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9 “SPARE THE ROD AND SPOIL THE CHILD”? REFLECTIONS ON THE BANNING OF CORPORAL PUNISHMENT IN ZIMBABWEAN SCHOOLS IN THE CONTEXT OF THE RIGHTS OF THE CHILD

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INTRODUCTION

This research examines the topical debate ensuing from High Court of Zimbabwe judgments resulting in blanket banning of juvenile corporal punishment in accordance with the Constitution of Zimbabwe, 2013, Sections 51, 53 and 81 and a range of international child rights instruments.² The rulings have caused much controversy amongst diverse interest groups, including teachers, religious believers, non-governmental organisations (NGOs) and children themselves. The debate centres on whether the “rod”, or corporal punishment, as a religio-cultural instrument for correcting bad behaviour can successfully be replaced by the application of legal and political entitlements, particularly claims of human rights. Christians and Muslims in Zimbabwe point to their Holy Scriptures, which are replete with the use of the rod in contexts ranging from family to criminal justice. African indigenous religionists refer to proverbs as communitarian ethical narratives legalising the use of the rod as a symbol of love for the child and the traditions of past generations. Many conservative parents, holding on to parental rights and authority, are keen to show that their successes lie in the efficacy of the power reposed in the disciplinary rod, but the NGOs and the children themselves are adamant that the days of the rod are anachronistic and bygone.

It is worthwhile to evaluate why use of the rod in Zimbabwean schools is only becoming an issue now. To begin with, the government was protective of corporal punishment in family, school and judiciary sentencing. The laws governing juvenile punishments from 1972 to 2013 generally specified these three environments as the places where corporal punishment was most likely to occur. As discussed below, court justices that nullified corporal punishment in response to applications from any of the three categories and inevitably extended the rulings to cover the other two categories. Of the three judgments, covered in this chapter, handed down by the High Court and subsequently confirmed by the Constitutional Court, it is the *Lindah Pfungwa* case of 2017, the most recent case, that elicited the worst public reaction. The case concerned a primary school child, Makanaka, who had been severely beaten by her teacher because her mother (the first applicant in the case)

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2 Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990.

had not signed her homework book to indicate that it had been completed. The applicant wanted corporal punishment to be declared unconstitutional, a petition that was granted by the High Court and confirmed by the Constitutional Court. The public outrage that followed centred on disdain for the banning of juvenile corporal punishment from schools and all other environments with children. The aim of corporal punishment defenders was to strengthen parental authority over children, for which corporal punishment was considered invaluable.³ The government had earlier swiftly amended the Lancaster House Constitution, Zimbabwe's negotiated independence document, to entrench corporal punishment in the aftermath of the 1989 Supreme Court declarations against juvenile corporal punishment in the family, school and judicial contexts. But in Linda Pfungwa's case in 2017, the government accepted its loss in the appeal at the Constitutional Court. The state's acceptance of defeat on the constitutionality of corporal punishment fuelled a public anger that was reflected in newspapers and social media. Conservative African indigenous believers, Christians and Muslims who believed in the sacrosanctity of the power reposed in the disciplinary rod claimed that the court judgments infringed on their religious rights regarding child discipline.

The reactions of Christians, Muslims and African indigenous believers demonstrate disparities between legal rights, as represented by the legislative law that is interpreted by courts, and religious rights as understood by the protesting public. John Witte and M. Christian Green, scholars of law, religion and human rights, have noted the ambivalence of religion in supporting both violence and human rights.⁴ Religion advances human dignity, while at the same time justifying violence including corporal punishment. What will be made clear in this chapter is that "religious precepts determine what one is willing to accept as properly a human right".⁵ Consequently, there is disagreement on whether human rights should follow religious precepts or essentially be taken as legal and political entitlements. In the view of global health and human rights scholar Stephen Marks, human rights originated from "ancient religious and philosophical concepts of compassion, charity, justice, individual worth, and respect for all life found in Hinduism, Judaism, Buddhism, Confucianism, Christianity and Islam".⁶ The problem with confining these rights to legislative law renderings is that "law revolutionizes whenever it is used as an instrument of [rights] preservation".⁷ In this case, it sets aside the long held religious view of the rod as a sacred object of morality by interpreting it as a traumatic weapon of torture. Nevertheless, "evidence from South Africa shows that

3 Ndoma S. 2017. "Contrary to Court Ruling, Zimbabweans Endorse Parental Right to Physically Discipline Children", *Afrobarometer Dispatch* 156:1-7.

4 Witte J (Jr) and Green MC (eds). 2011. *Religion and Human Rights: An Introduction*. New York: Oxford University Press.

5 Marks SP. 2014. "Human Rights: A Brief Introduction". Cambridge, MA: Harvard University, 2. Online at: <https://bit.ly/3JfCpWP>

6 Marks, "Human Rights: A Brief Introduction", 5.

7 Niezen R. 2015. "Indigenous Religion and Human", in Witte and Green (eds), *Religion and Human Rights: An Introduction*, 126.

banning corporal punishment in terms of law is different from its total eradication in conservative societies with high moral and traditional overtones."⁸

The chapter opens with a discussion of the meaning and relevance of corporal punishment from the points of view of scholars who have studied the practice and those who use it. This is followed by a discussion of the laws that have kept corporal punishment in force from 1972 to 2013, which explains why it is only becoming an issue now. That is followed by a section on the quashing of corporal punishment from schools and other environments by the courts. From there, the chapter examines religious and social perceptions on the use of the rod in the Christian, Muslim and African indigenous religionists before reaching some final conclusions about the practice in Zimbabwe.

THE MEANING AND RELEVANCE OF CORPORAL PUNISHMENT

Corporal punishment is "any form of correction that involves physical retribution ... [including] switching, spanking, caning, slapping, chastising, paddling or flogging."⁹ The United Nations Convention on the Rights of the Child (UNCRC) defines corporal punishment broadly in a way that extends to virtually all forms of punishment involving physical force impacting "some degree of pain or discomfort, however light."¹⁰ This covers human force emanating from using hands or such implements as "whip, stick, belt, shoe, wooden spoon."¹¹ Just a cursory examination of these forms of implementation, shows that they included some quite dangerous methods. This, in turn, demands further investigation as to why those in authority sometimes prefer corporal punishment to a host of alternative forms of punishment available for their selection.

"Spare the rod and spoil the child" has been a philosophy of child-rearing strongly held by both professionals and laymen.¹² Christopher Charamba, a features editor for *The Herald*, maintains that, for many, corporal punishment "has been a regular method of discipline both in homes and in schools."¹³ Resorting to corporal punishment is a result of the longstanding argument for "parental right, religious ideological perspectives, and the right of the government to correct, rebuke or

8 Dziva C. 2019. "The 2013 Constitution of Zimbabwe: A Positive Step Towards Ending Corporal Punishment against Children", *A South African Journal* 20(1):28.

9 Brown AD. 2017. "Spare the Rod, Spoil the Child? A New Perspective on Discipline", *Psychology Today*, 16 November, 2.

10 UN Committee on the Rights of the Child (UNCRC), General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (arts 19; 28, para 2; and 37, inter alia), 2 March 2007, CRC/C/GC/8.

11 UNCRC Committee, General Comment No. 8.

12 Nyakito C. and Allida D. 2018. "Spare the Rod and Spoil the Child – Is Corporal Punishment Morally and Legally Justified in Ugandan Secondary Schools? A Case of Gulu District", *Baraton Interdisciplinary Research Journal* 8:1.

13 Charamba C. 2017. "The corporal punishment debate", *The Herald*, 8 March.

create physical consequences for negative attitudes, behaviors or actions.”¹⁴ For this reason, in the majority of communities around the world, including African societies, “corporal punishment is the norm rather than the exception.”¹⁵ Regulations proposing contrary disciplinary methods are understood as hindrances to the child’s growing moral responsibility and, therefore, often ignored. A 2014 survey conducted in Ugandan schools noted that “seven out of every ten children were subjected to caning by teachers, apparently under the pretext of pushing them to attain higher academic grades.”¹⁶ That was in spite of the ban on corporal punishment in schools in 2006. A similar survey carried out in 2011 by Plan International, a human rights organisation in Zimbabwe, found non-commissioned teachers (those teachers without administrative posts) to be the worst and most indiscriminate abusers of school-going children.¹⁷ That was despite the fact that Minute Circular P35 of the Ministry of Education, Sport and Culture, 1999,¹⁸ which was in force until the promulgation of the new Constitution of Zimbabwe in 2013, allowed only the headmaster (or superintendent or housemaster in the case of boarding schools) to administer corporal punishment, only on boys and only as a last resort.¹⁹ Therefore, Plan International struggled to realise the goals of its “Child Friendly Initiative” meant to inculcate solutions more in line with children’s rights.

Worse still, stakeholders including teachers, parents and school administrators, have frequently expressed doubt that there are alternatives capable of transforming the mindset of a difficult child.”²⁰ This symbiotic agreement amongst parents, teachers and school administrators has made human rights approaches to child disciplining difficult to envisage, courting the ire of human rights groups like Plan International. Some child psychologists have complicated the already heated discourse by concurring with parents and teachers, against child rights campaigners, that corporal punishment is the only action that will have an effect on “problem” children. This is because physical pain is thought to act as deterrence for those children who have experienced it, which may lead to efforts at improvement.²¹ In this regard, the rod is viewed as an empowerment for the teacher to incentivise the students to aim higher. Ugandan researchers, Charles Nyakito and Daniel Allida, conclude that the banning of corporal punishment in Ugandan schools in 2006 has remained ineffective twelve years on because teachers found

14 Brown AD. 2017. “Spare the Rod, Spoil the Child?”, 1.

15 Brown, “Spare the Rod, Spoil the Child?”.

16 Kibuuka E. 2015. “Corporal Punishment kills Students’ Interest in Education”, *The New Vision*, 24 December, 3”.

17 “Teachers are Worst Abusers of School-going Children”, *Newsday*, 3 July 2011.

18 Circular Minute P35 is a statutory instrument specifying how corporal punishment should be carried out in schools.

19 Circular Minute P35. 1999. “Discipline in Schools: Suspension, Exclusion and Corporal Punishment”, ss 8.5.1, 8.5.3 and 8(1).

20 Brown, “Spare the Rod, Spoil the Child?”, 1.

21 Balogun OA. 2009. “A Philosophical Defence of Punishment in Traditional African Legal Culture: The Yoruba Example”, *Journal of Pan African Studies* 3(3):43-54.

no viable alternative.²² Nyakito and Allida maintain that the positive valuation of physical pain ignores the traumatic side of corporal punishment. The child rights proponents and the evolving ordinary voices are often drowned by the majority, who do not problematise the after-effects of corporal punishment. The Zimbabwe Teachers' Association (ZIMTA) similarly notes that teachers in Zimbabwe continue to get into serious trouble with the authorities by resorting to corporal punishment in contravention of the Zimbabwe Constitution, which has outlawed it.²³ ZIMTA blames culture and religion for the perceptions of schoolteachers with respect to corporal punishment, despite full knowledge that P35 has been suspended, pending alignment with the current Constitution.

Mahatma Gandhi, the powerful Indian human rights campaigner, saw power dynamics in the use of the rod. Gandhi observed, "Power is of two kinds. One is obtained by the fear of punishment and the other by acts of love. Power based on love is a thousand times more effective and permanent than the one derived from fear of punishment."²⁴ In reality, effective use of "acts of love" has been hugely overshadowed by preference for "acts of terror" undergirded with the philosophy that "without pain there is no gain" and that "a person in authority has to exert control always."²⁵ This is exactly what the international human rights instruments have sought to eradicate, preferring to infuse retributive power with love as opposed to "torture, inhuman or degrading treatment or punishment".²⁶

Torture is defined in the African Charter on the Rights and Welfare of the Child (ACRWC), Article 16(1) as encompassing "physical or mental injury or abuse",²⁷ all of which may result from corporal punishment. The UNCRC adds that "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment".²⁸ The logic is that the children who have experienced physical violence are more likely to adopt tyrannical laws and to grow negative attitudes towards their parents later in life. Corporal punishment, therefore, inculcates conditions for a vengeful future community. Scholars against corporal punishment doubt its capacity to induce the child to adopt positive attitudes that influence

22 Balogun, "A Philosophical Defence of Punishment".

23 Zimbabwe Teachers Association (ZIMTA). 2015. "Corporal Punishment now Illegal". Online at <https://www.facebook.com/393043474061856/posts/corporal-punishment-now-illegalthe-issue-of-corporal-punishment-has-once-again-c/963322467033951/>. May 18.

24 Brown, "Spare the Rod, Spoil the Child?", 1 (quoting Mahatma Gandhi).

25 Mushohwe B. 2018. "A Ray of Hope for the Outlawing of Corporal Punishment in Zimbabwe: A Review of Recent Developments", *Zimbabwe Electronic Law Journal* 76-91. See also UNICEF Uganda. 2008. "Creating Safer Schools: Alternatives to Corporal Punishment", 5.

26 African Charter on the Rights and Welfare of the Child (ACRWC), OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, art 17(2)(a).

27 ACRWC, art 16 (1).

28 UNCRC, art 37(a).

behaviour for the better.²⁹ The psychological sense of loss of self-dignity leads the child to lack trust in the adult population more prone to using the rod, rather than the word.³⁰ In the worst scenario for the educators, “corporal punishment often leads to loss of interest, resentment of the learning experience and, as a result, lack of value for education by children. More often than not, children who are beaten up learn to hate a subject or teacher, leading to subject or school dropout.”³¹ As a result, a number of African countries, including Uganda, Kenya, South Africa and Namibia, have joined the world in outlawing corporal punishment. It is worthwhile to assess why use of the rod in Zimbabwean schools is only becoming an issue now. To do that the discussion turns to some of the legal statutes which have kept the rod in place since 1972.

LAWS ON CORPORAL PUNISHMENT IN ZIMBABWE, 1972-2013

The 1972 Children’s Act authorised the use of physical force by those in charge of children. Article 7 authorised parents and guardians to “administer reasonable punishment” on the minors under their care.³² That was eventually expressly allowed by the amended Lancaster House Constitution of 1979, which Zimbabwe adopted at independence. The amended version of the Lancaster House Constitution allowed the schoolteacher or legal guardian to resort to moderate corporal punishment under Section 15(3), the negation of which in the current constitution has been hotly debated.³³ Many religious persons wanted the corporal punishment amendment clause, which was a sequel to the quashing of corporal punishment by the Supreme Court in the case of *A Juvenile v State*, 1989, to be retained in the new Zimbabwe Constitution of 2013. Although the state had become infamous for using corporal punishment as a political tool,³⁴ the court case was not a result of public outrage against beatings. It was instead a human rights issue, which tended to be seen as contravening religious values of the general populace. Public outrage was therefore against the court ruling, but as the state appeared reassuring, the anger quickly died down. The State responded by amending the Lancaster House Constitution in order to categorically state in Section 15(3) that:

No moderate corporal punishment inflicted – (a) in appropriate circumstances upon a person under the age of eighteen years by his parent or

29 Amini I. 2004. *Principles of Upbringing Children: The Codes of Training*. n.p: Al-Buraq Publication.

30 Mushohwe, “A Ray of Hope”.

31 Mushohwe, “A Ray of Hope”, 84.

32 End Corporal Punishment. 2020. “Country Report for Zimbabwe”, July. Online at: <https://endcorporalpunishment.org/reports-on-every-state-and-territory/zimbabwe/>

33 Magaisa AT. 2015. “Outlawing of Corporal Punishment on Male Juveniles in Zimbabwe”, Zimbabwe Situation, 29 January.

34 CCJP/LRF. 2008. Gukurahundi in Zimbabwe: A Report on the disturbances in Matabeleland and the Midlands 1980-1988. CCJP/LRF.

guardian or by someone in loco parentis or in whom are vested any of the powers of his parent or guardian; or (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 sub-Section (1) on the ground that it is inhuman or degrading.³⁵

That was a huge setback for the reformatory agenda set by the Court, leading to the entrenchment of legislation supportive of corporal punishment. Prominent amongst these pieces of legislation was the Criminal Law (Codification and Reform) Act 2004, which states in Article 241(2):

- (a) that "a parent or guardian shall have authority to administer moderate corporal punishment for disciplinary purposes upon his or her minor child or ward;
- (b) a school-teacher³⁶ shall have authority to administer moderate corporal punishment for disciplinary purposes upon any minor male pupil or student."³⁷

The amendment also found its way into Section 66 of the Education Act, 2004, stating that schoolteachers acting *in loco parentis* could apply "moderate corporal punishment" on male juveniles, despite absence of "constitutional definition, indication or guideline on what constituted 'moderate corporal punishment'".³⁸ Alex Magaisa, a human rights lawyer, succinctly summarised the pro-corporal punishment political and legislative rhetoric during the discussions leading to the promulgation of the 2013 Constitution thus:

The major argument advanced in favour of corporal punishment was that it was a necessary and socially-accepted form of discipline which helped in enforcing good morals and proper behaviour among children ... was part of traditional culture and ... Many argued that there was a lot of indiscipline and immoral behaviour among the younger and more urbane generation, largely because their parents were "too soft" on their children.³⁹

The politicians and many amongst the elderly population wished to avoid what they called "Western fiasco" in which children had lost all respect for their parents and the elderly social stratum due to the absence of corporal punishment. This traditional argument, however, succumbed to the human rights argument that informed Section 81(1) of the promulgated Constitution, which states: "Every child, that is to say every boy and girl under the age of eighteen years, has the right ... to equal treatment before the law, including the right to be heard."⁴⁰ Instead of

35 Lancaster House Constitution of Zimbabwe 1979, s 15(3).

36 "School-teacher" here refers to one of commissioned rank or his delegate.

37 Criminal Law (Codification and Reform) Chapter 9:23, Act 23/2004.

38 See Education Act 2004, s 66. See also Magaisa "Outlawing of Corporal Punishment".

39 Magaisa "Outlawing of Corporal Punishment".

40 Constitution of Zimbabwe Amendment (No.20) Act No. 1 2013, s 81(1).

equality before the law, corporal punishment tended to be discriminatory between a male and female juvenile, exposing only the male juvenile to subjection to the rod.

The new Constitution was also greatly influenced by international human rights law. That was because Zimbabwe had obligations as a state party to the UNCRC, as well as the International Covenant on Civil and Political Rights, the latter of which stated in Article 7 that, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁴¹ In 2006, the UNCRC Committee adopted General Comment No. 8 on “the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment.”⁴² The comment stressed that, “Addressing the widespread acceptance or tolerance of corporal punishment on children and eliminating it, in the family, schools and other settings, is not only an obligation of State parties under the Convention. It is also a key strategy for reducing and preventing all forms of violence in societies.”⁴³

The UNCRC criticised Zimbabwe in 1996 and 1998 for holding on to a constitution and statutes that contravened Article 7. It had eluded the government of Zimbabwe that “human rights of children are fundamental international human rights that protect all children against abuse by adults and caregivers as enshrined in the United Nations Convention on the Rights of the Child.”⁴⁴ Since the promulgation of the current Constitution, the courts have again taken up a reform agenda, leading to the current bitter discourse on the total banning of corporal punishments in all spheres of human life including the school.

LANDMARK COURT RULINGS QUASHING CORPORAL PUNISHMENT

By reference to the two landmark rulings under the current Constitution of Zimbabwe and fronting the courts as the flagship of the current reform agenda, it is suggested that the courts themselves are homogenous in their views towards corporal punishment. In fact, when the High Court of Zimbabwe handed down the first of the two verdicts that judicial caning (juvenile caning authorised by a court of law) was inadmissible under the new constitution, a senior magistrate was convinced that with inadequate reformatory facilities in Zimbabwe caning kept “youngsters out of prison.”⁴⁵ On 31 December 2014 in the case of *State v Chokuramba*, Justice Esther Muremba, a High Court judge, ruled that Section 353(1),

41 See Magaisa “Outlawing of Corporal Punishment”. See also International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art 7.

42 UNCRC Committee, General Comment No. 8.

43 UNCRC Committee, General Comment No. 8, para 3.

44 Shumba A. “Children’s rights in schools: What do teachers know?”, *Child Abuse Review* 12(4):251.

45 Farrell C. 2015. “Country Files, Zimbabwe”. Online at: <https://www.corpun.com/> [Accessed 4 November 2021].

of the Criminal Procedure and Evidence Act legalising the imposition of corporal punishment on male juvenile offenders was unconstitutional.⁴⁶ The case was brought to court by Justice for Children's Trust, represented by Tendai Biti, a constitutional lawyer, and David Hofisi, representing Zimbabwe Lawyers for Human Rights.⁴⁷ The decision was passed on to the Constitutional Court, which has the final say on the constitutional validity of Acts of Parliament, under terms of Sections 167(3) and 175(1) of the Constitution. Even though the decision related to a juvenile sentenced to caning by a competent court in terms of the statutes, the ruling was extended to school juvenile offenders as well.⁴⁸

Though P35, which allows corporal punishment in cases of "insubordination and indecency", is still to be repealed, its applicability has been put into question by the High Court reading of the Constitution, even before gathering the necessary legal force from the Constitutional Court. This is partly because Zimbabwe is also a signatory to the UNCRC, which mandates the government to take "all appropriate legislative, administrative, social and educational measures" to protect the child from any form of violence.⁴⁹ In other words, Zimbabwe is compelled to honour such verdicts because of the "current human rights global order."⁵⁰ In particular, Justice Muremba went beyond the Constitution to acknowledge international law on the matter, including "international treaties and conventions as is required by section 46(1)(c) of the Constitution of Zimbabwe."⁵¹

In the second case, *Pfungwa & Anor v Headmistress of Belvedere Junior Primary School & Others*, a High Court of Zimbabwe judge, Justice David Mangota, declared on 1 March 2017, "that corporal punishment at school or at home violates the rights of children as set out in Sections 51, 53 and 81 of the Constitution."⁵² This effectively means that parents, guardians and teachers should not lay their hands on children, even if they misbehave.⁵³ The verdict was in favour of an application filed by Biti, on behalf of Linda Pfungwa, who wished to have juvenile corporal punishment banned in line with the Constitution in the wake of her child being beaten by a teacher at Belvedere Primary School in Harare. The issue received enormous media attention. Makanaka, a primary school child, was severely assaulted by her teacher using a thick rubber pipe as punishment "for the simple reason that her mother, the first applicant, failed to sign Makanaka's reading book to confirm that

46 Magaisa, "Outlawing of Corporal Punishment", 2.

47 *The State V Willard Chokuramba*. Constitutional Court of Zimbabwe Judgment No CCZ 10/19.

48 ZIMTA, "Corporal Punishment now Illegal". See also Laiton C. 2017. "Corporal Punishment Outlawed", *Newsday*, 2 March.

49 ZIMTA, "Corporal Punishment now Illegal".

50 Mushohwe, "A Ray of Hope", 77.

51 Mushohwe, "A Ray of Hope", 77.

52 "Zimbabwe, Corporal Punishment of Children is Unconstitutional", *JuriAfrica*, 5 May 2017.

53 Charamba, "The Corporal Punishment Debate".

Makanaka had done her homework.”⁵⁴ Though the Constitutional Court has the mandate to nullify the affected acts of parliament, Charamba maintained that the legal route alone is inadequate. Instead, Charamba argued for the necessity of “a comprehensive national discussion on what constitutes effective discipline”,⁵⁵ before such a tradition can be effectively set aside. Specific to the education sector, Justice Mangota, observed that portions of the laws on education that permitted corporal punishment were ultra vires of the Constitution and therefore unconstitutional.⁵⁶

However, to enhance their effect in practice, the rulings set forth above have first to be confirmed by the Constitutional Court of Zimbabwe and promulgated into legislation. Six years on from the handing down of the first ruling and three years since the second ruling, the two prohibitions have not yet been confirmed.⁵⁷ Article 241 of the Criminal Law (Codification and Reform) Act 2004, still authorised “moderate corporal punishment” by schoolteachers, parents and guardians, though its admissibility has become controversial. For these reasons, it would be advisable for the act to be repealed, together with Section 66 of the Education Act, 2004, and new laws promulgated in their place to prohibit all forms of corporal punishments. Though the Constitutional Court eventually confirmed the High Court rulings on 3 April 2019, the state still remained unmoved for almost a calendar year.⁵⁸ In his ruling confirming the unconstitutionality of corporal punishment, Justice Malaba stressed that ending “corporal punishment from the penal system is an immediate and unqualified obligation on the State.”⁵⁹

The first legislative step was eventually taken by gazetting, on 6 March 2020, the Education Amendment Act, 2020, which states in Section 68(5): “Under no circumstance is a teacher allowed to beat a child.” The same section rejects all actions that amount “to physical or psychological torture, or to cruel, inhuman or degrading treatment or punishment.”⁶⁰ The delay in the promulgation of the law may have been caused by the public outrage occasioned by court rulings against corporal punishment, though one may not rule out mere intransigence on the part of government, which widely used corporal punishment to gain support during elections.⁶¹ The NGOs deplored delays in the promulgation of child protective laws, while Christians, Muslims and African indigenous religionists dismissed the rulings as exogamous interferences with their religious rights, though they made no appeals at the courts. The newspapers were awash with opposing views of

54 Mushohwe B. 2018. “A Ray of Hope”, 86.

55 Charamba, “The Corporal Punishment Debate”.

56 Laiton, “Corporal Punishment Outlawed”, *Newsday*, 2 March.

57 End Corporal Punishment, “Country Report for Zimbabwe January 2020”.

58 *The State v Willard Chokuramba*, Constitutional Court, 3 April 2019, CCZ 10/19.

59 *The State v Willard Chokuramba*, Judgment CCZ 10/19, p. 69.

60 Education Amendment Act, 2020 [Act 15-2019], s 68(2)(a)(ii).

61 Dube E. 2018. “The Search for Justice and Peace: Reflections on the *Jambanja* Discourse as an Articulation of Justice Foreshadowing Peace”, in Masitera E and Sibanda F (eds). *Contemporary Power in Zimbabwe*. London: Routledge, 15-30.

the public against new laws against the established way of disciplining children through corporal punishment. This led journalist Christopher Charamba to propose national dialogue, because the legal root alone seemed inadequate. Below are some examples of the public reactions against the final verdict of 2017.

RELIGIOUS AND SOCIAL PERSPECTIVES ON CORPORAL PUNISHMENT

Significantly, in the cases described above, parents made negative comments about the prospect of banning of all forms of juvenile corporal punishment. News coverage of the case prompted one reader, identified through the social media handle Baba vaTino, to maintain that petitioner Pfungwa "should have complained about her own child only and not others as she didn't consult other parents".⁶² Another reader, identified as Mirairo, reached for a biblical invocation, to argue:

Proverbs 13:24 ... its good that you apply sanctions to your kid. What if she realises she can have pocket money from men? When we say kids let's not look at grade zero to grade four. When even the Bible, written many many years ago declared it fit to at times to use the rod to correct kids, let's be aware of the generation that we are creating. Let's not cry if we create a generation of bitches and thieves. At times we need to pray before we make such decisions else we will be used by the devil to further his territory.⁶³

Another reader by the name of Tendai commented:

That's the end of discipline in our schools and home. When the courts and parents openly fight God we are headed for a society like America where children do not respect their parents. All adults here are evidence that corporal punishment works, including the wise judge who presided over this matter. It is a sad development indeed. I give the mother 5 years before she begins to realise her folly. Proverbs 13:24 is not a mistake.⁶⁴

The complaints clearly draw upon religious, even biblical, notions compelling an evaluation of religious notions on corporal punishment and how these have figured into the debate over corporal punishment in Zimbabwe.

Christian perceptions on corporal punishment

Although the phrase "spare the rod and spoil the child" is generally associated with the Bible in Zimbabwe, its verbatim equivalent actually emanates from seventeenth-

62 Baba vaTino, "Commentator on Facebook about the Linda Pfungwa case", *Newsday*, 2 March 2017.

63 Mirairo, "Commentator on Facebook about the Linda Pfungwa case", *Newsday*, 2 March 2017.

64 Tendai, "Commentator on Facebook about the Linda Pfungwa case", *Newsday*, 2 March 2017.

century poem by Samuel Butler called *Hudibras*.⁶⁵ The poem analogises a love affair to a child and proposes that spanking strengthens the affair. Nevertheless, the reader finds the Bible replete with the “rod of chastisement”, both physical and metaphorical. Of these, the most popular is Proverbs 13:24, which reads: “He who spares the rod hates his son, but he who loves him is diligent to discipline him.”⁶⁶ Like the Zimbabwean statutes, it refers only to the son. Proverbs 22:15 also stands out prominently by stating: “Folly is bound up in the heart of a child, but the rod of discipline drives it far from him.” In a New Testament passage in Acts 5:40, when the apostles defied the Sanhedrin Jewish ruling council, by continuing to witness to the death and resurrection of Jesus as Christ, they were sentenced to caning, after which they were strictly charged to avoid the same error. As in the Zimbabwean context, the Jewish state had both the “rod of guardianship” and “judiciary caning.”

In research conducted for this chapter, the present writer interviewed six Christians (three Catholics and three Protestants) on their perceptions of the two High Court rulings banning corporal punishment in schools. Elderly respondents made references to the attitudes of early white principals on the use of the rod in schools. They were unanimous that students faced the wrath of caning for absconding from church services, as well as dodging schoolwork. They were clear that from the very beginning those who established the mission schools also initiated the rod of chastisement in the same schools. “It was like that from the very beginning. No school could stand intact without the rod of chastisement reposed in the Reverend Principal’s office. If anyone tells you the contrary, consider that fabrication of the highest order,” noted the Elder Mahalape, with a gummy smile.⁶⁷ Elder Makandiwa added, “Spare the rod and spoil the child, was the motto then. It is very strange that you, inexperienced educators, now say you can do it without the rod. Do you not know that those white missionaries, who introduced education, introduced it with the rod?”⁶⁸ Finally, Gogo Munapo sympathised with the learned judges, as she fingered through her rosary. She insisted adamantly, “You call them learned judges, but all they do is to mislead the people of God. Neither Christians nor Indigenous believers can be saved by their judgments.”⁶⁹

One education inspector told the author that he found twenty-five pieces of broken rods in the office of a Christian senior master of a local high school. When queried, the senior master cited both the Bible and the still extant disciplinary instruments. In essence, the traditions of the white principals, backed by the Bible, are still respected in the education sector.

65 Smith J. “‘Sparing the rod’ and a quote on ‘sex’ draw responses”, *Los Angeles Times*, 27 February 1991.

66 For Bible verses, see Revised Standard Version. 1971. *Holy Bible*. New York: The Bible Societies.

67 Interview with Elder Mahalape by E Dube. Zimbabwe, 10 March 2020.

68 Interview with Elder Mahalape by E Dube. Zimbabwe, 15 March 2020.

69 Interview with Gogo Munapo by E Dube. Zimbabwe, 2 March 2020.

Witte and Green have noted the ambivalence of religion in supporting both violence and human rights.⁷⁰ In advocating for corporal punishment, Christians demonstrated the violent side of religion. The sacred texts quoted, however, specify the domestic environment rather than the intended school environment. In the South African High Court decision over *Christian Education SA v Minister of Education of the Government of SA*, 1999, lack of specificity became a sticking point on which the religious applicants citing sacred texts lost their case.⁷¹ In deciding the appeal, the Constitutional Court Justice, Albert Sachs, declared Section 10 of the South African Schools Act of 1996 proscribing corporal punishment, constitutional on the basis that it offered reasonable limitations in a democracy.⁷² Sachs refrained from "expressing any view on whether it is a constitutionally allowable exercise of a religious belief if parents themselves administer corporal punishment to their own children."⁷³ He therefore did not offer a blanket ruling as in the cases in Zimbabwe discussed above, but his ruling was clearly an extension of the banning of the court-imposed whipping in 1995 in the case of *State v Williams*.⁷⁴

Muslim perceptions of corporal punishment and its eradication

Bilal Mohammad, a Muslim scholar, defines corporal punishment as "physical punishment inflicted on a child by an adult in authority."⁷⁵ The primary sources of the nature and purpose of this "physical punishment" are the Quran and the *sunnah*. The crimes whose punishments are specified in the Quran and the *sunnah* are known as *hudud* (boundary) crimes.⁷⁶ These include adultery, sexual slander, sapphism, alcohol drinking and procuring, whose punishments are whipping of between 75 and 100 lashes.⁷⁷ The Quran recommends clemency or forgiveness for the same crimes, and the root of the word "forgiveness" appears two hundred and thirty two times.⁷⁸ Mohammad cites the *hadith* of the Prophet which reads: "The

70 Witte and Green (eds), *Religion and Human Rights: An Introduction*.

71 *Christian Education SA v Minister of Education of the Government of SA* 1999 (9) BCLR 951 (SE).

72 Du Plessis L. 2009. "Religious Freedom and Equality as Celebration of Difference: A Significant Development in Recent South African Constitutional Case-Law", *Potchefstroom Electronic Law Journal* 12(4):19.

73 Du Plessis, "Religious Freedom and Equality", 19.

74 Woolman S. 2015. "Between Norms and Facts: The Constitutional Court's Commitment to Pluralism in South Africa's Radically Heterogeneous Public Schools", *Potchefstroom Electronic Law Journal* 18(6):2084.

75 Mohammad B. 2020. "Is corporal punishment allowed and applicable according to Shariah?", *Jamiatul Ulama KZN*. Online at: <https://bit.ly/3FmaO4b>

76 Ghassemi G. 2009. "Criminal Punishment in Islamic Societies: Empirical Study of Attitudes to Criminal Sentencing in Iran", *European Journal on Criminal Policy and Research* 15:159-180.

77 Quran 24:2-4.

78 Wayel AMD. 2015. "Corporal Punishment Verses in the Qur'an are to be Reinterpreted to Counter Violent Extremist Practices from Within the Islamic Juristic Tradition", *Digest of Middle East Studies* 24 (2):170.

Messenger of Allah said: Command your children to pray when they become seven years old, and beat them for it (prayer) when they become ten years old; and arrange their beds (to sleep) separately.”⁷⁹ Though this *hadith* is directed to parents to act in specific instances, it gives a general indication towards permission of corporal punishment, even by teachers, if authorised by parents or in circumstances where parents themselves would resort to similar methods. Caliph Ali is clear that a guardian may give corporal punishment to an orphan, if in a similar case he would do the same for his son.⁸⁰ Ibrahimi Amini, a Muslim scholar, notes that “Lots of parents give physical punishment to their children in the interest of proper upbringing. Even some teachers too contribute to this attitude”.⁸¹ Corporal punishment must avoid “hitting the face”,⁸² which attracts several fines depending on whether the face turns black, blue or red.⁸³

Research for this chapter also included interviews with four practising Muslims on whether corporal punishment could be abolished in line with the constitution and human rights protocols, as interpreted by the two judges of the High Court of Zimbabwe. They all noted that although clemency and forgiveness were reputable, their efficacy did not lie in abolishing divine command on *hudud* punishments. Elder Galimoto was of the opinion that the “wise judges erred in giving blanket bans to corporal punishment, because the infallible holy Quran cannot be amended by a mere human voice sitting in a chair of earthly authority.”⁸⁴ Gogo Laika noted that the judgments in question were clear signs of how much humanity was prepared to “digress from the path of grace by laboring to amend the uncreated word of God”.⁸⁵ Muslims were clear that the banning of corporal punishment was an infringement on their religious freedom. The major hurdle provided by Muslim corporal punishment in schools is that it is derived from divine sources that do not specify schools per se, but prayer recitations.

Indigenous African perceptions of corporal punishment

Charamba contends that in some indigenous communities, any adult or educator could apply corporal punishment to a child deemed misbehaving.⁸⁶ Banning corporal punishment is viewed as rendering teachers powerless and driving children into indiscipline, which is a departure from tradition. Indigenous members of the public are convinced that fear is the best tool for moulding the child into a responsible citizen, and in this they are supported by some members of the

79 Mohammad, “Is corporal punishment allowed and applicable according to Shariah?”

80 Wayel, “Corporal Punishment Verses in the Qur’an”.

81 Amini I. “Principles of Upbringing Children”, 74.

82 Mohammad B.2020. “Is corporal punishment allowed and applicable according to Shari’ah?”

83 Amini I. “Principles of Upbringing Children”.

84 Interview with Elder Galimoto by E Dube. Zimbabwe, 12 February 2020.

85 Interview with Gogo Laika by E Dube. Zimbabwe, 12 February 2020.

86 Charamba, “The corporal punishment debate”.

Zimbabwean parliament, who extol the rod as traditional heritage.⁸⁷ Of the six indigenous practitioners interviewed concerning the High Court rulings against corporal, not one spoke in agreement. Elder Machigere was of the opinion that "*Kukaka ngoma kunoitwa dehwe richiri nyoro* (straining the drum is done when the hide is still soft). Once the child majors, he is beyond correction."⁸⁸ He noted that when straining the drum, the craftsman uses the hammer in conjunction with the wooden strainers and there is no need for "re-inventing the wheel". Only a fool would do it without either the strainers or the hammer; only to be disappointed by the unstrained drum. "Nothing short of the rod can do the job better. The learned judges have been badly alienated. It is worthwhile finding out whether they have children, and what their behaviours are."⁸⁹

The African communitarian perspective expects Africans to operate within the norms of indigenous society, because the community's values are self-sufficient and should be insulated from foreign intrusion. It was therefore a "misnomer that the two judges clearly noted that they respected international law in place of indigenous norms, which amounted to allowing foreigners to rule over their houses".⁹⁰ The discussions clearly separated mercy and forgiveness from justice and proper upbringing, though the two are also recognised and revered in the indigenous communities. Withholding corporal punishment where it was due as an act of mercy or forgiveness was highly applauded, but making it an entitlement was unacceptable. It would seem that there was need to reinterpret the rich African methods for conflict resolution, other than those involving corporal punishment. For example, the interviewed elders were agreed that the rod in the post-modern schools was used to enforce those ideas that alienated the young from their cultural traditions without allowing them to question. Yet there was no corporal punishment in the traditional "fireplace schools" in the evenings, which successfully inculcated the values of society in the minds of the children.⁹¹ That could be the starting point in the removal of the rod from the learning environments. The same African society took confession and acceptance of wrongdoing as reasons for rebuilding injured relations and withholding punishment. In the same manner, school disciplinary committees might utilise acceptance of wrongdoing and counseling as replacements for corporal punishment. This is in sync with the UNCRC's Article 40 recommendations of counseling, skills training and probation. More importantly, social control theory suggests that corporal punishment alienates the child from the adult implementer as well as from the subject being inculcated into the child.⁹²

87 ZIMTA, "Corporal Punishment now Illegal".

88 Interview with Baba Machigere by E Dube. Zimbabwe, 10 March 2020.

89 Interview with Nyamukuta Muchavurawa by E Dube. Zimbabwe, 11 March 2020.

90 Interview with Headman Dzwatsvatsva by E Dube. Zimbabwe, 25 January 2020.

91 Dube E. 2017. "The Fickle and the Constant in Child Folk Stories", *African Journal Children's Literature* 1(2):63-75.

92 Georshoff ET. 2002. "Corporal Punishment by Parents and Associated Child Behaviours and Experiences: A Meta-analytic and Theoretical View", *Psychological Bulletin* 128(4): 590-595.

This is because corporal punishment seeks to protect the wronged society by sacrificing the rights of the offending child.⁹³ Instead of protecting the child, it offers inhuman and degrading exposure.

CONCLUSION

In general, members of the indigenous public adhere to the maxim “spare the rod and spoil the child”, even in the face of the new constitutional standards. The High Court and Constitutional Court of Zimbabwe utilise constitutional law, which is receptive to international human rights protocols to engender the necessary change in society. As judiciary positions have tended to revolutionise known standards of child correction, the reactions of the general public, though not entirely justified, have been characterised by shock and disbelief. Christians, Muslims and African indigenous believers have questioned the efficacy of human rights standards replacing the “well-tried” methods of child discipline. It is clear that human rights organisations and the courts do not have sufficient support to influence a turnaround in the use of the rod. The generality of the religious public thinks that the courts have oddly moved too fast against Zimbabwean values, a move that may be regretted in future. Journalists closer to the situation think that the courts alone may not successfully help society evolve new values, even with the help of NGOs. Instead, there is need for government to roll out programmes aimed at educating the public on the meaning of the international protocols they have ratified and incorporated into law. In the past, the government agreed with the public that the courts had “contravened” local values about child correction at school, home and courts of law. At that time, the government intervened by amending the Lancaster House Constitution to unequivocally entrench corporal punishment in its Section 15(3). That action removed any basis for future court decisions in cases involving the use of the rod. Instead of using the intervening period to educate the public on the human rights protocols it had ratified, the government sat back until such rights were unequivocally specified in the new Zimbabwe Constitution of 2013. The current scenario has led constitutional and human rights lawyers to assist their clients challenge the institution of corporal punishment once more.

Although re-entrenchment of corporal punishment is not amongst the raft of new proposals to amend sections of the Constitution of Zimbabwe, 2013, the obvious legislative lethargy to align the corporal punishment laws with the Constitution, shows that the government is apathetic about the issue. This leaves the NGOs and the courts oddly at loggerheads with many Zimbabweans, particularly indigenous and religious groups, who point to both custom and sacred texts for their references. Christians have particularly opposed the new approach, as contradicting the procedures established by the missionaries who established the schools. To make people appreciate the inadequacies and dangers of corporal punishment,

93 Bhaiseni B. 2016. “Zimbabwe Children’s Act Alignment with International and Domestic Legal Instruments: Unravelling the Gaps”, *African Journal of Social Work* 6(1):5.

the government will have to engage the stakeholders for a sustained educational programme in effective parenting and child rights. The government, which has no history of being at the forefront of the rights of the child, has caused an uneasy situation. Its unfathomable inaction, even in the face of derision from the courts, human rights campaigners and members of the public could be a sequel to the botched campaign in favour of corporal punishment by many sitting members of parliament from the ruling party.

As a closure to the current stand-off between the courts and the public, the government should move swiftly to align laws with the pro-human rights constitution. To allay the fears of religious actors, the government might revive the programme of peer educators who successfully led to the turnaround in religious perceptions on HIV and AIDS. At that time, peer educators were selected from all strata of society (government, judiciary, traditional leaders, pastors, elders, teachers, students and other sectors) to influence positive attitudes in their constituencies. This may help in bridging the courts' international human rights character with religious views that want to see the survival of Zimbabwean family values in private and public school systems. It also helps African indigenous believers to creatively implement their "right to manifest, practise, develop, and teach their spiritual and religious traditions, customs and ceremonies" without contravening child rights.⁹⁴

⁹⁴ Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (2007), art 12(1).