

Giant leaps or baby steps? A preliminary review of the development of children's rights jurisprudence in Zimbabwe

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SUMMARY

This contribution provides an overview of children's rights adjudication in Zimbabwe with a specific focus on emerging jurisprudence under the 2013 Constitution. After a summary of Zimbabwe's performance in implementing children's rights under both international and African regional law, the authors examine how Zimbabwean superior courts have dealt with the protection of children's rights. In order to give a fair assessment, we begin by reflecting on the Lancaster House (LH) Constitution (1980) and the resultant jurisprudence thus shedding light on how courts conceptualised children's rights in the absence of a specific child rights provision in the Constitution. This is followed by an analysis of the emerging jurisprudence under the 2013 Constitution which specifically entrenches children's rights. We focus specifically on cases decided between 2013-2019. A focus on seminal court judgements and how courts adjudicated children's rights will guide the authors in ultimately deciding whether or not Zimbabwean courts have made giant leaps or baby steps in the protection and promotion of children's rights under the 2013 Constitution.

1 Introduction

In 2013, Zimbabwe adopted a new Constitution and one of the distinctive features of the Declaration of Rights (DoR) is the unique protection awarded to children.¹ The aim of this contribution is to review and demonstrate the implications of constitutionalising children's rights in Zimbabwe and assess progress made by the courts in the first five

1 S 81 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 (Constitution) is the children's rights clause, and it does not preclude children from claiming all the other rights in the DoR.

years of the Constitution (2013-2019). Given children's particular vulnerabilities and welfarism which dominates children's rights in general, the constitutional protection of children's rights in Zimbabwe cannot be gainsaid. The inclusion of a children's rights clause in the 2013 Constitution is revolutionary for a number of reasons. Firstly, it underscores the status of Zimbabwean children as individual rights holders signalling "a commitment to the recognition of children's rights at the highest level".² Secondly, it opens the door to "an undeniable claim of access to justice for children"³ and more importantly constitutionalisation sets up children's interests to take centre stage in litigation. In cases of rights violations, constitutionally entrenched children's rights are difficult to ignore and in cases where these rights are in conflict with national laws, entrenched rights enjoy a special status over the other laws.⁴ Thus section 81 stands as a powerful legal tool for vindicating children's rights in domestic courts.

The year 2019 marked a five-year milestone after the adoption of the 2013 Constitution, thereby presenting an opportunity to critically reflect on the extent to which the children's rights clause has impacted on the adjudication of children's rights by Zimbabwean courts. This five-year milestone provides an opportunity to advance our understanding of how the courts are engaging with children's constitutional rights. For the child rights movement in Zimbabwe, reviewing the court's performance in the first five years of the 2013 Constitution provides a benchmark from which to measure the court's and the country's progress in advancing children's rights going forward. This milestone is an opportune time to reflect on achievements and address any identified challenges. However, this review is by no means an exhaustive account of the children's rights jurisprudence in Zimbabwe but rather seeks to give a bird's eye view of the development of children's rights through courts with a specific focus on the 2013 Constitution.

This article is organised as follows: in order to paint a holistic picture, the first part begins by looking at Zimbabwe's performance in implementing children's rights under both international and regional law.⁵ The objective is to shed light on key child rights issues that Zimbabwe is grappling with. The second part reflects on the old constitutional order – the Lancaster House (LH) Constitution (1980) and the resultant jurisprudence, thus revealing how superior courts conceptualised children's rights in the absence of a constitutional

2 Kil Kelly "The UN Convention on the Rights of the Child: Incremental and transformative approaches to legal implementation" 2019 *International Journal of Human Rights* 5.

3 Fambasayi "The constitutional protection of child witnesses in Zimbabwe's criminal justice system" 2019 *South African Journal of Criminal Justice* 58.

4 Sloth-Nielsen & Olieel "Constitutionalising "Children's Rights and Domestic Courts of Member States of the Council of Europe" (2019) 6.

5 Zimbabwe ratified the United Nations Convention on the Rights of the Child (UNCRC) in 1990 and the African Charter on the Rights and Welfare of the Child (ACRWC) in 1995.

children's rights clause. This is followed by an analysis of the emerging jurisprudence under the 2013 Constitution, reviewing cases between 2013-2019. Lastly, in order to ascertain progress in advancing children's rights, a comparison of case law under the two Constitutions is made and the authors will determine whether Zimbabwean courts, in the period under review, have made giant leaps or baby steps in the protection and promotion of children's rights under the 2013 Constitution.

2 International law and children's rights in Zimbabwe

2.1 The place of international human rights in domestic spheres

The domestic application of international law in Zimbabwe is guided by two principles: the monist approach which allows automatic application of international law into municipal law and the dualist approach which provides that international law requires national legislation to be applicable domestically. Zimbabwe follows both a monist and a dualist approach to international law which means customary international law is part of domestic law unless it is inconsistent with the Constitution.⁶ However, international conventions, treaties and agreements only have domestic application once transformed into municipal law, approved and incorporated into law by Parliament.⁷

When interpreting the DoR, courts are constitutionally mandated to take into account international law to which Zimbabwe is a party to.⁸ Of relevance to this contribution, Zimbabwe is party to the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC), as well as other international legal instruments which have a bearing on children rights.⁹ Although the UNCRC and the ACRWC have not been domesticated at national level, principles of children's rights laid down in both instruments have found constitutional expression in section 81 of the

6 S 326(1) of the Constitution.

7 S 327(2) of the Constitution. For a general discussion also see Feldman "Monism, dualism and constitutional legitimacy" 1999 *Australian Year Book of International Law* 105.

8 S 46 of the Constitution.

9 The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (May 2013); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (February 2012); the Convention on the Rights of Persons with Disabilities and its Optional Protocol (September 2013); the ILO Convention No. 182 on the Worst Forms of Child Labour (1999); the Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa (October 2009); the SADC Protocol on Gender and Development (August 2008); and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (November 2003).

2013 Constitution. It is therefore encouraging to learn that internationally recognised children's rights commitments are to some extent reflected in the 2013 Constitution thereby providing fertile ground for the emergence of a progressive children's rights jurisprudence.

2 2 Treaty monitoring bodies and Zimbabwe's children's rights scorecards

Ratification of international treaties means that Zimbabwe has to periodically report to experts from relevant treaty bodies. Reporting is often followed by the issuing of recommendations on necessary steps that the State party needs to take in order to meet its international and regional obligations laid out in the treaties.

It is estimated that children constitute 48% of the 13 million people in Zimbabwe.¹⁰ More than half of these children live in rural areas and lack access to adequate socio-economic rights such as health, education, nutrition, water and sanitation.¹¹ Therefore, the need for consistent review of Zimbabwe's performance in implementing children's rights, through submitting country reports to the UN Committee on the Rights of the Child (CRC Committee) and African Committee of Experts on the Rights and Welfare of the Child (African Committee) cannot be gainsaid.

2 2 1 The UN Committee on the Rights of the Child

Zimbabwe submitted its initial country report to the CRC Committee, which was due in 1992, sometime in 1995.¹² The second report was submitted 19 years later in 2015. From a procedural perspective on reporting under the UNCRC, Zimbabwe has not been doing as well as it should. This inconsistency in reporting prevents effective monitoring of the implementation of the UNCRC.

In its first Concluding Observations to Zimbabwe, the CRC Committee commended the government on a number of issues, including, the prohibition of gender discrimination; raising awareness of children's rights as well as encouraging child participation by organising a children's parliament and promoting youth councils and child mayors.¹³ Furthermore, the CRC Committee welcomed government's commitment

10 UNICEF "Situation of children in Zimbabwe" <https://www.unicef.org/> (last accessed 2020-08-18).

11 UNICEF "Situation of children" <https://www.unicef.org/zimbabwe/situation-children> (last accessed 2020-07-21).

12 See Zimbabwe's initial report to the CRC Committee CRC/C/3/Add.35 12 September 1995 <https://tbinternet.ohchr.org/> (last accessed 2020-07-10).

13 CRC Committee "Concluding Observations: Zimbabwe" CRC/C/15/Add.55 7 June 1996 https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ZWE/CRC_C_ZWE_CO_2_22991_E.doc (last accessed 2020-07-10) para 3.

to submit annual reports to Cabinet and Parliament on measures taken to implement rights in the UNCRC.¹⁴

However, the CRC Committee expressed concern over a number of issues, key among them being government's failure to carry out comprehensive legal reforms to align national legislation with the UNCRC; the existence of a dual system of common law and customary law which raised difficulties in implementing the UNCRC;¹⁵ insufficient attention being paid to the best interests of the child in legislation and practice; the exercise of children's rights subject to parental consent; the use of corporal punishment;¹⁶ issues on *juvenile*¹⁷ justice, particularly the lack of a clear legal prohibition of capital punishment, life imprisonment without the possibility of parole and indeterminate sentencing. The CRC Committee recommended, among other things, that Zimbabwe address all the issues mentioned above.

Zimbabwe submitted its second country report to the CRC Committee in 2015 and the Committee issued Concluding Observations and recommendations in 2016.¹⁸ The CRC Committee applauded Zimbabwe's progress in ratifying a significant number of international legal instruments pertaining to children.¹⁹ It welcomed various national plans, policies and strategies adopted by Zimbabwe on thematic areas of children's rights. However, it was concerned that the draft *Child Rights Policy* took too long to finalise.²⁰ The CRC Committee applauded the constitutionalisation of the best interests of the child and expressed concern that the best interests principle is not reflected in all relevant legislation nor applied in all areas and that its content is not well defined.²¹ The Committee then referred to its previous recommendations which, it said, were not sufficiently implemented, especially issues pertaining to law reform,²² prohibition of the use of corporal punishment,²³ and raising the minimum age of criminal responsibility.²⁴

14 CRC Committee *supra* para 4.

15 CRC Committee *supra* para 11.

16 CRC Committee *supra* para 42.

17 The authors use the term 'juvenile' as referred to in court rulings and legal documents in Zimbabwe. However, we are aware of the move away from using such terminology as it paints a negative picture of child offenders, that is why juveniles is in italics.

18 CRC Committee "Concluding observations on the second periodic report of Zimbabwe" CRC/C/ZWE/CO/2 (7 March 2016) <https://www.icj.org/wp-content/uploads/2016/01/Concluding-Observations-CRC-Zimbabwe-2016-eng.pdf> (last accessed 2020-07-01).

19 See the list in footnote 9 *supra*.

20 CRC Committee "Concluding observations on the second periodic report of Zimbabwe" (29 January 2016) para 10. At the time of writing this article no progress had been made in terms of finalising the draft policy.

21 CRC Committee *supra* para 28.

22 CRC Committee *supra* para 22.

23 CRC Committee *supra* para 31.

24 CRC Committee *supra* para 33.

Arguably, the Concluding Observations do not tell the best of stories. Although Zimbabwe has progressed, to some extent, from 1995 when the first report was submitted to the Committee, a lot of what was recommended by the Committee was also highlighted in the 2016 Concluding Observations as still requiring more action in order to give full effect to children's rights.

2 2 2 The African Committee of Experts on the Rights and Welfare of the Child

Zimbabwe submitted its initial country report to the African Committee in 2014, instead of 2003 and the periodic report was due in 2006. This is very discouraging as the failure to comply with its reporting obligations means that Zimbabwe is depriving the African Committee, ample opportunity to review its implementation of the ACRWC.

In its Concluding Observations, the African Committee, commended Zimbabwe for defining a child as a person below the age of 18 years under the 2013 Constitution. However, the Committee expressed concern with contradictions of the definition of a child in various pieces of legislation²⁵ and subsequently encouraged the government to ensure harmonisation in all corresponding domestic laws. Furthermore, the African Committee was concerned with the anomaly on the minimum age of marriage. The Marriage Act (Chapter 5:11), for example, sets the minimum age of marriage for girls at 16 while the Customary Marriage Act (Chapter 5:07) does not provide for the minimum age of marriage. The government was strongly urged to set the minimum age of marriage to 18 in all circumstances. Furthermore, the African Committee was concerned that the minimum age of criminal responsibility was set at 7 years and it was recommended that it be raised to at least 12 years of age in line with international standards.²⁶

Child participation was another subject of concern for the African Committee. It recommended the government to establish and strengthen child friendly courts as well as procedures for child victims and witnesses.²⁷ This would allow for children to be heard in judicial proceedings affecting them. Zimbabwe was scheduled to submit its combined fourth and fifth periodic reports, which the Committee considers as the first Periodic Report in December 2018. At the time of writing this contribution, no submission had been made.

In conclusion, Zimbabwe's commitment to children's rights at both international and regional level is laudable. However, the failure to report promptly and regularly to treaty monitoring bodies is a cause of concern.

25 Public Health Act (Chapter 15:17), and the Marriage Act (Chapter 5:11).

26 Concluding observations and recommendations by the African Committee of Experts on the Rights and Welfare of the child (ACERWC) on the Republic of Zimbabwe on the status of Implementation of the African Charter on the Rights and Welfare of the Child (2016) para 12.

27 African Committee *supra* para 20.

The jurisprudence of the treaty monitoring bodies are a valuable tool which may guide Zimbabwean courts in the interpretation of children's rights. Judicial officers and lawyers often rely on the recommendations and Concluding Observations from the treaty bodies to promote and protect children's rights. In addition, the jurisprudence of the treaty monitoring bodies is useful in putting pressure on the government to comply with its international and regional obligations.

3 Children's rights under the Lancaster House Constitution, 1980

The LH Constitution was a transitional document adopted in 1980 to address the injustices of Zimbabwe's colonial past. The LH Constitution had no express provision dedicated to children's rights, and it can be described as an "invisible child [C]onstitution"²⁸ where children were neither seen nor heard, and consequently not accorded any special recognition.²⁹ The DoR entrenched basic and justiciable fundamental human rights and freedoms for everyone, including children. Thus, the protection of children was premised on the understanding that the interpretation of constitutional provisions would ensure that fundamental rights are construed to fully apply to, and also protect, children.³⁰

While the LH Constitution protected everyone, there was bias towards the protection of first-generation rights at the expense of second-generation rights.³¹ Socio-economic rights were not justiciable, which may be ascribed to the fact that at the time of the enactment of the LH Constitution, globally, the constitutional protection of socio-economic rights was rare.³² This explains why the majority of notable court cases concerning children's rights dealt with civil and political rights while marginalising socio-economic rights,³³ as evidenced by the jurisprudence discussed below.

28 Tobin "Increasingly seen and heard: the constitutional recognition of children's rights" 2005 *SAJHR* 100.

29 See Alston and Tobin *Laying the foundation of children's rights* (UNICEF Italy 2005) 21-23.

30 Tobin 2005 *SAJHR* 102-103.

31 Ndulo "Zimbabwe's unfulfilled struggle for a legitimate Constitutional Order" in Miller (Ed) *Framing the court in times of transition: Case studies in Constitution making* (2010) 184.

32 Ndlovu "Protection of socio-economic rights in Zimbabwe. A Critical assessment of the domestic framework under the 2013 Constitution of Zimbabwe" (2016) 2.

33 In *Batsirai Children's Care v The Minister of Local Government, Public Works and Urban Development and others* (unreported case number HC 2566/05) an orphanage was affected by the *Murambatsvina* (Clean-Up Campaign) resulting in the unlawful demolition and eviction of children from the children's home, violating children's rights to dignity, housing, education amongst other socio-economic rights. Legal remedies, by way of spoliation, failed leaving the children homeless and in limbo.

However, courts were alive to the duty to protect the rights and interests of children within the broader context of human rights. Constitutional litigation on children's rights, dealt with matters relating to the use of judicial corporal punishment against *juvenile* (child) offenders, the sentencing of *juvenile* offenders to imprisonment, the right of children to freedom of conscience and religion, amongst others.

The commitment towards children's rights was visible even before Zimbabwe ratified the UNCRC and the ACRWC. In *S v A Juvenile*,³⁴ the Supreme Court declared that judicial corporal punishment against *juvenile* offenders violated the constitutionally entrenched right not to be subjected to torture or inhuman or degrading punishment.³⁵ In this matter, an 18-year-old male offender was convicted of assault with the intent to do grievous bodily harm³⁶ and sentenced to receive four cuts. The Supreme Court declared that the use of "a moderate correction of whipping" in terms of the Criminal Procedure and Evidence Act against male *juvenile* offenders was unconstitutional because it was inhuman and degrading punishment.

Dumbutshena CJ declared judicial corporal punishment to be inherently brutal and cruel, invading the inherent humanity, integrity and dignity of the child offender, equating it to an inhuman and degrading form of punishment - thereby unconstitutional. The same opinion was expressed in relation to corporal punishment meted in schools and homes, as a violation of section 51(1) of the LH Constitution. The Supreme Court described judicial corporal punishment as "institutionalised violence" against children sanctioned under the protection of the law.³⁷ Gubbay JA, in a separate opinion, noted that the prohibition against inhuman or degrading punishment was couched in absolute and non-derogable terms.³⁸ Influenced by (the then) contemporary international best practice and standards, the court relied upon international law³⁹ and persuasive decisions from foreign jurisdictions to reach a well-reasoned conclusion.

In a dissenting judgement, McNally JA disagreed with the conclusion that there is an inevitable brutality and cruelty in the use of corporal punishment. The reasoning behind the dissenting judgement validates a traditional latent welfarist protectionism philosophy which viewed children as mere objects, rather than subjects, of human rights. The judge

34 *S v A Juvenile* 1989 2 ZLR 61 (SC). The Supreme Court decision was delivered on 29 June 1989, whereas the CRC was ratified on 11 September 1990.

35 S 15(1) of the LH Constitution provided that "No person shall be subject to torture or to inhuman or degrading punishment or other such treatment".

36 The conviction for assault with intent to do grievous bodily harm was later set aside on appeal to be substituted by one of common assault. See *S v Harry & A Juvenile* S-146-88 (unreported).

37 *S v A Juvenile supra* 73F-H.

38 *S v A Juvenile supra* 91G-H.

39 For instance, Rule 17(3) of the UN Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules).

pointed out that whipping of children was constructive, correctional and reformatory.⁴⁰ Reliance was placed on the lack of alternative sentencing options befitting *juvenile* offenders, thus, corporal punishment saved *juvenile* offenders from imprisonment.⁴¹ Regrettably, the dissenting judgement upheld the constitutionality of corporal punishment because it formed the basis for parliament to amend the Constitution, thereby allowing corporal punishment against children.⁴² The reasoning for the minority decision was not supported by empirical research⁴³ or international human rights law and accordingly was ‘out of touch with contemporary thinking’ at the time.⁴⁴

On the strength of international law, superior courts were slowly moving away from the incarceration of *juvenile* (child) offenders, save in exceptionally serious offences. In *S v Zaranyika*⁴⁵ the High Court declared that ‘normally a *juvenile* should never be sent to prison unless the offense is so serious that only a prison sentence can be justified’. The court noted that in determining the appropriate sentence for a *juvenile* offender, ‘it is the duty of the court to have regard, not only to the nature of the crime committed and the interests of society, but also to the personality, age and circumstances of the offender, as well as the (best) interests of the juvenile’.⁴⁶ Cognisant of the youthfulness and immaturity of *juvenile* offenders, courts placed emphasis on treating *juveniles* in a manner different from adult offenders.⁴⁷ Even without any constitutional protection of the right of *juveniles* not to be detained except as a last resort, courts were applying the rights under international law to protect and promote children’s rights.

In addition, in *Dzvova v Minister of Education Sports and Culture*⁴⁸ the Supreme Court dealt with children’s right to freedom of conscience and religion. The applicant, the father of a six-year-old boy, filed a constitutional application in terms of section 24(2) of the LH Constitution on the basis that the actions of the respondents infringed section 19(1)

40 *S v A Juvenile supra* 93G-H.

41 *S v A Juvenile supra* 97F-H.

42 Constitution of Zimbabwe Amendment (No 11) 1990. See Naldi “Constitutional developments in Zimbabwe and their compatibility with international human rights” 1991 *African Journal International & Comparative Law* 376 arguing that “... the revision to S 15(3)(b) of the Zimbabwean Constitution reflects this minority opinion”.

43 *S v A Juvenile supra* 94B-C.

44 Hatchard “The fall and rise of the cane in Zimbabwe” 1991 *Journal of African Law* 200.

45 *S v Zaranyika* 1995 (1) ZLR 270H-271A.

46 *S v Zaranyika supra* 271D-E.

47 *S v Mavasa* HH 13-10. See also *S v Hunda* HH 124-10 where the Court held that the sentences on their own were not appropriate for young offenders aged 17 and 18 years respectively. Their pleas of guilty should have been given serious consideration and the rigours of punishment on young offenders should have had the effect of reducing the sentence and the total effective sentence.

48 *Dzvova v Minister of Education Sports and Culture* SC 26-07.

of the LH Constitution which protected the right to freedom of conscience and religion.

The child was enrolled at a Government Primary School, after attending pre-school at the same school. Whilst in pre-school the child's hair was never cut until the child graduated from pre-school and the hair had developed into dread locks. School authorities summoned the father to the school to advise him of the regulation that every child's hair had to be kept short. Pending the resolution of the matter between the school and the parent, the child was denied access to education. The father contended that his child was Rastafarian and cutting his hair was an infringement of his religious rights. Unsettled by that contention, the school issued a letter demanding that should the parent fail to comply, the child would be withdrawn from the school.

Aggrieved by the school's decision, the applicant challenged the regulations as *ultra-vires* section 19(1) of the LH Constitution. The court ruled that every child has a constitutional right to freedom of conscience and religion. Furthermore, the school regulations having been enacted without the authority of any law, infringed the child's enjoyment of his religion or belief through practice and observance. The court stated that attempts by the school to exclude the child was discriminatory and contravened constitutional provisions, as well as the Education Act (Chapter 25:04).⁴⁹ This ruling by the Supreme Court affirmed that in the absence of a specific children's rights provision, general constitutional rights could be interpreted to protect and promote children's rights.

It is commendable to note that, under the LH Constitution, judges were proactive to extend the protection of children's rights using general human rights provisions in the LH Constitution, although it was a slow process. Without legal instruments protecting the rights of children, Couzens argues that courts determine children's rights on a discretionary basis, dependent on the personal openness of individual judges towards the rights of children.⁵⁰ It is commendable that when matters were brought to courts, judges utilised the constitutional provisions to promote and protect children's rights.

4 Children's rights under the 2013 Constitution and emerging jurisprudence

4 1 The Constitution of Zimbabwe, 2013

The constitutionalisation of children's rights was a watershed moment in the history of human rights in Zimbabwe. The Constitution contains progressive provisions which protect and promote children's rights in

49 Section 4 of the Education Act.

50 Couzens "Le Roux v Dey and children's rights approaches to judging" 2018 *Potchefstroom Electronic Law Journal* 3.

line with the UNCRC and the ACRWC. Firstly, we see children's rights enumerated in section 19 under the heading 'national objectives' which details constitutional obligations of the State *vis-à-vis* the adoption of laws and policies ensuring that the best interests of the child are of paramount importance in all matters concerning children. The national objectives are not justiciable and enforceable in courts, however, their importance lies in the guidance they offer to the when developing laws and policies.

Notably, children's rights are also contained in section 81 in the Declaration of Rights. The inclusion of section 81 signals the primacy of children's rights because rights in the DoR are justiciable and enjoy horizontal and vertical application.⁵¹ Unlike section 19, children's rights in section 81, like all other rights in the DoR, have a built in enforcement mechanism found in section 85 of the Constitution.⁵² The insertion of children's rights in the DoR is a significant shift from the position of children's rights under the LH constitutional order which was regulated by a limited DoR.⁵³ The 2013 Constitution therefore lays fertile ground for litigation and judicial elaboration of children's rights.

The new constitutional era is not only characterised by an expanded DoR but a constitutional dispensation founded on the rule of law, separation of powers, government accountability, good governance and respect for fundamental rights.⁵⁴ Section 81 guarantees every child the right to, equality before the law; be heard; protected from economic and sexual exploitation; not to be detained except as a measure of last resort and the paramountcy of a child's best interests in every matter concerning the child amongst others. Furthermore, children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.⁵⁵ The 2013 Constitution presents Zimbabwe with an opportunity to change the trajectory of children's rights.

4 2 Emerging children's rights jurisprudence under the 2013 Constitution (2013-2019)

The discussion that follows explores how courts have utilised the children's rights clause found in section 81 to advance the respect, protection and promotion of children's rights.

51 In terms of sections 44 and 45 of the Constitution, rights in the DoR bind all organs of State as well as natural and justic persons.

52 Section 85 provides for the enforcement of fundamental human rights and freedoms.

53 Mavedzenge and Coltart "A Constitutional Law Guide Towards Understanding Zimbabwe's Fundamental Socio-economic and Cultural Human Rights" 2014 1.

54 Mavedzenge and Coltart *supra* 1.

55 S 81(3) of the Constitution.

4 2 1 Equality and non-discrimination: Intestate succession and children born out of wedlock

In *Bhila v Master of the High Court*⁵⁶ the High Court held that the common law position excluding children born out of wedlock from inheriting intestate from their father's estate violated children's rights to equality,⁵⁷ and non-discrimination.⁵⁸ The applicant, a surviving spouse, challenged the Master of the High Court's decision to allow three children born out of wedlock to inherit from her husband and their father's estate. The applicant and the deceased were married in a civil union. Upon the death of her husband, the applicant was appointed executrix of the estate, and whilst processing the estate the applicant realised that her late husband had three children born out of wedlock. The three children sought to inherit from their late father and the Master of the High Court appointed a natural executor, the second respondent who prepared a distribution plan. The issue before the Court, was whether children born out of wedlock can inherit intestate. The High Court ruled that excluding children born out of wedlock from inheriting intestate from their father was discriminatory and could not pass constitutional muster. Acting in terms of section 176 of the Constitution, which empowers the High Court to develop the common law and ensure that it aligns with the Constitution, the Court developed the common law on intestate succession *vis-à-vis* the rights of children born out of wedlock to inherit from their parent.

4 2 2 Detention of child offenders as a measure of last resort

In *S v FM (A Juvenile)*⁵⁹ a 17-year-old offender was convicted of eight counts of theft and eight counts of unlawful entry.⁶⁰ The accused was labelled as an unrelenting offender and as such the trial court sentenced him to nine years imprisonment. The case was sent on criminal review to the High Court and the judge was taken aback by the lengthy sentence against the young offender. Tsanga J held that, although,

“the sentence appears to be clearly dictated by the need to protect the public from a perceived delinquent and incorrigible young criminal offender the risks of incarcerating such a young offender over a lengthy period of time should not be so easily sacrificed at the altar of expediency”.⁶¹

56 *Bhila v Master of the High Court* (HC 4396/13) [2015] ZWHHC 549 (27 May 2015).

57 S 81(1)(a) of the Constitution provides for the right to equal treatment before the law.

58 S 56(1) of the Constitution provides that everyone is equal before the law and have the right to equal protection and benefit of the law; S 56(3) lists marital status as one of the prohibited grounds of discrimination.

59 *S v FM (A Juvenile)* 2015 (1) ZLR 56 (H).

60 S 131(1) and 131(1) (a) of the Criminal law (Codification and Reform) Act [Chapter 9:23].

61 *S v FM (A Juvenile)* *supra* 2.

The Court's approach, based on the Constitution⁶² and the UNCRC,⁶³ was aimed at ensuring that child justice matters are managed in a rights-based manner. The judge defended the proposition that child justice aims to assist children in conflict with the law to turn their lives around and become productive members of society.

Tsanga J was of the view that the sentence by the trial court ran contrary to the letter and spirit of the Constitution, especially given the fact that the offender did not commit a violent crime. Sentencing the child offender for such a lengthy time was described as "removing the child offender from the society by locking him up and throwing away the keys".⁶⁴ The judge challenges entrenched sentencing practices in Zimbabwe by holding the view that "[f]rom the point of view of children's rights custodial punishment is regarded as criminally damaging for children due to the criminogenic influences in prison".⁶⁵ Tsanga J's adoption of a children's rights perspective in sentencing must be celebrated. Anchored by the best interests of the child principle, the judge underscored the need to look at a much broader perspective when dealing with child offenders, emphasising the need to look at all the circumstances of the young offender's life and ensure that a child is detained only as a measure of last resort⁶⁶.

What is exceptional about this judgement is the judge's emphasis on proportionality of the sentence as guided by the circumstances that fuelled the delinquent behaviour in the young offender. From the facts of the case, the accused grew up in a child-headed household without much adult supervision. Without exonerating the accused, Tsanga J called for a balanced approach by emphasising the role of the State in such cases, opining that;

"It is the responsibility of the state and its officials who come into contact with cases of need to reduce chances of recidivism by thoroughly examining the range of possible interventions. It is also the responsibility of all officials involved, both judicial and non-judicial, to be thorough in their assessments so as to give each accused child a real chance at being justly treated".⁶⁷

After considering the circumstances of the case and the 16 counts involved, the Court altered the sentence from nine years to the shortest appropriate of three years imprisonment for all counts, of which one year was suspended for five years on condition of good behaviour.⁶⁸ Two important rights were upheld in the matter, namely, the best interests of the child and the right not to be detained except as a measure of last

62 S81(h)(i) of the Constitution.

63 Article 37(1)(b) and art 40(1).

64 *S v FM (A Juvenile) supra 2*.

65 *S v FM (A Juvenile) supra 3*.

66 For a detailed discussion, see Fambasayi and Moyo "The best interests of the child offender in the context of detention as a measure of last resort: A comparative analysis of legal developments in South Africa, Kenya and Zimbabwe" 2020 *South African Journal on Human Rights* 44-45.

67 *S v FM (A Juvenile) supra 4*.

68 *S v FM (A Juvenile) supra 5*.

resort for the shortest appropriate period. In reaching its decision, the Court emphasised the State's responsibility towards children in conflict with the law, highlighting the need to ensure the child's rehabilitation instead of a narrow focus on punishment.

4 2 3 Sexual exploitation of children

In *S v Banda; S v Chakamoga*,⁶⁹ the High Court invoked section 81(3) of the Constitution, in a matter involving two adult men convicted of having presumably consensual sexual relations and impregnating two girls aged 15 years of age. The first accused subsequently took the young girl as his wife while the other gave the young girl two small sums of money after he had sexually exploited her. In each case, the accused was sentenced to 24 months imprisonment, half of which was suspended. On review, the High Court noted with concern that the sentences handed down by the trial court trivialised the constitutional protection of children's rights.⁷⁰

The review judge underscored that courts were constitutionally mandated to adopt a reasonable interpretation consistent with international law,⁷¹

“Gone are the days when it was enough for a judicial officer to be insular in his jurisprudence: attention must be paid to international best practices, particularly on matters that impinge on the rights of vulnerable groups, such as children. The current position that Zimbabwe holds on the African continent requires judicial officers to rise to the responsibility that go with it and help, if not lead, in setting judicial standards and benchmarks for the protection of children”.

Charewa J underscored the importance of the constitutional protection of children in Zimbabwe, and cautioned judicial officers against paying mere lip service to these rights.⁷² The significance of the paramountcy of the best interests of the child in all court proceedings was emphasised, including handing down appropriate sentences that serve as a deterrent for those preying on children.⁷³ The constitutional obligation placed on the courts, and the High Court in particular, by section 81(3), makes it imperative to reconsider the sentencing regime for sexual offences. In the judge's view, “the courts must be seen to apply the law in a manner that achieves the intended aim of the legislature which is to effectively protect children from predatory older persons”. In reaching his judgement Charewa J relied heavily on international and regional law and opined that, under the circumstances, an effective sentence of not less than three years should be imposed in these cases, on an incremental basis for those accused who are twice the victims' ages, are married with

69 *S v Banda; S v Chakamoga* (CRB GVE 644/15, CRB Mhw 450/15, HH 47-16) [2016] ZWHHC 47 (20 January 2016).

70 *S v Banda; S v Chakamoga supra* 1.

71 S 327(6) of the Constitution.

72 *S v Banda; S v Chakamoga supra* 2.

73 *S v Banda; S v Chakamoga supra* 3.

children of their own, and impregnate the young persons or infect them with sexually transmitted diseases other than HIV.⁷⁴

4 2 4 *Child marriages*

The approach that courts are obliged to offer adequate protection to children is also evident in the widely celebrated Constitutional Court judgement against child marriages in *Mudzuru v Ministry of Justice, Legal & Parliamentary Affairs*.⁷⁵ Two young women, acting in the public interest, applied for a declaratory order to the Constitutional Court asking that the minimum age of marriage be set to 18 and that no person under this age should be allowed to enter a marriage. The application was based on section 78(1) of the Constitution, which provides that every person who has attained the age of 18 years has the right to found a family; read together with section 81(1) of the Constitution, which accords special protection to children. In terms of the then applicable law, the Marriage Act⁷⁶ and the Customary Marriage Act, a girl above the age of 16 years was allowed to marry.

There were four issues before the Court:⁷⁷ (a) *locus standi* of the applicants since they were no longer children; (b) whether section 78(1) sets 18 as the minimum age of marriage; (c) if so, did the coming into force of the Constitution render invalid section 22(1) of the Marriage Act or any other law authorising a girl under 16 to marry; and (d) if it did, what relief should be granted.

On the first issue, the Court found that the applicants had the *locus standi* to bring the matter in the public interest because children are a vulnerable group in society whose interests constitute a category of public importance.⁷⁸ The Court was satisfied that the applicants were acting in the public interest specially to protect girls' rights. Malaba DCJ (as he then was) writing for a unanimous court held that,

"Children fall into the category of weak and vulnerable persons in society. They ... have no capacity to approach a court on their own seeking appropriate relief for the redress of legal injury they would have suffered. The reasons for their incapacity are disability arising from minority, poverty and socially and economically disadvantaged positions. The law recognises the interests of such vulnerable persons in society as constituting public interest".⁷⁹

74 *S v Banda; S v Chakamoga supra* 7.

75 *Mudzuru v Ministry of Justice, Legal & Parliamentary Affairs* CC 12-15. See Sloth-Nielsen and Hove "Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others: A review" 2016 *African Human Rights Law Journal* for an in-depth discussion of the case.

76 In particular, S 22 provided for the marriage of the girls under the age of 16 years or boys under 18 years with the written consent of the Minister of Justice and Parliamentary Affairs.

77 *Mudzuru supra* 7.

78 *Mudzuru supra* 12.

79 *Mudzuru supra* 24.

On the second issue, the Court pronounced that section 78 of the Constitution, as read with section 81(1), makes it clear that any person below the age of 18 years is a child and cannot start a family.⁸⁰ The Court noted that the enactment of sections 78(1) and 81(1) of the Constitution was born out of Zimbabwe's commitment to provide greater protection for the fundamental rights of the child as provided for in international and regional law. According to the Court, the obligation imposed by article 21 of the ACRWC to observe 18 as the minimum age to marry was clear and Zimbabwe was duly bound to comply with it and abolish child marriages.⁸¹

Thirdly, the Court declared provisions in the Marriages Act and the Customary Marriages Act unconstitutional, from the date of the judgement in 2016. The applicants argued that, because

“the ... government failed to take legislative measures to repeal s 22(1) of the Marriage Act, it has continued to provide...legitimacy to child marriages entered into after 22 May 2013”.

The Court opined that “invalidity of existing legislation inconsistent with a constitutional provision occurs at the time the constitutional provision comes into force and not at the time a fundamental right is said to be infringed or when an order of invalidity is pronounced by a court”.⁸² Lastly, the Constitutional Court declared, as its first children's rights judgement since its creation, that child marriages are unconstitutional.

Sloth-Nielsen and Hove lists three ways in which the Mudzuru judgment made significant jurisprudential contribution: “first, with respect to legal standing to bring a constitutional challenge under the Zimbabwean Constitution; second, with respect to the use of international treaty law and foreign case law; and third, in its purposive approach to the interpretation of the relevant constitutional provisions relating to child marriages”.⁸³ We agree with this view and note that the Mudzuru judgement is undoubtedly one of the Zimbabwean judiciary's trailblazing rulings.

4 2 5 Judicial corporal punishment

In *S v Chokuramba*⁸⁴ the Constitutional Court was tasked to confirm the declaration of unconstitutionality of judicial corporal punishment from the High Court.⁸⁵ The High Court had declared section 353 of the Criminal Procedure and Evidence Act, which permitted the sentence of whipping of *juvenile* male offenders, unconstitutional. In terms of section

80 *Mudzuru supra* 45.

81 *Mudzuru supra* 43.

82 *Mudzuru supra* 47.

83 Sloth-Nielsen and Hove 2016 *AHRLJ* 555

84 *S v Chokuramba* (CCZ 10/19 Constitutional Application No. CCZ 29/15) [2019] ZWCC 10 (03 April 2019).

85 *S v C (A Juvenile)* (CRB R 87/14) [2015] ZWHHC 718 (30 December 2014).

175(4) of the Constitution, the High Court referred the matter to the Constitutional Court for confirmation of the order of invalidity.

In Court, three key issues were up for determination: the constitutionality of section 353 of the Criminal Procedure and Evidence Act which allowed the use of corporal punishment as a sentence against male *juvenile* offenders; the meaning of the phrases “inhumane punishment” and “degrading punishment” and whether judicial corporal punishment amounts to ‘inhuman’ or “degrading punishment”. The Constitutional Court confirmed the order of invalidity and ruled that judicial corporal punishment was by nature, intent and effect an inhuman and degrading punishment within the meaning of section 53 of the Constitution.⁸⁶ The Court emphasised the centrality of section 53 in the constitutional protection of human rights in Zimbabwe. Malaba DCJ (as he then was) opined that the value system underpinning the Constitution was instructive,⁸⁷ the Court held that the object and purpose of section 53 is to afford protection to human dignity as well as physical and mental integrity.⁸⁸ Human dignity is a foundational value which consequentially gives rise to all fundamental rights, and the Court made reference to inherent human dignity as a guiding provision.⁸⁹ The Court underscored the fact that:

“Human dignity is a special status which attaches to a person because he or she is a human being ... Human dignity is inherent in every person all the time regardless of circumstances or status of the person. Human dignity is not a creature of State law; the law can only recognise the inherence of human dignity in a person and provide for equal respect and protection of it.”⁹⁰

In terms of section 86(3) of the Constitution, the limitations clause, the right to dignity and right not to be subjected to inhuman and degrading punishment are non-derogable rights. Therefore, no law may limit these rights and no person may violate them.

In determining what constitutes inhuman or degrading treatment, the Court was guided by the right to human dignity. Malaba DCJ noted that the appropriate approach when interpreting a provision guaranteeing a fundamental right must be purposive, broad, progressive and a value-based approach.⁹¹ Following a purposive approach towards section 53, the Court opined that if punishment invades a person’s human dignity then it is inherently inhuman.⁹² Judicial corporal punishment, in the Court’s view, brutalises the recipient as it violates their physical and mental integrity. Furthermore, punishment is degrading if the recipient

86 The section guarantees freedom from torture or cruel, inhuman or degrading treatment or punishment.

87 S 5 of the Constitution.

88 *Chokuramba supra* 13.

89 S 51 of the Constitution.

90 *Chokuramba supra* 19.

91 *Chokuramba supra* 17.

92 *Chokuramba supra* 22.

is, according to the Court, exposed to disrespect and contempt from fellow human beings. Lastly, the fact that punishment arouses fear, anguish or inferiority in the person being punished means that it can be considered degrading.

Addressing alternative sentencing options and dismissing that corporal punishment can serve the interests of keeping children in conflict with the law out of prison, the Court stated that:⁹³

“Keeping male ... offenders out of jail cannot justify the imposition of inhuman or degrading punishment ... as the means of securing the legitimate objectives of punishment ... Human dignity may not be infringed upon for any reason. No interest, such as saving the ... offender from imprisonment, can justify infringement of human dignity. Interpretation of what constitutes the best interests of the ... offender cannot be used to justify practices which conflict with ... human dignity and right to physical integrity ... Judicial corporal punishment is not in the best interest of the male juvenile”.

Apart from relying on international law, in particular the UNCRC, ACRWC and the Beijing Rules, the Court utilised the best interests principle emphasising its centrality in determining appropriate sentences for child offenders.⁹⁴ The Court was wary of competing interests and pointed out that, in as much as the best interests should be a primary consideration in every decision affecting the child, this principle will not always be the single overriding factor to be considered. Rightfully, the Court declared that in those exceptional circumstances, a child's best interests must be the subject of active consideration. Active consideration, in this case refers to a demonstrated fact that the child offenders' interests have been explored and taken into account as a primary consideration in the choice of appropriate sentences for juvenile offenders.⁹⁵

The Court noted that, the abolition of judicial corporal punishment should give new impetus to the establishment of a well-equipped juvenile justice system that is specifically responsive to the needs of juvenile offenders and which will also contribute to their reintegration into society.

This judgment is important for several reasons: firstly, it underscores the fact that child offenders are individual rights holders whose right to human dignity is not created or awarded by the State but rather requires legal protection at all times. Secondly, it emphasises that sentencing child offenders should be a less formal and more inquisitorial process that is able to provide sentences which are geared towards rehabilitation of children in line with principles of restorative justice. Although the *Chokuramba* judgement was a big win for children's rights, the delay by the Constitutional Court in handing down judgement is a grave concern.

93 *Chokuramba supra* 40.

94 *Chokuramba supra* 51.

95 *Chokuramba supra* 52.

5 Conclusion: Giant leaps or baby steps?

This article has done three things. Firstly, it looked at Zimbabwe's performance in implementing children rights under the UNCRC and the ACRWC and found that Zimbabwe is still grappling with a significant number of children's rights issues. Secondly, the article reflected on how Zimbabwean courts, under the LH Constitution, conceptualised children's rights in the absence of a children's rights clause. The lack of a children's rights clause in the LH Constitution resulted in slow progress, referred hereto as "baby steps", in the development of children's rights via courts. However, we acknowledge that lawyers and judges did the best they could in the context of broad human rights provisions and applied them to protect children's rights as seen in the judicial corporal punishment and freedom of religion judgements. Thirdly, we analysed the emerging children's rights jurisprudence under the 2013 Constitution, reviewing cases between 2013-2019. Under this period, we demonstrated how Zimbabwean courts have engaged with children's constitutionally protected rights resulting in a progressive and promising jurisprudence. This is evident in how the High Court has been a front-runner in shaping the contours of children's constitutional rights resulting in the development of a fledgling children's rights jurisprudence in the areas of child justice – limiting the detention of child offenders to the shortest period of time; underscoring the role of courts in protecting children from sexual exploitation and developing the common law in as far as it denied children born out of wedlock from inheriting because of their "illegitimacy" status.

Section 81 of the Constitution is a powerful tool for the Constitutional Court, together with other superior courts, to set promising and transformative child rights jurisprudence, such as the ones we have seen on child marriages and judicial corporal punishment. Section 81 has also been used in conjunction with other rights, such as the use of human dignity as a core value in the *Chokuramba* case dealing with judicial corporal punishment. Unlike under the LH Constitution in which rights were construed in general, we see the children's rights provision taking centre stage and operating as the fulcrum in the interpretation of children's rights.

The constitutionalisation of children's rights in the 2013 Constitution is a watershed moment in how courts interpret children's rights in Zimbabwe. The courts' treatment of children's rights has been far more engaging. The emerging jurisprudence demonstrates how children's rights and child law in Zimbabwe is replete with potential for further developments. From the discussion above, we submit that Zimbabwe is making decent and promising progress, not quite giant leaps yet, in the development of children's rights via courts. Progress is owed, in no small part, to a progressive Constitution which has entrenched children's rights as opposed to the LH Constitution.