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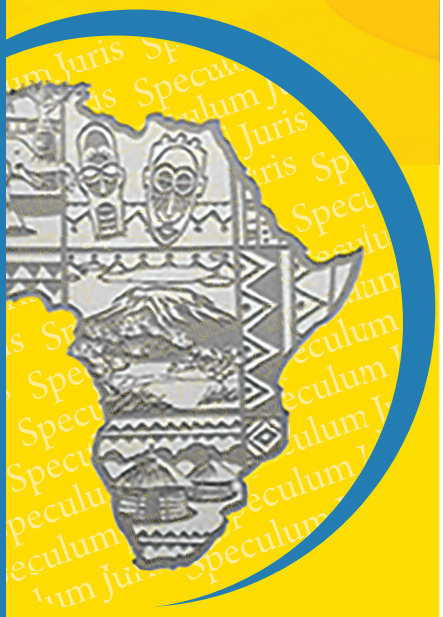

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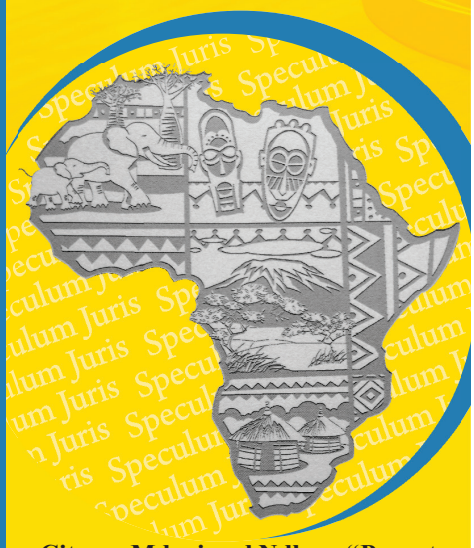

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Parents Call it Discipline, the Constitutional Court Calls it Violence: Moderate and Reasonable Chastisement through the Lens of *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* [2019] ZACC 34

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Abstract

For a very long time, parents were legally permitted to apply physical force to reasonably discipline their children. Such exercise of physical discipline with a certain degree of inflicting physical pain was protected by law in terms of the common law defence of reasonable and moderate chastisement to the effect that parents evade criminal liability on charges founded on assault and in some instances assault with intent to do grievous bodily harm. As early as 1994, the Constitutional Court abolished chastisement. In Freedom of Religion South Africa v Minister of Justice and

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Constitutional Development the court held that reasonable and moderate chastisement is contrary to the Constitution as it perpetuates violence against children thereby impairing their inherent dignity. The court reasoned that the best interests of the child are of paramount importance and should be upheld in all issues concerning children. Consequently, children's rights ought to be protected and children must not be exposed to violent treatment especially in the name of discipline and within an environment that ought to be conducive for their well-being. This decision is significant not only to South Africa but also sets the tone for other jurisdictions to protect children's rights, and ban reasonable and moderate chastisement. It is thus the aim of the authors to analyse the decision of the apex court in Freedom of Religion of South Africa v Minister of Justice and Constitutional Development to emphasize the fact that chastisement subjects children to violence and is a flagrant violation of human dignity.

Keywords: common law; children's rights; reasonable chastisement; violence, Constitution, Constitutional Court

1 INTRODUCTION

For a very long time, parents in most Commonwealth nations were,[1] based on *inter alia* religion and culture, afforded the legal entitlement to raise their children as they deemed fit with minimal State interference. In many instances, parents who administered corporal punishment as a form of disciplinary mechanism were — to a certain extent — exempted from criminal liability under the common law. Suffice to state that, despite this exemption, the use of physical punishment or child chastisement as a corrective discipline remains a complex and sensitive topic in both a retentionist and abolitionist jurisdiction. Laws and attitudes towards this issue vary among countries in the Commonwealth nations.

While some countries have abolished the defence of child chastisement, others may still retain it to some extent.[2] However, in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development*[3] (hereinafter referred to as "*FORSA*"), the Constitutional Court correctly confirmed the constitutional invalidity of the common law defence of moderate and reasonable chastisement afforded to parents who use force to discipline their children at home. The rationale for this decision was that the defence was inconsistent with sections 10 and 12(1)(c) of the Constitution.[4] It is thus at the heart of this article to analyse the *FORSA* judgment and examine the importance of the court's decision by putting it in its wider legal context.

This article is divided into five parts. Part two briefly examines the emergence of the defence of moderate and reasonable chastisement in South Africa. Part three then elaborates on the role of the courts in developing the common law to be consistent with constitutional principles. Part four further deals with the facts, issues, and judgment of the *FORSA* case. Part five presents an analysis of the judgment and account and considers the value and importance of the judgment regarding domestic law and international law obligations. Part five further deals with developments of the abolishment of corporal punishment in other African jurisdictions, particularly Southern African countries. Lastly, the conclusion summarises the main points of this article.

1 Suffice to state that some countries still retain the common law defence of reasonable chastisement by parents, notably, Australia and Canada.

2 See, for example, Canada.

3 [2019] ZACC 34.

4 Constitution of the Republic of South Africa, 1996 (the Constitution).

2 THE EMERGENCE OF THE DEFENCE OF MODERATE AND REASONABLE CHASTISEMENT IN SOUTH AFRICA

Despite recent developments of condemnation, corporal punishment of children by parents is arguably still a socially, culturally, and legally accepted form of discipline of children in some parts of the world[5] (as this was the case in South Africa before the *FORSA* judgment). Studies have shown that corporal punishment is a disciplinary practice that is powerfully entrenched in South Africa's societal norms and practices.[6] Legally, the defence of moderate and reasonable chastisement originates from Roman-Dutch common law. As a general principle, parents bear the primary duty to protect children.[7] Equally, they bear the primary responsibility to guide their children to become well-adjusted adults. Amongst others, it is on this basis that parents were permitted to employ corporal punishment to discipline children and could evade criminal liability founded on assault under the defence of reasonable and moderate chastisement. The defence was first examined in South Africa in *Rex v Janke and Janke*[8] where the court stipulated that:

> The general rule adopted both by the Roman, the Roman-Dutch law and the English law is that a parent may inflict moderate and reasonable chastisement on a child for misconduct provided that this not be done in a manner offensive to good morals or for other objects than correction and admonition … The presumption is that such punishment has not been dictated by improper motives … A parent … may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment.

An array of subsequent judgments consistently followed the approach laid down in the *Janke* case.[9] This perpetuated the subsistence of the legal protection afforded to parents who discipline children by using corporal punishment.

3 THE ROLE OF THE COURTS IN DEVELOPING THE COMMON LAW

Common law is one of the primary sources of law in South Africa and continues to play a vital role in our society to date — provided it is congruent to the spirit, object, and purport of the Constitution. In similar vein to African customary law, some common law principles are at odds with the provisions of the Constitution and thus offend constitutional principles. In circumstances where a common law principle has been found by a court of law to be offensive, it is the courts' duty to develop the common law by applying constitutional values as mandated by sections 8(3), 39(2) and 173 of the Constitution.[10] In addition, the grand scheme of sections 8(3), 39(2) and 173 must be read with section 2 of the Constitution which stipulates that the Constitution is the supreme law of the land, and any law or conduct inconsistent with it is invalid. The Constitutional Court has held that, while there are no two systems of law, the

5 Kleynhans Considering the Constitutionality of the Common Law Defence of "Reasonable and Moderate Chastisement" (LLM-thesis, UP, 2011) 4.

6 *Ibid* 6.

7 See http://www.derebus.org.za/common-law-defence-of-reasonable-chastisement-discussed-at-clarks-family-law-conference/ (accessed 05-06-2020).

8 1913 TPD 382.

9 *Rex v Schoombee* 1924 TPD 481; *S v Lekgathe* 1982 3 SA 104 (B); and more recently *Du Preez v Conradie and Another* 1990 4 SA 46 (BG).

10 See the Constitution of South Africa, 1996. Fagan "The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law's Development" 2010 *SALJ* 611–627.

common law[11] must continue to apply subject to the constitutional framework, particularly the Bill of Rights. This was held in the case of *Pharmaceutical Manufacturers* Association of South Africa and Another: In re Ex *Parte President of the Republic of South Africa and Others* where the court held that:

> The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims – thus, the command that law be developed and interpreted by the courts to promote the 'spirit, purport and objects of the Bill of Rights. This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system, the Constitution is the supreme law with which all other law must comply.[12]

While the clear constitutional mandate to develop common law is section 8(3) of the Constitution, section 39 provides a general yet empathic obligation on the courts. Hence in *Carmichele v Minister of Safety and Security*, the court held that "it needs to be stressed that the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately."[13] Therefore, "whenever a court is dealing with the common law, it must test the common law against the demands of the Bill of Rights."[14] This will ensure that the common law evolves consistently within the ambit of the Constitution and where it is not in sync with the Bill of Rights be declared invalid to the extent of its inconsistency.

Moreover, the Constitution expressly empowers the courts when deciding a constitutional matter to declare invalid any law or conduct that is inconsistent with the Constitution to the extent of its invalidity.[15] The common law is no exception to this provision. Some authors allude that, by modifying, extending, or supplementing the common law principles, the courts seek to keep the law "in tune with changing social needs and values".[16] In keeping with their constitutional mandate to develop the common law, the courts are expected to always be "alert to the normative framework of the Constitution".[17] In this regard, the Constitutional Court in *Carmichele v Minister of Safety and Security*[18] held that "the influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed." In the *FORSA* case, it appears that the common law defence of chastisement

11 *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 2 SA 672 para 49, Chaskalson P observed that: "The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims – thus, the command that law be developed and interpreted by the courts to promote the 'spirit, purport, and objects of the Bill of Rights. This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply." See also, *Charmichele v Minister of Safety and Security* 2001 4 SA 938 para 4.

12 *Pharmaceutical Manufacturers Association of South Africa* para 49.

13 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC).

14 Cornell "In Defence of the Constitutional Court: Human Rights and the South African Common Law" 2011 *MLJ* 18.

15 The Constitution, s 172(1), see also, s 173.

16 Mupangavanhu "Yet Another Opportunity Missed to Develop the Common Law of Contract? An Analysis of *Everfresh Market Virginia Pty Ltd v Shoprite Checkers Pty Ltd* (2011) ZACC 30" 2013 *Speculum Juris* 148.

17 *Ibid* 53.

18 2001 4 SA 938 (CC) para 54.

could not be saved from the face of unconstitutionality hence the authors argue that, despite many people justifying the use of reasonable chastisement at home, it can never be justified as a measure of discipline. This is especially in light of the child rights normative framework which requires children to be raised in an ideal environment that ensures their protection, safety, respect for human dignity, and bodily integrity. It follows that anyone who fails to abide by the outcome of the courts falls short of the constitutional mandate and deviates from the law.

4 FACTS OF THE CASE

The *FORSA* case began as a trial of assault with intent to do grievous bodily harm in the Johannesburg Magistrate's Court. The father abused his 13-year-old son for watching pornographic material. The violence inflicted also took the form of vicious kicking and punching. In his defence, the father raised the common law defence of reasonable and moderate chastisement. The magistrate's court, however, found that the father could not have justifiably raised the defence of reasonable and moderate chastisement or relied on religious or cultural grounds to justify that unmistakably immoderate and unreasonable application of force.[19] As such, he was convicted of common assault.

The father, dissatisfied with the outcome, appealed to the High Court. Although the State did not challenge the constitutional validity of the common law right of parents to chastise their children moderately and reasonably, the High Court of its own accord decided the issue.[20] The court declared the defence to be constitutionally invalid and, therefore, prospectively unavailable to parents charged with the offence of assault (common or with the intent to do grievous bodily harm) upon their children.[21]

5 LEGAL ISSUES IN THE *FORSA* CASE

At the court of first instance, the issue before the court was whether the father was criminally liable for assaulting his son and wife. The court found him guilty on both charges. On appeal, the High Court, on its own accord, raised and decided the issue of the constitutional validity of reasonable and moderate chastisement as a defence against common assault charges faced by parents.[22] The High Court, as the upper guardian of all children, must be commended for its role in inculcating a culture of transformative constitutionalism. In particular, the court ensured that laws keep evolving in line with the constitutional dictates and international human rights law, which South Africa has voluntarily undertaken. The High Court dismissed the appeals and declared constitutionally invalid the common law defence of reasonable and moderate chastisement because it offends children's human rights in the Constitution and international human rights instruments. The question before the Constitutional Court was whether the common law defence of reasonable and moderate chastisement is incompatible with the Constitution.

19 *FORSA* para 5.

20 *S v YG* 2018 1 SACR 64 (GJ) para 20.

21 *Ibid* para 6.

22 *FORSA*.

6 ANALYSIS OF THE *FORSA* JUDGMENT

The Constitutional Court confirmed the decision of the High Court, that reasonable and moderate chastisement is unconstitutional. In so doing, the apex court ensured that corporal punishment administered by parents as a form of discipline to their children is legally proscribed in South Africa. The court focused on a plethora of good practices around the world and constitutional prerogatives as the basis for its decision, namely the right to dignity,[23] the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources,[24] the right of the child to be protected from maltreatment, neglect, abuse or degradation,[25] and the best interests of the child per section 28(2) of the Constitution.

Freedom of Religion[26] joined the proceedings as an amicus and advanced before the court arguments that sought to distinguish between reasonable and moderate parental chastisement and assault. Freedom of Religion argued that not every parent who enforces discipline using chastisement intends to harm or abuse their child.[27] Freedom of Religion's arguments portrayed an understanding that just as verbal condemnation could have a traumatising effect on the well-being of the child, so can chastisement which is unreasonable and immoderate.[28] In other words, they only sought to protect and preserve a parental entitlement to lovingly discipline their children, just or almost as positively as alternative methods reportedly do.[29] As a result, Freedom of Religion solicited to preserve reasonable and moderate parental chastisement for all parents, irrespective of religious or cultural positions.[30]

On the contrary, the respondents and amici such as the Children's Institute, the Quaker Peace Centre, and Sonke Gender Justice all represented by the Centre for Child Law, University of Pretoria, alluded that there is a nexus between reasonable and moderate chastisement and assault. To appreciate this connection, the question inevitably arises as to why it is necessary to resort to chastisement in the first place.[31] Is it not the actual or potential pain or hurt that flows from it that is believed to be more likely to have a greater effect than any other reasonably available method of discipline?[32] It is the bite of the force applied or threat thereof, that is hoped to be remembered to restrain a child from misbehaviour whenever the urge or temptation to do wrong comes.[33] After all, reasonable and moderate chastisement cannot escape the inclusive nature of the Bill of Rights, especially section 12(1)(c) of the Constitution which seeks to stipulate that everyone should be "free from all forms of violence". This provision encompasses any model of violence, moderate or otherwise.

One of the most significant constitutional rights that was imputed in this matter and employed by the court in reaching its decision is section 12(1)(c) of the Constitution — the right to be free from all forms of violence.[34] The ambits of section 12(1)(c) expressly cover and protect all persons, particularly children. It would be untenable to justify the legality of chastisement against defenseless children, especially when any form of chastisement against adults is unlawful.

23 Section 10 of the Constitution.

24 Section 12(1)(c) of the Constitution.

25 Section 28(1)(d) of the Constitution.

26 FORSA is a non-profit organisation in South Africa which seeks to advance religious freedom.

27 *FORSA* para 33.

28 *Ibid.*

29 *Ibid.*

30 *Ibid.*

31 *Ibid* para 39.

32 *Ibid.*

33 *Ibid* para 40.

34 *Ibid* para 36.

This is so because children are one of the vulnerable groups in society who sometimes need protection against abuse, maltreatment and any form of harm.[35] Moreover, the court is of the view that chastisement does by its very nature entail violence or the use of force which cannot be quantified and or justified as reasonable under any circumstances.[36] It is the actual or potential pain that flows from it that deters the child from misbehaviour and maintains discipline. "All forms" of violence as contemplated in section 12(1)(c) encompass the prohibition of violence from either public or private sources — therefore, the purpose of this provision is to leave no form of violence (moderate, reasonable, or excessive) or application of force out of the equation.[37]

Furthermore, the court sought to ascertain the proper meaning of "violence" and referred to a variety of academic literature.[38] As such, the court established that the definition of assault by different authors revolves around the same meaning. The pre-eminent connotation of assault is the "unlawful and intentional application of force to the person of another or inspiring a belief in that person that force is immediately to be applied as threatened."[39] This definition is consistent with the ordinary meaning of violence. The dictionary meaning of violence is "behaviour involving physical force intended to hurt, damage or kill someone or something".[40] It is evident from this definition that the degree of force applied is irrelevant to determining whether or not violence has been committed. From this perspective, the court pronounced that reasonable and moderate chastisement falls within the scope of the violence proscribed by section 12(1)(c) of the Constitution.[41] While commenting on the *YG v The State,* Mezmur correctly concluded that a ruling by the apex court on the common defence of reasonable chastisement as unconstitutional will be significant as it will lay the foundation for the effective protection of child rights against all forms of violence which are perpetuated for a variety of reasons.[42] The current analysis fully agrees with the sentiments above, but further alludes to the fact that laws alone are not sufficient in eradicating all forms of violence against children including chastisement. Such other strong and deliberate interventions such as advocacy, education, and awareness among others are key in protecting children.

Another important right that was imputed in this matter is the right to human dignity.[43] The right to human dignity and to have dignity respected is not merely a fundamental right contained in the Constitution, but it is a foundational value of the democratic polity.[44] As a foundational value, it is the basis for many fundamental human rights. Section 10 specifically uses the word "everyone" to indicate that, irrespective of age, the right to dignity is vested in all persons. Accordingly, the court carefully paid attention to the word "everyone" in that section 10 of the Constitution protects adults as well as children as autonomous beings.[45] It is with the above that the court emphasised the fact that, inflicting harm on children, the use of violence, ill-treatment, and abuse of children under the disguise of moderate and reasonable chastisement does not

35 *Ibid* para 55.

36 *Ibid* para 39.

37 *Ibid* para 42.

38 Burchell *Principles of Criminal Law* 5 ed (2016) 423 and Snyman *Criminal Law* 6 ed (2014) 455.

39 *FORSA* para 37.

40 *Oxford English Dictionary* 8 ed (2010) 1659. Alternatively, see *FORSA* para 38.

41 *FORSA* para 41.

42 Mezmur "Don't Try this at Home?: Reasonable or Moderate Chastisement, and the Rights of the Child in South Africa with YG v S in Perspective" 2019 *Speculum Juris* 76−92.

43 Section 10 of the Constitution of South Africa, 1996.

44 Section 1(a) of the Constitution of South Africa, 1996.

45 *FORSA* para 46.

stand constitutional scrutiny.[46]

In addition, the Constitutional Court correctly observed section 28(2) of the Constitution which provides that the best interests of the child are of paramount importance in every matter concerning the child. It is apposite to say that the scheme of section 28 was specially designed to protect children from any matter that might be detrimental to them. In essence, this provision recognises the best interests of the child and rebukes any treatment that might subsequently cause harm to and unduly undermine the fundamental rights of the child.[47] This is in line with the obligations of the Republic under the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child which both provide for the best interests of the child in all matters. Section 28 accordingly draws inspiration from Article 4 of the ACRWC which stipulates that "in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration". Suffice to submit that section 28 unequivocally imposes a duty on parents — as primary caregivers and guardians of their children — to protect them against any form of malicious treatment as it is not in their best interest.[48] Be that as it may, the best interests of the child are not absolute and thus do not surpass other fundamental rights. In *S v M*, the Constitutional Court expressed this in the following words:

> The fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights, their operation has to take account of their relationship to other rights, which might require that their ambit be limited.[49]

However, in this case, both the court *a quo* and the apex court upheld the best interests of the child in that the defence of reasonable chastisement cannot withstand the Constitution mainly because it infringes on the dignity of children, their bodily integrity, and the equal protection in the law. Accordingly, chastisement — whether reasonable or not — cannot be reconciled with constitutional standards as it exposes the child to physical and psychological harm that is detrimental to the child's life, survival, and development. In this case, the court flawlessly preserved the best interests of the child against violence.

7 SIGNIFICANCE OF THE *FORSA* JUDGMENT IN PROTECTING CHILDREN AGAINST VIOLENCE DISGUISED AS DISCIPLINE

7 1 Domestic Law

As stated above, section 173, as read with section 39(2) of the Constitution imposes a duty on the courts to develop the common law in a manner that promotes the spirit, purport, and object of the Bill of Rights. As Bekink[50] puts it, the courts are mandated to apply the common law, where applicable, but the new dispensation dictates that it be applied in line with the Constitution. The judiciary therefore is inevitably entrusted with the protection and promotion of the Bill of Rights by, particularly, ensuring that all laws conform to the supremacy of the Constitution. As early as 1994, the Constitutional Court while performing its functions under the interim Constitution upheld its constitutional mandate and has to date delivered landmark rulings that advance and protect the fundamental rights of all. For instance, in *S v Makwanyane*,

46 *Ibid* para 48.

47 Section 28(1)(d) of the Constitution.

48 The State also has a duty, as per s 7(2) of the Constitution, to respect, protect and promote the rights in the Bill of Rights, more so, the rights of children.

49 2008 3 SA 232 (CC) para 26.

50 Bekink "When Do Parents go too Far? Are South African Parents Still Allowed to Chastise their Children through Corporal Punishment in their Private Homes?" 2006 *SACJ* 174.

the apex court was at pains in protecting the right not to be subjected to torture, inhumane and degrading punishment, thereby protecting the right to life and human dignity of those who were likely to be subjected to capital punishment.[51] It is this rich jurisprudence that continues to shape the country's constitutional democracy and give direction even to sister jurisdictions.

Accordingly, the Constitutional Court accurately addressed the constitutional disparity of reasonable and moderate chastisement to curb further children's rights violations. The court initially banned corporal punishment in *S v Williams*[52] where it ruled that judicial whipping of juveniles is unconstitutional. The court held that "a culture of authority which legitimates the use of violence is inconsistent with the values for which the Constitution stands."[53] The Constitutional Court further in *Christian Education v Minister of Education*[54] banned corporal punishment in schools on the basis that it is inconsistent with the Constitution as it violates the right to human dignity of the child. While the decision had far-reaching implications for reform and led to the implementation of the Abolition of Corporal Punishment Act 1997, several concerns remain. For instance, in 2021, Statistics South Africa reported that in 2019, over a million out of 13 million school-going children aged 5 to 17 years had experienced some form of violence, and some of it was experienced in school despite the ban by the jurisprudence of the apex court.[55] Suffice it to state that almost 84 percent of children experienced corporal punishment by teachers.[56] This is even though the outlawing of institutionalised physical punishment is manifestly intended to promote respect for the dignity and physical and emotional integrity of all children.[57] This is clear from all the decisions of the apex courts including the *FORSA* case that children must be protected against all forms of violence and the need to come up with positive means of discipline short of chastisement. Therefore, the Constitutional Court in *FORSA* made it a point that there is uniform application of the law relating to the protection of human rights, particularly children's rights. According to Skelton, it is irrational that the physically smallest and most dependent human beings would be less protected by law.[58] The *FORSA* judgment reaffirmed the status of children in the legal system as people who equally deserve the protection of the law in all societal spaces.

It is trite to argue that the Constitutional Court's ruling in *FORSA* was a necessary development of the common law in contemporary South Africa, where the Constitution, particularly the Bill of Rights, is the cornerstone of democracy and the obligation rests on the State to respect, promote, protect and fulfil the fundamental rights of everyone including children.[59] Taking into account the banning of judicial whipping in 1995, and corporal punishment in schools in 2000, the courts took too long to ban chastisement at home. The courts are the primary guardians of the Bill of Rights; they have a mandate to develop all laws to be in line with the Constitution. As far as corporal punishment and equal protection are concerned, the inclusion of reasonable chastisement as a defence leaves children with less protection than adults under the criminal law of assault.[60] Section 28 of the Constitution requires the courts to carefully consider children's

51 1995 2 SACR 1 (CC).

52 1995 2 SACR 251 (CC) para 52.

53 *Ibid.*

54 2000 4 SA 757 para 55.

55 StatsSA "92-02-01 - Children Series Volume I Children Exposed to Maltreatment, 2021" https://www.statssa.gov.za/?page_id=1854&PPN=92-02-01&SCH=73567 (accessed 01-10-2023).

56 *Ibid.*

57 See section 10 read together with section 12 of the Constitution, 1996.

58 Skelton "S v Williams – A Springboard for Further Debate about Corporal Punishment" 2015 *AJ* 336 337.

59 Section 7(1) of the Constitution.

60 Mezmur "Don't Try this at Home? Reasonable or Moderate Chastisement, and the Rights of the Children in South Africa with YG v S in Perspective" 2018 *Speculum Juris* 76 88.

interests and protect children's rights in every matter concerning them. Children are, after all, the most vulnerable. Children are constitutionally recognised as independent human beings, inherently entitled to the enjoyment of human rights, regardless of whether they are orphans or have parents.[61] The court's decision in *FORSA* ensured that children will no longer be subjected to prejudice based on age — even at home. After all, violence at home often goes unpunished because of its concealed nature.[62]

South Africa has put in place various legislative measures to try and curb violence against children.[63] According to constitutional demands and perhaps with the influence of previous court decisions that were pronounced against physical punishment of children in correctional institutions and schools, the legislature enacted the Children's Act.[64] The primary objective of the Children's Act is — as specified in its preamble — to give effect to certain rights of children as contained in the Constitution and to set out principles relating to the care and protection of children. In particular, the Children's Act gives effect to the constitutional rights of children to be protected from maltreatment, neglect, abuse, or degradation; South Africa's obligations concerning the wellbeing of children in terms of international instruments binding on it; to provide care and protection to children who need care and protection.[65] Be that as it may, the Children's Act (and the current legislative framework in general) does not sufficiently protect children.[66] Instead, its provisions are broad and do not directly and completely ban the defence of reasonable and moderate chastisement.

Furthermore, the Children's Act places a duty of care on parents to protect their children. This includes the duty to protect the child from, among other things: maltreatment, abuse, neglect, degradation, and any physical, emotional, or moral harm or hazards; the duty to protect, respect, promote, and secure the fulfilment of, and guarding against any infringement of the child's rights set out in the Bill of Rights; the duty to guide the behaviour of the child humanely; guiding, directing and securing the child's education and upbringing, including religious and cultural upbringing and education, in a manner appropriate.[67] This duty, as highlighted by some writers, requires that parents must also respect and protect a child's constitutional rights as the Constitution confers.[68] Therefore, in our view, the retention of reasonable and moderate chastisement would have been an embarrassing infringement on a plethora of rights and guarantees that children are granted by international law, the Constitution, and legislation. A contrary view would suggest that chastisement remains legal and strictly monitored. Again, this would be a very difficult task. The moderation and reasonableness of a punishment is not solely based on the severity of the punishment, but a lot of factors come into play, such as the frequency of the chastisement being administered and the method used. If it is meted constantly, it might be immoderate and unreasonable inflicting pain and suffering.

7 2 International Law Relevant to Child Protection against Violence

South Africa has fared well in protecting the fundamental rights of everyone, including children. The State has further ratified multi-human rights instruments that protect children against violence. Case law as well as academic debates have strongly argued that in interpreting the Bill

61 *FORSA* para 46.

62 Skelton 2015 *AJ* 350.

63 See Childcare Act 74 of 1983 and the Prevention of Family Violence Act 133 of 1993.

64 38 of 2005.

65 Section 2(b)(c)(g) of the Children's Act.

66 Bekink 2006 *SACJ* 189.

67 Section 1(c)(d)(g)(e), under definition of "care".

68 Bekink 2006 *SACJ* 174.

of Rights, courts must consider both binding and non-binding international law. Section 39(1) of the Constitution states that when interpreting the Bill of Rights, a court, tribunal, or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. In so doing, section 39 specifically emphasizes that courts, tribunals, and forums are under a peremptory constitutional obligation to consider international law and may consider relevant foreign law. The consequence thus is that, in line with Articles 231 and 232, courts must consider the international human rights standards that protect children against violence. While there is discretion in making recourse to comparative foreign law, it plays a critical role in cases such as the abolition of corporal punishment because it allows the courts to draw best practices from similarly situated jurisdictions on how to best protect fundamental rights.

Section 233 of the Constitution further provides that every court must prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. In an analysis that impacts child rights, it is important therefore that an understanding of child rights in the Bill of Rights be done in line with the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, African Charter on Human and Peoples' Rights, UNCRC, African Charter on the Rights and Welfare of the Child and Southern African Development Community model laws. These international instruments make it clear that international law is not only a tool to be used for interpreting the rights contained in the Bill of Rights but must also be used in the interpretation of South African domestic legislation. The court in *Government of the Republic of South Africa v Grootboom*[69] emphasized the interpretive function of international law but went further to emphasize that "where the relevant principles of international law bind South Africa, it may be directly applicable."

Considering this background from the Constitution, the following international human rights instruments are of importance: the UDHR; the ICCPR; the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CATAOP); and the UNCRC. Similarly, the UDHR and the ICCPR protect rights which are protected by the Constitution such as human dignity, life, liberty and security of the person, prohibition of torture, cruel, inhuman or degrading punishment, and equality before the law, religion, and culture.[70] Bekink submits that these rights of international law support and strengthen the rights set out in the Constitution.[71] More importantly, the various rights and entitlements of parents and children are protected equally and rights in conflict with one another must be balanced concerning the prevailing circumstances of each case.[72]

South Africa is a party to numerous international instruments and is thus bound by obligations imposed by those international laws. In this case, the most pertinent international human rights treaty is the UNCRC. South Africa ratified the UNCRC in 1995 and must accordingly give it due consideration when interpreting the Bill of Rights. Articles 2(1) and 4 of the UNCRC place an obligation on all State parties to respect and ensure that the rights in the UNCRC are realised for each child within its jurisdiction without discrimination of any kind; and must also undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the UNCRC. Article 37 of the UNCRC emphatically imposes an obligation on State parties to ensure a child's right to protection, by providing that "no child shall be subjected to torture or other cruel, inhumane or degrading treatment or punishment." State parties are further mandated "to take all appropriate legislative, administrative, social, and educational

69 2001 1 SA 46 (CC).

70 See arts 1, 3, 5, 7, 18 and 27 of the UDHR and arts 3, 4, 7, 10, 18, 24 and 26 of the ICCPR, respectively.

71 Bekink 2006 *SACJ* 184.

72 *Ibid.*

measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."[73] Though the UNCRC does not explicitly address parental physical chastisement, the UNCRC Committee stated in General Comment 8 (2006) that corporal punishment is incompatible with the UNCRC.[74] It constitutes cruel and degrading treatment. All children have the right to be free from all forms of cruel and degrading treatment.[75]

Likewise, South Africa is bound by human rights treaties at the regional level, such as the African Charter on the Rights and Welfare of the Child (the African Children's Charter). The African Children's Charter maintains a similar standard to that of the UNCRC in respect of corporal punishment. The Charter is a further means of securing children's rights in the international context by supplementing the UNCRC in the African regional context as they cover the same ground.[76] South Africa ratified the African Children's Charter in 2000 and is thus subject to its obligations. Article 11(5) deals with the discipline of children in a school and home environment and provides that children should be treated with humanity and respect for their inherent dignity and in compliance with the standards of the Charter.[77] Moreover, Article 16(1) of the African Children's Charter complements Article 11 (5) by vesting an obligation on State parties to protect children from all forms of torture, and inhumane and degrading treatment (physical or mental) while in the care of the child. The Articles in the Charter provide minimal standards for the protection of children's rights and State parties must establish and impose a higher standard of protection in their respective jurisdictions. The *FORSA* judgment serves this purpose perfectly as it ensures that the South African jurisprudence conforms with human rights standards imposed by international instruments, particularly the UNCRC and the African Children's Charter.

Therefore, it is worth stating that the Constitutional Court rightly abolished reasonable and moderate chastisement to protect children's rights entrenched in the Bill of Rights and recognised by international instruments. Moderate and reasonable chastisement as a tool for discipline, cannot be retained at the expense of a child's fundamental right to dignity.[78] It is, in the court's view, to achieve the same laudable objective without causing harm or unduly undermining the fundamental rights of the child.[79] As the Constitutional Court alluded in *S v Williams*, per Langa DCJ (as he then was), "we must progressively move from punishments that emphasized retribution and vengeance rather than correction, prevention and recognition."[80] Therefore, the authors support the view that the application of force or a resort to violence, which could be harmful cannot, in circumstances where there is an effective non-violent option available, be said to be consonant with the best interests of the child.

73 Article 19 of the UN Convention on the Rights of the Child.

74 General Comment No. 8 (2006) on The Right of the Child to Protection from Corporal Punishment and other Cruel or Degrading Forms of Punishment (ars 19; 28, para 2; and 37, *inter alia*) paras 7, 12 and 18. https://endcorporalpunishment.org/human-rights-law/crc/ (accessed 12-07-2020).

75 General Comment No. 8 (2006) on The Right of the Child to Protection from Corporal Punishment and other Cruel or Degrading Forms of Punishment (ars 19; 28, para 2; and 37, *inter alia*) paras 7, 12 and 18. https://endcorporalpunishment.org/human-rights-law/crc/ (accessed 12-07-2020).

76 Gose *The African Charter on the Rights and Welfare of the Child* (2002) 11.

77 Article 11(5) of the African Charter on the Rights and Welfare of the Child.

78 *FORSA* para 67.

79 *Ibid* para 66.

80 *S v William's* para 63. For example, the abolition of the death penalty in *S v Makwanyane* 1995 2 SACR 1 (CC).

8 DEVELOPMENTS ON THE ABOLITION OF CORPORAL PUNISHMENT IN OTHER AFRICAN JURISDICTIONS

Many civilisations and comparable democracies have kept the defence of reasonable and moderate chastisement alive and relatively few have abolished it.[81] As of 2022, about 11 countries have abolished all forms of corporal punishment in all settings including at home. These include Togo in 2007, Kenya in 2010, the Republic of Congo in 2010, Tunisia in 2010, Carbo Verde in 2013, Benin in 2015, South Africa in 2019, Seychelles in 2020, Guinea in 2020, Zambia in 2022, and Mauritius in 2022.[82] This is significant progress in the continent in line with the move to end all forms of violence against children and the basic child rights principles which include life, survival and development, the best interest, non-discrimination, and child participation.

Togo was one of the first countries in the continent to outlaw and completely prohibit corporal punishment in all settings, a move that aligns with the best interest of the child, which is of paramount importance in all matters concerning children.[83] Article 4 of the African Children's Charter provides that in "all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration."[84] Despite this move, the reality on the ground remains volatile for many children who are subjected to corporal punishment. In the recent concluding observation by the Committee on the Rights of the Child while Togo has made significant strides in abolishing physical violence against children, several concerns remain.[85] These include corporal punishment in all settings and domestic violence.[86] Suffice it to state that despite the progressive decision in the *FORSA* case, there remains a lot to be done in terms of awareness, advocacy, and education on positive discipline measures short of corporal punishment and violence against children. A key takeaway from the progress in Togo is that the Committee on the Rights of the Child strongly recommended that despite outlawing corporal punishment, authorities must comprehensively assess the extent, causes and nature of violence on the ground as these inform policy transformation and strengthen efforts to eliminate all forms of violence against children, hold perpetrators accountable and enforce legislation prohibiting corporal punishment.[87]

In the Democratic Republic of Congo (DRC), for instance, the parliament has several provisions relevant to protecting children against physical violence. Article 53 of Law No. 4-2010 on the Protection of the Child 2010, provides that, "it is forbidden to use corporal punishment to discipline or correct the child".[88] This renders the defence of child chastisement unlawful and that no one is permitted to use violence against a child. In addition, Article 107 of the same law strengthens child protection by providing that "persons who inflict cruel inhuman or degrading

81 According to the global initiative to end corporal punishment, 65 states globally have achieved prohibition in all settings as of May 2023 and governments of at least 27 other states have expressed a commitment to enacting full prohibition. See Global Initiative to End All Corporal Punishment of Children https://endcorporalpunishment.org/reports-on-every-state-and-territory/ (accessed 15-10-2023).

82 *Ibid.* Alternatively, see *FORSA* para 54.

83 See the Children's Code 2007 formally referred to as Republic of Togo, Loi no. 2007-017 du 6 juillet 2007 portant code de l'enfant, July 6, 2007, https://www.refworld.org/docid/5ce409a34.html. See also https://endcorporalpunishment.org/reports-on-every-state-and-territory/togo/

84 Children's Code 2007.

85 https://www.ohchr.org/en/documents/concluding-observations/crcctgoco3-4-concluding-observations-togo. See also https://endcorporalpunishment.org/reports-on-every-state-and-. See also Children's Code 2007.

86 https://www.ohchr.org/en/documents/concluding-observations/crcctgoco3-4-concluding-observations-togo

87 https://endcorporalpunishment.org/reports-on-every-state-and-territory/togo/ (accessed 15-10-2023)

88 https://endcorporalpunishment.org/reports-on-every-state-and-territory/congo-republic-of/(accessed 15-10-2023)

punishment on children" are liable to the penalties in the penal code.[89] This is in accordance with the child rights approach provided for in the UNCRC and the African Children's Charter that children must never be subjected to any form of violence.[90] Essentially, an approach based on children's rights is informed by the best-interests principle, the right to life, survival, and development, as well as by general international and national human rights laws.[91] In General Comment 8 regarding the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, the Committee on the Rights of the Child reaffirmed the importance of eliminating violent and humiliating punishment of children. This involves legal reform complemented by other measures, as well as the recognition of the inherent dignity of children, placing an immediate and unqualified obligation on state parties under the UNCRC and the African Children's Charter.[92] Despite outlawing corporal punishment in the DRC, several challenges remained including corporal punishment. As a result, the UNCRC Committee in its concluding observations strongly recommended that the State,

> a) ensure the full implementation of Law 4-2010 prohibiting corporal punishment and ensure that all cases of corporal punishment are effectively investigated and prosecuted; b) continue to raise awareness among the general public, including children, about the unlawfulness and the negative consequences of corporal punishment and other forms of violence on the development and well-being of the child; c) promote positive, non-violent and participatory forms of child-rearing and discipline as an alternative to corporal punishment; and d) provide children with child-sensitive mechanisms to lodge complaints in case they are victims of violence, including corporal punishment.[93]

The recommendations expressed by the UNCRC are important in addition to the prohibition of any form of violence against children. If the *FORSA* judgment is to make a significant contribution in South Africa, it is equally important that beyond the court judgment, extra measures are undertaken to ensure that no child is subjected to chastisement.

Before the enactment of the 2010 Kenyan Constitution, parents in Kenya had a right to administer reasonable physical discipline through chastisement following dictates in article 127 of the now-defunct Children Act of 2001.[94] In 2010, Kenya enacted a comprehensive Constitution with expansive provisions that protect child rights including the right to be free from all forms of violence, exploitation, and degrading punishment.[95] The 2010 Kenyan Constitution is similar to the 1996 Constitution of South Africa in many respects. Similar to the provisions that were utilised in the *FORSA* case, the Constitution of Kenya brought reforms in that country by

89 Also, Article 130 states that international conventions ratified by the Republic of Congo on the rights of the child are an integral part of this law.

90 General Comment No. 8 and General Comment No. 13.

91 General Comment No. 8 UNCRC. See also, https://www.endcorporalpunishment.org/wp-content/uploads/country-reports/CongoRepublicOf.pdf (accessed 15-10-2023)

92 *Ibid* para 22.

93 Committee on the Rights of the Child Concluding observations on the combined second to fourth periodic report of the Congo 2014 (CRC/C/COG/2-4).

94 Article 127 of the repealed Children's Act 2001, Kenya, provides that, (1) "Any person who having parental responsibility, custody, charge or care of any child and who — (a) wilfully assaults, ill-treats, abandons, or exposes, in any manner likely to cause him unnecessary suffering or injury to health (including injury or loss of sight, hearing, limb or organ of the body, and any mental derangement); or (b) by any act or omission, knowingly or wilfully causes that child to become, or contributes to his becoming, in need of care and protection, commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings, or to imprisonment for a term not exceeding five years, or to both: Provided that the court at any time in the course of proceedings for an offence under this subsection, may direct that the person charged shall be charged with and tried for an offence under the Penal Code (Cap. 63), if the court is of the opinion that the acts or omissions of the person charged are of a serious or aggravated nature …" (5) Nothing in this section shall affect the right of any parent or other person having the lawful control or charge of a child to administer reasonable punishment on him.

95 https://endcorporalpunishment.org/reports-on-every-state-and-territory/kenya/ (16-10-2023).

rendering corporal punishment unlawful at home.[96] In particular, article 29 of the Constitution 2010 states that every person (including children);

> has the right to freedom and security of the person, which includes the right not to be – ... (c) subjected to any form of violence from either public or private sources; (d) subjected to torture in any manner, whether physical or psychological; (e) subjected to corporal punishment; or (f) treated or punished in a cruel, inhuman or degrading manner.

Article 29 is meant to ensure that no one is exempted from the ambit of constitutional imperatives. This is because in a similar vein as section 8 of the Constitution, 1996, "the Bill of Rights in Kenya applies to all law and binds all State organs and all persons."[97] Article 53 in this regard is instructive in that in line with the fundamental rights of the child, a child "has the right (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence (including corporal punishment), inhuman treatment and punishment, and hazardous or exploitative labour".[98] One of the issues raised in *FORSA* was the right to religion and by necessary implication the right to culture which may be used as a defence in corporal punishment. Culture and religion in Africa and elsewhere have been used to subject children to harmful practices, hence the stronger constitutional provisions outlawing any justification of harmful practices and violence. Article 2(4) of the 2010 Constitution of Kenya provides that: "any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid."[99] As a result of the Kenyan supreme law, parliament enacted the 2022 Children's Act which augmented the constitutional provision outlawing corporal punishment against children. Article 25(3)(b)(c) of the Children's Act 2022, for instance, confirms the constitutional prohibition of corporal punishment intending to completely protect children against violence in the name of correction and discipline.[100] Article 25(3) of the Children's Act specifically provides that "any person who subjects the child to torture or other cruel and inhuman or degrading treatment, including corporal punishment, commits an offence and shall, on conviction, be liable to the offence under the law".[101]

In the same vein as Kenya, Tunisia moved swiftly to outlaw chastisement or any correction of children using violence or physical force.[102] Article 319 (as amended) of the Penal Code explicitly prohibits any form of assault or physical correction of children using force.[103] Despite the transitional challenges South Sudan included strong protecting child protection provisions. The Transitional Constitution of the Republic of South Sudan 2011 outlaws and prohibits corporal punishment of children by everyone including at home by parents and legal guardians. Article 17(1) of the Transitional Constitution South Sudan 2011, "every child has the right to be free from corporal punishment and cruel and inhuman treatment by any person including

96 *Ibid.*

97 See Article 20(1) of the Kenyan Constitution, 2010.

98 See Article 53 of the Kenyan Constitution, 2010.

99 See Art 2 (4) of the Kenyan Constitution, 2010. See also s 2 of the Constitution of South Africa, 1996. See also, s 2 of the Constitution of Zimbabwe 2013.

100 UNCRC Committee General Comment 13 on the Rights of the Child to Freedom from all forms of violence 2011.

101 Article 25(3) of the Children's Act: "Any person who — (a) unlawfully deprives a child of his or her liberty; (b) subjects the child to — (c) torture or other cruel and inhuman or degrading treatment, including corporal punishment, (d) any cultural or religious practice which dehumanizes or is injurious to the physical, mental and emotional wellbeing of the child, commits an offence and shall, on conviction, be liable to the offence under the Prevention of Torture Act."

102 https://endcorporalpunishment.org/reports-on-every-state-and-territory/tunisia/ (16-10-2023).

103 Article 319 of the Penal Code, Tunisia.

parents, school administrations and other institutions.[104] There are no exceptions to this rule largely because of the many vulnerabilities that children face in transitional justice communities such as South Sudan, hence the strongest protection.[105]

Cabo Verde also joined the progressive nations in Africa by banning corporal punishments in 2013.[106] The Law on Children and Adolescents which was enacted in 2013, and promulgated in 2014, explicitly provides that "the family must provide a loving and safe environment that allows the full development of children and adolescents and protects them from any actions affecting their integrity."[107] In article 31(2), the law in Carbo Verde requires that in exercising the right to correction "parents must always keep in mind the rights of children and adolescents to an upbringing free from violence, corporal punishment, psychological harm and any other measures affecting their dignity, which are all inadmissible".[108] The law in Cabo Verde aligns well with the fundamental principles underlying children's rights, that of life, survival and development and the best interest of the child which require children to be raised in a conducive environment.[109] This is similar to the approach followed by the legal reform in Seychelles where the law specifically provides that, the Children's Act (as amended) explicitly prohibits corporal punishment and repeals any other defence such as religion or reasonable correction or chastisement.[110]

Other countries in Africa that have abolished the death penalty in all settings include Benin, Mauritius, Seychelles, and Zambia. In Mauritius for instance, corporal punishment was not prohibited up until 2020. In 2020, the parliament in that country enacted the Children's Act of 2020, and in section 14 prohibited corporal punishment. This was a necessary intervention in protecting children against violence. Section 14 of the Children's Act 2020 stipulates that "no person shall inflict corporal or humiliating punishment on a child as a measure to correct or discipline the child".[111] One of the key reforms in Mauritius, that is a crucial takeaway for the reforms in South Africa, is the definition of corporal punishments or humiliating punishment. Section 14(3) of the Children's Act in Mauritius expressly defines these terms as "any form of punishment which causes pain or suffering to a child through, but not limited to, the use of force or use of substances". While the apex court dealt with the use of force and pain inflicted by chastisement, it edged parliament to ensure that it enacted reforms that will ensure positive, non-violent, and participatory forms of child-rearing and discipline short of inflicting violence on children.

104 https://endcorporalpunishment.org/reports-on-every-state-and-territory/south-sudan/ (16-10-2023).

105 *Ibid.* also UNCRC Committee General Comment No. 13 on the Rights of the Child to Freedom from all forms of violence, 2011. See also, General Comment No. 8 UNCRC 2007.

106 https://endcorporalpunishment.org/reports-on-every-state-and-territory/cabo-verde/ (16-10-2023).

107 *Ibid.*

108 *Ibid.*

109 *Ibid.*

110 https://www.endcorporalpunishment.org/wp-content/uploads/country-reports/Seychelles.pdf (16-10 2023).

111 Section 14(1) Children's Act 2020 (Mauritius). See also the consequence of the failure to adhere to the law, s 14(2) of the same Act provides that: "2) Any person who contravenes subsection (1) shall commit an offence and shall, on conviction, be liable to a fine not exceeding 200,000 rupees and to imprisonment for a term not exceeding 5 years."

In the SADC region for instance, countries such as Zimbabwe, Zambia, and Botswana are manifestly progressing towards completely banning corporal punishment in all societal spheres, including the home. As Sloth-Nielsen[112] indicates, Zimbabwe, Namibia, South Africa, and Botswana are not only neighbours, they share a common legal heritage as recipients of a blend of Roman-Dutch law and English law.[113]

Zambia has made significant progress being one of the countries in the region to prohibit corporal punishments in all settings as of 2022. Before that, and with a similar approach as South Africa, the court in Zambia declared corporal punishment or whipping unconstitutional as it offended the Constitution. In the *Banda v The People*,[114] the court in that country set aside the sentence of corporal punishment. As a result, the legislature in Zambia enacted the Children's Code Act No. 12 of 2022. Two key provisions are relevant to this article namely sections 22 and 23 of that statute. On the one hand section 22 for example provides that, "a person shall not impose corporal punishment as a form of punishment on a child." On the other hand, section 23(1) further strengthens child protection against violence, torture, and inhumane and degrading punishment by stipulating that "a person shall not subject a child to torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty." This section will consider and enunciate only the position of corporal punishment in the Zimbabwean legal system. The reason for this is that in Zimbabwe, likewise in South Africa, developments concerning the ban of corporal punishment in the home are being performed in most part through the courts.[115]

In 2013, Zimbabwe adopted a new Constitution (the "2013 Constitution") which strongly protects human rights.[116] Children's rights are specifically protected by section 81, though they are of course beneficiaries of all the rights contained in the parts of the 2013 Constitution. Section 53 of the 2013 Constitution states that "no person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment". Section 86(3)(c) of the Constitution of Zimbabwe further guarantees no exceptions to this right by stating that, "no law may limit, and no person may violate the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment". The courts in Zimbabwe have since applied these provisions consistently with section 2(1) of the 2013 Constitution which states that "the Constitution is the supreme law of Zimbabwe and any law, practice custom or conduct inconsistent with it is invalid to the extent of the inconsistency". Section 53 read with section 86(3)(c) under the umbrella of section 2(1) leaves no room for the survival of corporal punishment as it is legally impermissible for anyone (including parents) to subject another human being to inhuman or degrading punishment. Prior to the enactment of the 2023 Constitution, the Supreme Court of that country had some progressive jurisprudence in protecting children against violence in the name of discipline. This is because on several occasions it declared corporal punishment as barbaric and brutal against the inherent dignity of persons. In the case of *S v Juvenile*, for instance, Gubbay JA explained juvenile whipping as

112 Sloth-Nielsen "Southern African Perspectives on Banning Corporal Punishment – A Comparison of Namibia, Botswana, South Africa and Zimbabwe – A Comparison of Namibia, Botswana, South Africa and Zimbabwe" in Saunders, Naylor, and Levine (eds) *Comparative Social and Legal Developments in Dealing with Corporal Punishment of Children* (2018).

113 See also this acknowledged by the apex court in *S v Juvenile* while declaring corporal punishment in schools across South Africa. Arguably this judgment laid a good foundation for the *FORSA* decision.

114 *Banda v The People* (2002) AHRLR 260 (ZaHC 1999).

115 See also Benin Article 130 of the Children's Code which provides that "the State shall ensure that discipline within the family, at school and in other public or private institutions does not involve corporal punishment or any other form of cruel or degrading treatment."

116 The Constitution of Zimbabwe Amendment Act (No. 20) Act, 2013.

> … inherently brutal and cruel; for its infliction is attended by acute physical pain. After all, that is precisely what it is designed to achieve ... In short, whipping, which invades the integrity of the human body, is an antiquated and inhuman punishment which blocks the way to understanding the pathology of crime.[117]

In addition, the Zimbabwe Constitutional Court in *The State v Willard Chokuramba*[118] confirmed a judgment by the Harare High Court that had found that judicial corporal punishment violated section 53 of the 2013 Constitution and as such was unconstitutional. In the confirmatory proceedings, the Constitutional Court of Zimbabwe was asked to test whether section 353 of the Criminal Procedure and Evidence Act[119] on the "corporal punishment of male juveniles" was constitutionally invalid, specifically in light of section 53 of the 2013 Constitution which guarantees the right to be protected from physical or psychological torture or to cruel, inhuman or degrading treatment or punishment. In its ruling, the Constitutional Court declared that the concept of human dignity ought to be central when interpreting the Constitution and held that the purpose of 53 of the Constitution is to afford protection to human dignity, and physical and mental integrity. The court stated: "human dignity is (…) 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."[120] The Constitutional Court of Zimbabwe accordingly struck down section 353 of the Criminal Procedure and Evidence Act as unconstitutional, and therefore outlawing the judicial whipping of male juveniles.

Moreover, the courts in Zimbabwe continue to portray a good standing towards the protection of human rights. The High Court of Zimbabwe in *Pfungwa v Headmistress Belvedere Junior Primary School*[121] held that corporal punishment in school and at home is unconstitutional as it violates the rights of children as set out in sections 51, 53 and 81 of the Constitution of Zimbabwe. The matter concerned a child who was assaulted by a teacher at school with a thick rubber pipe. The pupil suffered red bruises on her back and was traumatised to the point where she did not want to return to school the following day. The applicants urged the court to accept that the new Constitution is a transformative document that must be used creatively and wisely.[122] They submitted that the court should, through it, develop the law.[123] It was the case of the applicants that no one, whether a school, a teacher, or a parent at home should inflict corporal punishment on children as it leads to physical trauma or injury to children.[124] In essence, the applicants argued that corporal punishment in all settings should and must be declared unconstitutional. The respondents did not oppose the application, and it is yet to be confirmed by the Constitutional Court of Zimbabwe. Notably, the courts in Namibia, South Africa and Zimbabwe have often relied on each other's decisions for support. This is a commendable approach to silence potential arguments (which do surface) that corporal punishment is culturally sanctioned by African culture.[125] This is further important in developing regional standards that are in line with international human rights and African human rights standards meant to protect children against all forms of violence.

The courts play a significant role in ensuring that the democracy of States remains intact, and the protection of human rights is realised. In South Africa, the courts are mandated by the

117 *S v Juvenile* 1990 4 SA 151 (ZSC). See also *S v Ncube; S v Tshuma; S v Ndlovu* 1988 2 SA 702 (ZSC).

118 CCZ 10/19, Constitutional Application No. CCZ 29/15.

119 The Criminal Procedure and Evidence Amendment Act, 2016 (No. 2 of 2016) [Chapter 9:07].

120 *The State v Willard Chokuramba* 14.

121 (HH 148-17 HC 6029/16) [2017].

122 *Pfungwa v Headmistress Belvedere Junior Primary School* 2.

123 *Ibid.*

124 *Ibid.*

125 Sloth-Nielsen in *Comparative Social and Legal Developments* 264.

Constitution to exercise judicial activism and ensure that all laws (legislation, common and customary law) conform with the Constitution.[126] The courts have performed this function diligently and successfully, particularly with the prohibition of corporal punishment. However, court decisions often attract controversial reactions. Some of these contrary views are contained in the judgments themselves in the form of dissent judgments. As Mezmur[127] suggests, one of the limitations of a judicially-based prohibition, in the absence of subsequent law reform, is that it often fails to articulate the message that the first purpose of the prohibition of corporal punishment in the home setting should be educational, and not punitive. Accordingly, judicial decisions prohibiting corporal punishment can be susceptible to violations in the absence of a follow-up by a legislative measure.[128] For example, in Zimbabwe, a declaration of constitutional invalidity is of no effect until it is confirmed by the Constitutional Court of Zimbabwe. Two judgments in Zimbabwe have banned corporal punishment – both in 2017 – but there is ostensibly no political will to legislate these developments. Parliament in that country ought to have revised and reformed child rights-related legislation to expressly outlaw any corporal punishment following the above-mentioned judicial pronouncements. Arguably the same criticism should be stated against the parliament in South Africa after the *FORSA* decision. The slow delays of reforms by the makers of the law leave children exposed to violence abuse and corporal punishment and with minimal protection in all settings.

9 CONCLUSION

In conclusion, for the longest time, parents who administered corporal punishment to their children as a form of discipline were able to evade criminal liability based on the common law defence of reasonable and moderate chastisement in most British erstwhile colonies. The Constitutional Court, in the case of *FORSA*, confirmed the decision of the High Court and declared this defence unconstitutional. The court held that reasonable and moderate chastisement violates several rights in the Constitution, namely the right to dignity, the right to equal protection before the law, the right to freedom and security of the person, and the best interests of the child, amongst others. The authors submit that this decision was a necessary and imperative development in South African law as it ensured that domestic law conforms to international law and obligations and protects constitutionally recognised children's rights. In as much as the Constitution and international human rights treaties vest rights to individuals, those rights ought to be supplemented by legislation which will be intended to give effect thereto. In practice, this is not always fulfilled as parliamentary procedures and debates are long and extensive or there is a lack of political will to effect law reform. In this regard, the Constitution obliges the courts to exercise judicial activism and develop all laws when they interpret the spirit and purport of the Constitution.

There is a global trend, also apparent in the African region, towards the banning of corporal punishment in all spheres of society. A number of African countries, some of which are discussed above, have banned corporal punishment in their jurisdiction although some of these nations have made an exception for the application of corporal punishment. The courts in South Africa and elsewhere in the continent have played and continue to play a crucial role in developing domestic law to be in line with international obligations and promote the protection of human rights. The courts in the region have delivered landmark judgments that boldly struck down corporal punishment in all settings. Some parliaments like that of Zambia have further enacted specific legislation which expressly outlaws corporal punishment. Landmark and developmental decisions ought to be followed by the necessary law reform to ensure legislative protection

126 Section 39(2) of the Constitution.

127 Mezmur 2018 *Speculum Juris* 83.

128 *Ibid* 85.

of the rights of children. The authors firmly support the decision of the court in *FORSA* and applaud the judiciary for its role in transformative constitutionalism and acting as a last line of defence in protecting human rights, especially that of children. The court advised that parents should resort to alternative ways of discipline that are more loving as opposed to chastisement. These may include encouragement of good behaviour, positive ways of life, respect, dos and don'ts, and denial of certain privileges, among others. It is hoped that after the landmark ruling by the apex court parliament has initiated a holistic approach to come up with measures, laws, and policies to fully effect this decision. Such reforms will be key in advocating for the full prohibition of violence against children and awareness purposes.