constitution makes provision for both the legitimate purpose punishment must seek to achieve and the means to be chosen for the advancement of the governmental interest to achieve the object and purpose. The Constitution prohibits in absolute terms the use of inhuman or degrading punishment as a means of achieving the objects and

purposes of punishment. As a means for the achievement of legitimate objectives of the penal system, a type of punishment must be chosen which is consistent with the protection of human dignity and physical integrity.

Keeping male juvenile offenders out of jail cannot justify the imposition of inhuman or degrading punishment on male juvenile offenders as the means of securing the legitimate objectives of punishment. The fact that judicial corporal punishment is a type of punishment that amounts to a total lack of respect for the human being does not change on account of the legitimacy of the objective pursued by its infliction on the male juvenile offender. Human dignity may not be infringed upon for any reason. No interest, such as saving the male juvenile offender from imprisonment, can justify infringement of human dignity.

Interpretation of what constitutes the best interests of the male juvenile offender cannot be used to justify practices which conflict with the juvenile's human dignity and right to physical integrity. The measures adopted in giving effect to the sentence imposed on the authority of s 353 of the Act do not protect the offender from physical and mental violence. Judicial corporal punishment is not in the best interest of the male juvenile.

In the *Williams and Ors* case *supra* at 651B-CLANGA J (as he then was) had this to say:

> "It was argued that sentencing alternatives for juveniles were limited and that this country did not have a sufficiently well-established physical and human resource base which was capable of supporting the imposition of alternative punishments. This is, of course, an argument based on pragmatism rather than principle. It is a problem which must be taken seriously nevertheless. It seems to me, however, to be another way of saying that our society has not yet established mechanisms to deal with juveniles who find themselves in conflict with the law; that the price to be paid for this state of unreadiness is to subject juveniles to punishment that is cruel, inhuman or degrading. The proposition is untenable. It is diametrically opposed to the values that fuel our progress towards being a more humane and caring society. It would be a negation of those values

> precisely where we should be laying a strong foundation for them, in the young; the future custodians of this fledgling democracy."

The third ground on which the constitutionality of s 353 of the Act was supported was the proposition that a male juvenile offender reacts to the infliction of corporal punishment on him in a manner different from that of an adult offender.

Mr. Uladi and *Mr. Mpofu* relied on what MCNALLY JA said in the dissenting judgment in the *S* v *A Juvenile* case *supra*. The comments by the learned JUDGE OF APPEAL, which were essentially an expression of a subjective judgment on the issue before the court, were based on the theory that somehow age in itself was a redeeming factor. The view expressed by MCNALLY JA was that while an adult whose character and personality had already been formed was likely to be hardened by the infliction of judicial caning, the position was the opposite in the case of a juvenile. HIS LORDSHIP reasoned that, as a juvenile's character was still in the process of formation, he was still susceptible to correction. The contention was that judicial corporal punishment might still have a reformative effect on the male juvenile offender.

Whilst confessing to the fact that he was referring to "conventional wisdom" and generalizing without evidence, MCNALLY JA nonetheless at 95B-Dof the *S* v *A Juvenile* case *supra* said:

> "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 exactly 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 officer."

It is interesting to note that there is no reference to human dignity as an interpretative value in the learned Judge's dissenting opinion. What was expressed is an almost religious faith in the utility of judicial corporal punishment inflicted on male juvenile offenders. There is no attempt to reconcile the clear and absolute obligation on the State to protect the male juvenile offender, as an autonomous human being with inherent dignity, with the deliberate use of physical and mental violence on him to achieve the purposes and objects of punishment. Failure by the learned Judge to ground the assessment of the constitutionality of judicial corporal punishment on its effect on the inherent dignity of the male juvenile offender led to the unbelievable proposition that the corporal punishment was in the best interests of the person being caned.

The principle of constitutional morality requires that courts should approach constitutional issues from the point of view that accepts that the content of the rights protected by the Constitution change with the changes in social norms. Acts that may have been regarded as falling within the scope of the protection of a fundamental right or freedom some three decades ago may no longer be accepted today. See: *Catholic Commission For Justice and Peace in Zimbabwe* v *Attorney-General and Ors* 1993 (1) ZLR 242 (S).

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 instrument.

In *Trop* v *Dulles* 356 US 86 (1958) at 101, it was held that the Eighth Amendment, which prohibits cruel and unusual punishment, must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. In *Weems* v *United States* 217 US 347 (1909)at 378 the court observed that the Eighth Amendment is progressive and does not merely protect cruel and unusual punishments known but may acquire a wider meaning "as public opinion becomes enlightened by humane justice". In *Jackson* v *Bishop* 404 F2d 571 (1968) at 579 reference is made to "contemporary concepts of decency and human dignity and precepts of civilisation which we profess to possess". In *Tyrer's* case *supra* the European Court of Human Rights determined that judicial corporal punishment of juvenile offenders, which was acceptable in 1956, was no longer acceptable by Convention standards in 1978.

The application of the doctrine of "evolving standards of decency" is based on the theory that facts may have changed or come to be seen so differently from the time that a decision was made to the current situation. *Atkins* v *Virginia* 536 US 304, 321 (2002).

It is a fact that at the time the learned JUDGE OF APPEAL practiced law and even wrote his dissenting opinion in *S* v *A Juvenile supra* the Constitution in existence then did not have a strong protection for human dignity as a foundational value. In fact, the former Constitution did not have an express provision on the right to inherent dignity and the right to have that dignity respected and protected as provided for in s 51 of the Constitution. There was no provision for the protection of the right to bodily and psychological integrity, which includes the right to freedom from all forms of violence from public and private sources.

A deliberate and systemic assault with a cane on the buttocks of an individual, inflicted by strangers as a form of punishment authorised by a judicial tribunal, is inherently a demeaning invasion on the inherent dignity of the person punished. It must in the circumstances be degrading and inhuman. It does not become less so because a juvenile might conceivably recover from such assault on his inherent dignity sooner than an adult might in similar circumstances.

In *Ex parte Attorney-General, Namibia supra* at 91A-EMAHOMED AJA (as he then was) said:

> "What then are the material differences which could sufficiently distinguish the position of juveniles from adults for the purposes of art 8(2) of the Constitution?
>
> There appear to be three arguments advanced in support of such a distinction. The first contention is that the right to impose corporal punishment gives to the sentencing officer the opportunity of avoiding more unsuitable alternatives. Since most juveniles would not be in the position to pay a fine, it is contended that judicial officers might be compelled to resort to unsuitable custodial sentences if the alternative of corporal punishment was made constitutionally unavailable. (See the judgment of MCNALLY JA in the case of *S* v *A Juvenile supra* at 173H). In support of this argument we were also reminded that there are no suitable reformatories or correctional institutions apparently available for young juveniles in Namibia at present. I am not persuaded by this argument. The first issue which requires to be determined is whether the infliction of corporal punishment upon juveniles, in consequence of a punishment, directed by a judicial or quasi-judicial authority, in fact constitutes degrading or inhuman treatment within the meaning of art (8)(2)(*b*) of the Constitution. If it does, it is unlawful even if the motive behind such a practice is to keep young offenders, who need to be punished, out of prison. Means otherwise unauthorized by the law do not become authorised simply because they seek to achieve a permissible and perhaps even a laudable objective. (*Van Eck NO and Van Rensburg NO* v *Etna Stores* 1947 (2) SA 984 (A), at 996, 998.) The provisions of art (8)(2) of the Constitution do not permit of a derogation on such grounds. The duty of the Court is to apply the clear provisions of the Constitution."

How is it possible that two different conclusions can be reached on the question whether judicial corporal punishment of male juvenile offenders in execution of a sentence for crime amounts to inhuman or degrading punishment? The reason is that one conclusion has no regard

to the obligation on the State to respect and protect the inherent dignity and physical integrity of the male juvenile offender as an autonomous human being. The approach is not based on the principle that a male juvenile offender is a child who, like another human being, has inherent dignity to be equally respected and protected. It looks at the male juvenile offender purely as a criminal who deserves corporal punishment. The question of the impairment of the juvenile's dignity as a human being does not come into the equation. If the obligation to respect and protect the inherent dignity of the male juvenile offender does not come into the equation, then the question of the corporal punishment amounting to inhuman or degrading punishment does not arise. Yet a close examination of the basis of the argument advanced reveals that it is an attempt at the justification of violation of the right of the male juvenile offender to equal respect for his human dignity. Human dignity is always and unconditionally violated when infringed.

Those who argue that judicial corporal punishment does not constitute inhuman or degrading punishment within the meaning of s 53 of the Constitution have not contested the correctness of the principle that judicial corporal punishment is by its very nature, intent and effect inhuman and degrading. They have not contested the correctness of the comment by the Committee on the Rights of the Child, in *General Comment No. 8* that corporal punishment is "invariably degrading". So one cannot argue that judicial corporal punishment does not amount to inhuman or degrading punishment without at the same time condoning violation by the State of its obligation to respect and protect the male juvenile offenders right to respect for human dignity. Judicial corporal punishment does not respect the inherent dignity of the male juvenile offender.

The admitted use by the State of physical and mental violence on the male juvenile offender with the intention of causing acute pain and suffering is a manifestly inhuman and degrading punishment. The obligation on the State is to protect every child from violence. Every child is an autonomous human being with his or her own inherent dignity. Punishment for any crime must be chosen that is consistent with the male juvenile offender's inherent dignity. It is absolutely inconceivable under the applicability of s 53, as read with s 51, of the Constitution to have corporal punishment as a punishment to be imposed on a male juvenile offender on the basis of a statutory authorization.

AVAILABILITY OF SENTENCING OPTIONS

It is necessary to examine available resources to determine whether there are indeed appropriate sentencing options which the State can employ in the punishment of male juvenile offenders that would comport with their human dignity and physical integrity, whilst achieving the objectives and purposes of punishment sanctioned by the Constitution.

The choice and assessment of an appropriate sentence or disposition for a juvenile offender is a scientific process with specific objectives, undertaken in accordance with principles defined and prescribed by law in the interests of justice.

The Act prescribes a range of sentences which may be imposed by the courts on convicted offenders to achieve the objectives of punishment in the criminal justice system. The sentencing options provided by the legislation may be applied to any person convicted of an offence, including a juvenile offender who would have been processed through the criminal justice system.

The Act makes provision for a court dealing with a juvenile offender convicted of an offence to consider using disposition orders ordinarily used for adjudicated delinquents by the children's court for non-punitive purposes characteristic of the juvenile justice system. The provision is in addition to the sentencing options designed for all convicted offenders as punishment.

The disposition orders are, therefore, an integral part of the options for the disposition of juvenile offenders convicted of offences through the criminal justice system. Although the sentencing options and the disposition orders pursue some of the same objectives, the purpose of the disposition order is fundamentally to ensure the reformation and rehabilitation of the juvenile offender and not to punish him or her.

The objective of retribution, which may be the purpose for the choice of a sentencing option by a court, would not be the motivating factor in the decision by a court to dispose of the juvenile offender convicted of an offence through the disposition orders characteristic of the juvenile justice system.

The appropriateness of the choice by a court of a sentencing option or disposition method for a juvenile offender will depend on the extent to which the decision complies with the fundamental principles of international law, conventions and treaties to which Zimbabwe is a party that govern the administration of juvenile justice.

The criminal justice system and the juvenile justice system in Zimbabwe have embraced the fundamental principles of relevant international legal instruments and given effect to them. In that way, they bind judicial officers to comply with the provisions of the international legal

instruments in the choice and application of the sentencing options and disposition orders when dealing with juvenile offenders.

The relevant provisions of international law, conventions and treaties brought a revolution to the administration of the juvenile justice system, both in terms of the shift of emphasis in respect of the objectives to be pursued in the punishment of juvenile offenders and the principles to be applied in the assessment of the appropriate sentence.

The most important instrument in this regard is the *CRC*. The primary objectives the court is required by the *CRC* to bear in mind when choosing and assessing an appropriate sentence for a juvenile offender are the reintegration and rehabilitation of the juvenile offender with his or her family or community, where he or she becomes a productive member.

PURPOSES OF PUNISHMENT

Recognizing that all human rights derive from the inherent dignity of the human being, international human rights law requires that the essential aim of all penal systems must be to allow, encourage and facilitate the reformation and social rehabilitation of the offender. See Article 10.3 of the *ICCPR*. The goal is critical to community safety.

Underpinning several of the *CRC* provisions is the fundamental recognition of the juvenile offender's potential for rehabilitation. The *CRC* recognises the unacceptability of sentences that negate the potential of children to make change for the better over time.

Article 40.1 of the *CRC* provides that the objective of sentencing a juvenile offender is the promotion of his or her reintegration into society to assume a constructive role in his or her

community. According to Article 40.4 of the *CRC*, a child's wellbeing is not merely a primary consideration but has to be ensured.

Article 14.4 of the *ICCPR* requires that in the case of juvenile offenders the procedure adopted in the criminal justice system shall be such as will take account of their age and the desirability of promoting their rehabilitation. The *ICCPR* requires States to respond to the offences children commit by focusing on positive measures and education rather than punishment. Manfred Nowark "*UN Covenant on Civil and Political Rights: Commentary*" (1993) p 266.

Rule 5.1 of the *Beijing Rules* asserts that the aim of a juvenile justice system shall be to emphasize and promote the wellbeing of the juvenile and ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both offender and the offence. The Rule refers to two of the most important objectives of juvenile justice systems. The first objective is the promotion of the wellbeing of the juvenile. The objective relates to the criminal justice system and contributes to the avoidance of merely punitive and retributive sanctions. The second objective is the proportionality of the punishment which, in this particular context, means that "the response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances", such as "social status, family situation, the harm caused by the offence or other factors affecting personal circumstances".

The principle of proportionality must, however, also be safeguarded in ensuring the welfare of the juvenile offender so that the measures taken do not go beyond what is necessary, failing which the fundamental rights of the juvenile offender may be infringed. In other words, Rule 5calls for no less and no more than a fair reaction in any given case of juvenile delinquency

and crime. The issues combined in the Rule may help to stimulate development in both regards. New and innovative types of reactions are as desirable as precautions against any undue widening of the net of formal social control over juveniles. See "*Human Rights – A Compilation of International Instruments*" Vol 1 (First Part) Universal Instruments p 360: www.chchr.org/Documents/Publications/training.

The primary focus on the rehabilitation of the juvenile offender is also present in Article 17(3) of the *African Charter on the Rights and Welfare of the Child* ("the *ACRWC*"), according to which "the essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, reintegration into his or her family and social rehabilitation".

FUNDAMENTAL PRINCIPLES OF SENTENCING

The courts are required to choose and assess the appropriate sentence or disposition for a juvenile offender convicted of an offence in a manner that takes account of and applies the fundamental principles of international law contained in the *CRC* and other related conventions and treaties on the administration of juvenile justice. The relevant principles show that conviction even for a very serious offence does not extinguish a juvenile's claim to just treatment. Nor does it free a government to ignore fundamental rights.

Three fundamental principles of the administration of juvenile justice having a direct bearing on the issues of sentencing and disposition of juvenile offenders in the criminal justice system deserve mentioning. There are, of course, many other principles of international law that relate to the processes and procedures of adjudication of cases involving juvenile offenders that

are not pertinent to the purposes of highlighting the relevant law to be applied in the choice and assessment of an appropriate sentence for or disposition of a juvenile offender.

The first fundamental principle is one contained in the provisions of Article 3.1 of the *CRC*. It is to the effect that in all actions concerning children, the best interests of the child shall be a primary consideration. Section 81(2) of the Constitution also provides that "a child's best interests are paramount in every matter concerning the child". See also Article 4(1) of the *ACRWC*.

The best interest of the child is the most important principle laid down by the *CRC* which conditions the consideration of issues relating to the choice and assessment of appropriate sentences or dispositions for juvenile offenders.

The fact that the best interest of the child "shall be a primary consideration" in every decision affecting the child is an indication that "the best interests of the child" will not always be the single overriding factor to be considered. There may be competing or conflicting human rights interests. The "child's best interests" must, however, be the subject of active consideration. It is a matter that takes precedence over all others under consideration.

There must be demonstration of the fact that children's interests have been explored and taken into account as a primary consideration in the choice and assessment of appropriate sentences for or dispositions of juvenile offenders. See "*Implementation Handbook for the Convention on the Rights of the Child*" New York, UNICEF, 1998.

The second principle to be considered by courts in the choice of sentence options and assessment of appropriate punishment or disposition for juvenile offenders is that children have

special rights that reflect their unique vulnerabilities and needs and the concomitant responsibility of government to protect them. The effect of the principle is that a juvenile offender's culpability should not be measured by the same standard as that of an adult. The reason is that during the formative years of childhood and adolescence minors often lack the experience, perspective and judgment expected of adults. In the early and middle teen years, adolescents are more vulnerable, more impulsive and less self-disciplined than adults. See *S v Lehnberg and Anor* 1975 (4) SA 553 (A) at 560.

Crimes committed by juveniles may be just as harmful to victims as those committed by older persons. When an individual of any age can be held responsible for his or her actions, failure to bring them to account would deny justice to the victim. Children deserve less punishment because they may have less capacity to control their conduct and think in long-range terms than adults. Moreover, juvenile crime, as such, is not exclusively the offender's fault. Offences by juveniles also present a failure by family, school and the social system, which share responsibility for the development of the youth. Actions of a child are less likely to be evidence of irretrievable depravity.

In November 1959 the United Nations General Assembly adopted the "*Declaration on the Rights of the Child*", which recognised that "the child by reason of his physical and mental immaturity needs special safeguards and care including appropriate legal protection before as well as after birth". General Assembly Resolution 1386 (XIV) Nov. 20, 1959.

The *ICCPR* specifically acknowledges the need for special treatment of children in the criminal justice system and emphasises the importance of their rehabilitation. Human Rights General Comment No. 1 (1992) para 13.

The principle therefore is that whilst children can commit the same acts as adults, they cannot by virtue of their age and immaturity be as blameworthy as adults. They do not have adults' developed abilities to think, to weigh consequences, to make sound decisions, to control their impulses, and to resist group pressures. See *Roper* v *Simmons* 125 S.Ct. 1183, 1197 (2005).

There is national as well as international consensus that it is fair to hold an eighteen-year-old as accountable as an adult. Most youths of eighteen years of age are well into the process of acquiring the full capacity of adulthood. So sentences for offenders who are children – a group society recognises as uniquely vulnerable and in need of protection in many realms of life – should acknowledge the profound differences between childhood and adulthood. See: *Just Sentences for Youth: International Human Rights Law* – Human Rights Watch: https://wwco.hrw.org>reports>9.htm. See also *In re Stanford* 537 US 968,970-71 (2002).

The last principle to guide a court in the choice of sentence options and assessment of appropriate punishment for juvenile offenders is the principle of proportionality. It is a precept of justice that punishment for a crime should be graduated and proportioned to the offender being punished. The *Beijing Rules* provide guidance which is relevant to the sentencing process. Rule 17.1 ensures that the reaction to a juvenile offender shall be in proportion not only to the circumstances and needs of the juvenile offender but also to the needs of society.

It is stated in Rule 17.1(a) of the *Beijing Rules* that "the reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence, but also to the circumstances and the need of the juvenile as well as to the needs of the society". In other words, an appropriate sentence for a juvenile offender is one that does not serve the retributive purpose

only by relating directly to the seriousness of the offence and the culpability of the offender in committing it, ignoring his or her personal circumstances and the interests of society.

Rule 16 of the *Beijing Rules* not only takes a child's developmental stage into consideration, it also emphasises the importance of considering the background of the juvenile offender. It provides that the background and circumstances in which the juvenile was living or the conditions under which the offence was committed shall be properly investigated so as to facilitate judicious adjudicating of the case by the competent authority.

It is important that the court, in compliance with the principle of proportionality, takes into consideration the background of the juvenile offender and the circumstances in which the offence was committed when deciding on an appropriate sentence for or disposition of the juvenile offender.

TYPES OF PUNISHMENT

The kinds of punishment a court may impose on a juvenile offender convicted of a crime are set out in s 336 of the Act. The section provides that a court may impose on a person convicted of an offence a sentence of imprisonment for a determinate period, a fine, community service, or recognizance with conditions. The provisions of the *CRC* and other relevant international instruments contain the principles which a court is required to consider and enforce in the assessment of an appropriate sentence to be imposed on a juvenile offender convicted of a crime. The application of the principles ensures that the sentence or disposition order is appropriate in respect of its proportionality to the circumstances of the juvenile offender, the offence, and the interests of society.

IMPRISONMENT

Under the provisions of the *CRC* and domestic law, the imposition of a sentence of imprisonment for a determinate period on a juvenile offender convicted of a crime is permitted. Rule 17.1(c) of the *Beijing Rules* recognises that a sentence of direct imprisonment may be imposed on a juvenile offender where he or she is adjudicated of a serious act involving violence against another person or persistence in committing other serious offences and unless there is no other appropriate response. The sentence must, however, honour the constitutional provision to the effect that imprisonment of a child offender should be a measure of last resort and for the shortest appropriate period of time.

A sentence of direct imprisonment involves the deprivation of the juvenile offender of his or her liberty. Deprivation of a juvenile offender of his or her liberty by means of a sentence of direct imprisonment must be in accordance with the principles and procedures prescribed in the *CRC*, the *Beijing Rules* and the Constitution.

Under s 81(1)(i) of the Constitution, a juvenile offender has a fundamental right not to be sentenced to a direct term of imprisonment except as a measure of last resort and for the shortest appropriate period. The contents of the right protected by s 81(1)(i) of the Constitution reflect the contents of the provisions of Article 37(b) of the *CRC*.

Article 37(b) of the *CRC* requires that the imprisonment imposed on a juvenile offender must not be arbitrary. It must be in conformity with the law. It must be used only as a measure of last resort and for the shortest appropriate period of time. A court has to consider other measures to deal with the juvenile offender before resorting to the use of direct imprisonment.

According to Rule 17.1(b) of the *Beijing Rules*, imprisonment of a juvenile offender "shall be imposed only after careful consideration and shall be limited to the possible minimum". Furthermore, the *Beijing Rules* promote the wellbeing of the juvenile offender as the guiding factor in the assessment of an appropriate sentence. A sentence should not reflect a determination that there is nothing that can be done to render the child a fit member of society. It should be an expression of faith that hard work and time can promote positive change.

In *S* v *Z* 1999 (1) SACR 427 (ECD), it was held that a sentence on a juvenile should be tailored to the personal circumstances of the offender. Three important principles were highlighted -

> Firstly, the younger the juvenile offender the more inappropriate a sentence of direct imprisonment.
>
> Secondly, direct imprisonment is especially inappropriate for a juvenile offender who is a first offender.
>
> Thirdly, short term imprisonment is seldom appropriate for a juvenile offender.

In *S* v *Nkosi* 2002 (1) SA (WD) at 500D-501C, the principles applicable in the consideration of an appropriate sentence for a juvenile offender, particularly with regard to whether imprisonment is the appropriate punishment, were summarized as follows –

(a) Where possible, a sentence of imprisonment should be avoided, especially in the case of a first offender.

(b) Imprisonment should be considered as a measure of last resort and where no other sentence could be considered appropriate.

(c) Where imprisonment is considered appropriate, it should be for the shortest appropriate time and also considering the nature and gravity of the offence and the needs of society, as well as the particular needs and interest of the juvenile offender.

(d) If possible, the judicial officer should structure the punishment in such a way as to promote the rehabilitation and reintegration of the juvenile concerned into his or her family or community.

Imprisonment is not an inherently cruel, inhuman or degrading punishment. An excessive punishment, however, becomes cruel, inhuman or degrading if its severity or length is greatly or grossly disproportionate to the circumstances of the offender, the nature and gravity of the crime, the culpability of the offender, and the interests of society. The prohibition of cruel, inhuman or degrading punishment in Article 7 of the *ICCPR* is complemented by the positive requirements of Article 10(1), which stipulates that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

For treatment or punishment to be humane, it must be appropriate to age and legal status. The vulnerability and immaturity of juvenile offenders render them more susceptible to cruel, inhuman or degrading punishments, which will in turn have a much more profound impact on the body and mind of a developing child than an adult. See "*Just Sentences for Youth: International Human Rights Law*" Human Rights Watch *supra*.

The general principle of the administration of juvenile justice is, therefore, that direct imprisonment should not be imposed on a juvenile who is a first offender unless it is absolutely necessary and appropriate to do so, regard being had to the circumstances of the juvenile offender, the nature and gravity of the offence, the degree of culpability of the offender, and the interests of society.

FINES

Imposing a fine on a juvenile offender is generally not an appropriate sentence, unless he or she is earning a salary. Few juvenile offenders earn a salary and fines would generally be paid by parents or legal guardians of the child. Consequently, it is not the juvenile offender being punished but his or her parents or legal guardian. Furthermore, where a fine is set with an alternative of imprisonment, the concern is that poverty could cause a child to be imprisoned. See Skelton A "*The Major Sources of Children's Legal Rights*" Children and the Law (1988) 146-158 http://www.ihr.org.za.

The court may permit the juvenile offender, as an alternative to paying the fine, to render such community service as may be specified by it in terms of ss 247(1)(b) and 350A(3) of the Act.

COMMUNITY SERVICE

In terms of s 350A of the Act, a court which convicted a juvenile offender of any offence may, instead of sentencing him or her to imprisonment or a fine, make a community service

order requiring him or her to render service for the benefit of the community or any section of the community for such number of hours as shall be specified in the order.

The court may sentence the juvenile offender to a fine or imprisonment as an alternative punishment if he or she fails to render the service specified in the order. Subject to such conditions and requirements as may be prescribed, an offender in respect of whom a community service order is in force is obliged to render the service specified in the order for the number of hours specified therein. Unless revoked, a community service order remains in force until the offender has rendered the number of hours of service specified. Where there has been failure to comply with any requirement of a community service order, the court may amend or extend the order in such a manner as the court thinks will best ensure that the offender renders the service specified in the order.

The importance of a sentence entailing community service cannot be over-emphasised, especially with regard to juvenile offenders. The advantages of a community service order have been neatly encapsulated in an article by Francis Howes in 1984 *SACC* 131, titled "*Community Service as Community Orientated Punishment*", cited with approval in the case of *S* v *Sikunyana* 1994 (1) SACR 206 (Tk) at 208h-209c. In the article, Howes states as follows:

"A system of community service has, *inter alia*, the following advantages:

(i) Community service is a viable alternative, especially to short-term imprisonment. It can alleviate not only the overcrowding in prisons in this category, but can eliminate the detrimental effects that imprisonment can have on certain offenders.

(ii) It is generally accepted that offenders can best be treated in the community and that isolation of the offender in an artificial social environment seldom contributes to his rehabilitation. Community service keeps the offender in

the community and combines the punitive and rehabilitative aspects of a sentence.

(iii) Instead of becoming a financial burden on the State, the offender remains a productive member of society. Family disintegration and dependency, which are often a by-product of imprisonment, are eliminated.

(iv) By involving the community in the treatment of the offender, it becomes more aware of the crime problem, which might create a more positive attitude towards treatment of offenders. Furthermore, community service enables the offender to become better integrated into society and affords him a positive learning."

It is beyond doubt that community service orders are key in the rehabilitation of a juvenile offender. A community service order strikes a balance between the punitive and reformative aspects of the sentencing objectives in criminal law. It metes out punishment in a manner that facilitates the integration of the juvenile into society, whilst the community benefits directly from the work performed by the offender. So community service orders may be structured in such a way that they meet the punitive element of sentencing while allowing for the education and rehabilitation of the offender. See *William's* case *supra* at 654C.

PICKERING J in the *S* v *Sikunyana* case *supra* at 209g-i correctly held that, prior to the making of a decision to order an accused (a juvenile offender in this case) to render community service, the court should be informed of the following:

"(a) Whether community service is an appropriate sentence in the particular circumstances of the case;

(b) whether the accused is a suitable candidate for community service;

(c) …;

(d) the identification of a suitable place for the rendering of such service;

(e) the identification of a suitable person under whose supervision and control the service should be rendered;

(f) the determination of the number of hours and the days on which the service should be rendered;

(g) the date on which the rendering of the service should commence; and

(h) the duration of the period of such service."

POSTPONEMENT AND SUSPENSION OF SENTENCE

Section 358(1) of the Act refers to postponement of passing sentence. Section 358(2)(a) of the Act makes provision for the court to postpone the passing of a sentence for a period not exceeding five years upon conditions as are available for the suspension of sentence.

Section 358(2)(d) of the Act provides that the court may in its discretion discharge a juvenile offender with a caution or reprimand. Such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction. This is because in terms of s 358(2) of the Act the discharge follows a conviction for an offence other than an offence specified in the Eighth Schedule to the Act. The offences listed in the Eighth Schedule are murder other than the murder by a woman of her newly-born child, any conspiracy or incitement to commit murder, any offence in respect of which any enactment imposes a minimum sentence, and any conspiracy, incitement or attempt to commit any such offence.

Section 358(4) of the Act provides that if the period of conditional postponement has expired and the court is, at the end of the period, satisfied that the conditional postponement has expired and the conditions have been kept, the accused shall be discharged without passing sentence. The discharge has the effect of an acquittal, except that the conviction is recorded as a previous conviction.

In terms of s 358(3) of the Act, the passing of sentence may be postponed or the operation of the whole or part of a sentence may be suspended for a period not exceeding five years on conditions relating to any of the following matters:

> "(*a*) good conduct;
>
> (*b*) compensation for damage or pecuniary loss caused by the offence …;
>
> (*c*) the rendering of some specified benefit or service to any person injured or aggrieved by the offence:
>
> Provided that no such condition shall be specified unless the person injured or aggrieved by the offence has consented thereto;
>
> (*d*) the rendering of service for the benefit of the community or a section thereof;
>
> (*e*) submission to instruction or treatment;
>
> (*f*) submission to the supervision or control of a probation officer appointed in terms of the Children's Act[*Chapter 5:06*] … or submission to the supervision and control of any other suitable person;
>
> (*g*) compulsory attendance or residence at some specified centre for a specified purpose;
>
> (*h*) any other matter which the court considers it necessary or desirable to specify having regard to the interests of the offender or of any other person or of the public generally."

The type of punishment referred to in s 358 of the Act is particularly appropriate in cases of juvenile offenders. The court has the option of adding conditions for the postponement of the sentence. The juvenile offender may, for instance, be sent on a rehabilitation programme such as a skills Programme, or be placed under the supervision of a probation officer. In the light of the wide discretion of the court in s 358(3)(h) of the Act, the court can use this form of sentence to advantage.

To determine an appropriate sentence, the court has to be innovative and preventative. Rehabilitation should be a priority.

JUVENILE JUSTICE SYSTEM OPTIONS

When a court considers the question of sentencing a juvenile offender, s 351 of the Act provides special alternatives to punishment. Instead of punishment, the court may invoke the procedure of disposition orders specifically applicable in the children's court. Procedures relating to the issuance of disposition orders are specifically and exclusively applicable to children alleged as, accused of, or recognised as, having infringed the penal law.

Article 40.4 of the *CRC* requires States Parties to use a variety of measures to address the situation of children in conflict with the law. The measures include "a variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education; and vocational training programmes". The alternatives to punishment are to ensure that children are dealt with in a manner appropriate to their wellbeing and proportionate to both their circumstances and the offence.

The founding model of the juvenile justice system characterized by the children's court is not based on offence-related considerations. Interactions with the juvenile offender, as well as the choice of the manner of disposition, are supposed to be based solely on the goal of rehabilitation of the offender. In theory, if not in practice, the seriousness of the offence is not supposed to be a relevant consideration, much less a determinate one, in choosing a juvenile court disposition. See also "*Just Sentences for Youth: International Human Rights Law*" Human Rights Watch *supra* at p 183.

Section 351(2) of the Act provides:

"**351 Manner of dealing with convicted juveniles**

(2) Any court before which a person under the age of nineteen years has been convicted of any offence may, instead of imposing a punishment of a fine or imprisonment for that offence, subject to subsection (1) of section *three hundred and thirty-seven*—

(*a*) order that he shall be taken before a children's court and dealt with in terms of the Children's Act [*Chapter 5:06*]; or

(*b*) after ascertaining from the Minister responsible for social welfare that accommodation is available, order that he shall be placed in a training institute in Zimbabwe or in a reform school in the Republic of South Africa for the period specified in subsection (1) of section *three hundred and fifty-two*."

If a juvenile offender is ordered to be taken before a children's court or the court disposes of him or her in terms of s 351(2)(b) of the Act, the conviction shall not, for the purposes of any enactment, be regarded as a conviction. If, however, such person is convicted on a second or subsequent occasion before he or she attains the age of eighteen years it shall be lawful to prove that earlier conviction as a conviction.

The period of "retention" or "supervision" referred to in s 352 of the Act is the period during which a person shall remain in a training institute, reform school or certified institution. A juvenile offender in respect of whom a disposition order has been made in terms of s 351(2) of the Act placing him or her at a training institute or reform school is required to remain there for a period of three years from the date of the order or until he or she is released on license in terms of the Children's Act or until he or she has been discharged from the effect of the order in terms of the Children's Act, whichever is the soonest.

After the expiration of the period of retention of the juvenile in a training institute or reform school, whether by effluxion of time or release on license, the juvenile is obliged to remain under the supervision of the management of the training institute or reform school for a period not exceeding three years from the time of the expiry of his or her period of retention or until he or she is discharged from the supervision in terms of the Children's Act or until he or she attains the age of twenty years, whichever is the soonest.

Under s 352(4) of the Act, where a court is satisfied, on the application of the Minister to whom the administration of the Children's Act is assigned or the parent or legal guardian of the person concerned, that a further period in a training institute, reform school or certified institution would advance the education or welfare of a person who has been placed in such an institute, school or institution and whose period of retention has expired or is about to expire, the court may order the juvenile to return to or remain in the institute, school or institution concerned for a further period or periods as it may fix, and may at any time revoke such order.

In terms of s 3(2) of the Children's Act, every magistrates court is a children's court for any part of its jurisdiction. Section 19(1)(b) of the Children's Act provides that a children's court before which a child has been brought in terms of an order of a court which has convicted him or her of an offence, in order to be dealt with in terms of the Children's Act, shall inquire into and determine the appropriate order to be made in terms of s 20(1). After holding the inquiry in respect of a child who has been ordered by a court which convicted him or her of an offence to be dealt with in terms of the Children's Act, the children's court may make any of the following orders -

"(i) upon being satisfied that a certified institution will accept the child …, order that the child … shall be placed in that certified institution, which shall be named in the order; or

(ii) order that the child … shall be placed in, returned to or remain for foster care in the custody of any suitable person named in the order; or

(iii) order that the child … shall be placed in, returned to or remain in the custody of his parent or guardian; or

(iv) order that the child … shall reside in such place as the court may determine; or

(v) order that the child … shall render service for the benefit of the community or a section thereof; or

(vi) upon being satisfied that a training institute will accept the child …, order that the child … be placed in that training institute, which shall be named in the order;

for the period specified in subsection (1) of section *twenty-five*."

A children's court which makes an order in terms of subpara (ii), (iii) or (iv) of subs (1) of s 20 of the Children's Act may also order, at the same or any later time, that the child shall be placed under the supervision of a probation officer for such period, not exceeding three years, as the court may determine.

A children's court which makes an order in terms of subpara (ii), (iii) or (iv) of subs (1) of s 20 of the Children's Act may order that the child, if he or she is of or above the age of twelve years, shall attend an attendance centre specified in the order on such days and during such hours as may be stated in the order. No child may be ordered to attend such centre for longer than three hours per week or forty-eight hours in all.

Section 25 of the Children's Act provides that a child in respect of whom an order has been made in terms of subs (1) of s 20 shall reside in the place determined by the court or shall remain in the certified institution or training institute or in the custody in which he or she was

placed or ordered to return to or remain in any other certified institution, training institute or custody to which he or she may be transferred in terms of the Children's Act or shall render service for the benefit of the community, as the case may be –

(*a*) until a period of three years from the date of the order has lapsed; or

(*b*) until he or she is released on license in terms of the Children's Act; or

(*c*) until the order has been discharged or he or she has been discharged from the effect of the order in terms of the Children's Act;

whichever is the soonest.

Upon the expiration of the period of retention of a juvenile in a certified institution or training institute, whether by effluxion of time or release on license, that juvenile shall remain under the supervision of the management of that certified institution or training institute or under the supervision of the management of any other certified institution or training institute to which he may be transferred in terms of the Children's Act -

(*a*) for a period not exceeding three years from the date of the expiry of the period of retention; or

(*b*) until he or she is discharged from that supervision in terms of the Children's Act;

whichever is the soonest.

A children's court may, if it thinks it necessary, order that —

(*a*) any former pupil of a certified institution or training institute whose period of retention has expired shall return to and remain in that institution or institute; or

(*b*) any juvenile offender in a certified institution or training institute whose period of retention is about to expire shall remain in that institution or institute; or

(*c*) a child who was ordered to render service for the benefit of the community and whose period of service is about to expire, shall continue to render such service to the community;

for such further period or periods as the court may fix and may at any time revoke such order, provided that the period or the aggregate of periods shall not exceed two years at any time. Any such order shall lapse upon the juvenile or former pupil attaining the age of eighteen years.

The juvenile justice system should ensure that juvenile offenders are held accountable for their wrongdoing and that, in doing so, they are treated fairly. A review of the Children's Act reveals that it typically declares dual objectives. It holds youth accountable and provides rehabilitative services to reduce their risk of re-offending. Both of these goals are necessary to satisfy public expectations that corrective action will be taken. What this means is that a juvenile offender can be made to take responsibility for his or her wrongdoing and rehabilitated without being punished.

If designed and implemented in a developmentally informed way, procedures for holding juvenile offenders accountable for their actions whilst undergoing programmes for reformation, reintegration and rehabilitation into society can promote positive legal socialisation, reinforce a prosocial identity, and facilitate compliance with the law.

The courts have to play a new role in the promotion and development of a new culture in juvenile sentencing, founded on the recognition of human rights enshrined in the Constitution. Sentencing policies have to be influenced by both the Constitution and international law.

The abolition of judicial corporal punishment should give new impetus to the establishment of more training institutions in the country. Formal rehabilitation programmes, such as vocational training for juvenile offenders, need to be intensified and expanded to contribute towards the reintegration of juvenile offenders into the community.

There is need for the training of more probation officers. Rule 16.1 of the *Beijing Rules* requires that before a court renders a final disposition prior to sentencing a juvenile offender, the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the court. Social reports are an indispensable aid in legal proceedings involving juveniles. The court should be informed of relevant facts about the juvenile offender, such as social and family background, school career and educational experience. The rule requires that adequate social services should be available to deliver social reports of an informed nature.

To the extent that facilities and physical resources may not always be adequate, the new dynamic shall be regarded as a timely challenge to the Government to ensure the provision and execution of an effective juvenile justice system. See *Williams'* case *supra* at 653H.

CONCLUSION

The elimination of judicial corporal punishment from the penal system is an immediate and unqualified obligation on the State. Judicial corporal punishment constitutes a serious violation of the inherent dignity of a male juvenile offender subjected to its administration. It is an antithesis of compliance with the values recognised in s 53 of the Constitution.

To emphasize human dignity is to engage with our conception of what it is to be human. It is also a point of closure: it is definitive and universal. It is not a value that tolerates either derogation or dissent. We recognise this in all sorts of areas, including constitutional law.(See Michael D A Freeman "*Upholding the Dignity and Best Interests of Children*"; "*International Law and the Corporal Punishment of Children*"; *The Law and Contemporary Problems* Vol 73 (Spring 2010) 211 at 251 or scholarship.law.duke.edu.

DISPOSITION

The order of the court *a quo* declaring s 353 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] to be invalid for the reason that it is in contravention of s 53 of the Constitution is confirmed.

The declaration of invalidity of s 353 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] shall take effect from 03 April 2019, which is the date of delivery of this judgment. As of that date s 353 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is struck down.

With effect from 03 April 2019 no male juvenile convicted of any offence shall be sentenced to receive moderate corporal punishment. The prohibition shall apply to sentences to

receive moderate corporal punishment that have already been imposed and are awaiting execution.

CHIDYAUSIKU CJ:

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

HLATSHWAYO JCC: I agree

MAVANGIRA JCC: I agree

BHUNU JCC: I agree

UCHENA JCC: I agree

MAKONI AJCC: I agree

National Prosecuting Authority, State's legal practitioners

Attorney General's Office, State's legal practitioners

Justice for Children's Trust, as *amicus curiae*

Zimbabwe Lawyers for Human Rights, as *amicus curiae*