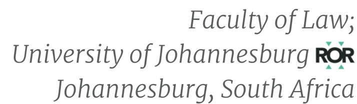
Chapter 1

Striking a Balance: The Constitutional Court's Stand on Corporal Punishment of Minors and the Right to Personal Freedom and Security

S v Williams[1]

Roxan Laubscher



Faculty of Law;
University of Johannesburg
Johannesburg, South Africa

> "If the State, as role model *par excellence*, treats the weakest and the most vulnerable among us in a manner which diminishes rather than enhances their self-esteem and human dignity, the danger increases that their regard for a culture of decency and respect for the rights of others will be diminished" (*S v Williams* par 47).

Abstract

S v Williams stands as a landmark constitutional case that fundamentally transformed South Africa's approach to corporal punishment and children's rights. The case challenged the constitutionality of juvenile whipping under section 294 of the

Criminal Procedure Act within the framework of the Interim Constitution. The Constitutional Court's deliberation centred on whether this form of punishment constituted "cruel, inhuman or degrading treatment" prohibited by section 11 of the Interim Constitution. In its groundbreaking judgment, the court ruled that juvenile whipping violated the constitutional rights to human dignity and freedom and security of the person, rejecting arguments that corporal punishment served as an effective deterrent or alternative to imprisonment. The court emphasised that a culture of authority legitimising violence contradicted the constitutional values that South Africa aspired to uphold following its painful history of institutionalised violence. This judgment catalysed what scholars term the "constitutionalisation of children's rights" in South Africa, leading to subsequent legal developments including the abolition of corporal punishment in schools through the South African Schools Act and, eventually, the invalidation of the common law defence of 'reasonable chastisement' for parents in *Freedom of Religion South Africa v Minister of Justice*. The *Williams* judgment established crucial precedents regarding the interpretation and application of constitutional rights concerning children, recognising them as rights-bearers deserving equal protection from all forms of violence – whether from public or private sources. Beyond corporal punishment, the case has influenced judicial considerations of children's best interests across various contexts, including adoption, sentencing of caregivers, education rights and juvenile justice. By emphasising the state's obligations to respect, protect and fulfil children's constitutional rights, *S v Williams* represented a decisive break with South Africa's authoritarian past and established an enduring framework for protecting the dignity, equality and security of the nation's most vulnerable citizens.

1.1 Introduction

The right to human dignity, along with the right to freedom and security of the person, forms part of the central rights and values underlying the South African Bill of Rights. Guaranteeing these rights allowed the South African constitutional order to move

forward, transitioning from a system of arbitrary authoritarian rule to a system premised on justified democratic rule. The Constitutional Court's ruling in *S v Williams* highlighted the prominence of the right to freedom and security of the person, together with the right to human dignity, in our constitutional order. The *Williams* ruling has had a lasting effect on our courts' interpretation and application of rights, especially regarding the rights of children and their personal freedom and security in subsequent judgments. This chapter highlights the most significant aspects of the judgment and shows the ripple effect that these aspects have had on the jurisprudence of the South African courts in the years that followed.

The issue in the *Williams* case was whether a sentence of juvenile whipping, in terms of section 294 of the Criminal Procedure Act 51 of 1977, was consistent with the provisions of the Constitution of the Republic of South Africa, 1993 (the Interim Constitution). First, the court highlighted the function and role of the courts in upholding our new constitutional order as well as making sure that the rights of "the weakest and the most vulnerable, are defended and not ignored".[2] Second, the court pointed out that the issue in this case was not the differences between adult and juvenile whipping, but the constitutionality of juvenile whipping.[3] It was argued that the impugned provisions infringed sections 8, 10, 11, and 30 of the Interim Constitution (the rights to equality, dignity, personal freedom and security and the rights of children respectively), although the court chose to focus mainly on the rights to personal freedom and security and human dignity.[4] The court proceeded to consider the matter in terms of the right to personal freedom and security; more specifically, whether juvenile whipping (corporal punishment for juveniles) represented a "cruel, inhuman, or degrading treatment or punishment" within the meaning of section 11 of the Interim Constitution, various international law provisions and foreign case law.[5] The court pointed out that

> "[t]he process of political negotiations which resulted in the Constitution were a rejection of violence… The Government has a particular responsibility to sustain

> and promote the values of the Constitution. If it is not exacting in its acknowledgement of those values, the Constitution will be weakened. A culture of authority which legitimates the use of violence is inconsistent with the values for which the Constitution stands."[6]

The court extensively considered the limitation of the right in terms of the previous limitation clause (section 33) of the Interim Constitution and, therefore, concluded that this form of punishment was indeed an infringement of sections 10 and 11 of the Interim Constitution.[7] This chapter explores the significant aspects of the *Williams* judgment and tracks the impact and development of these aspects in various selected subsequent cases.

1.2 Significant aspects of the judgment

1.2.1 Interpretation, application and limitation of the right to freedom and security of the person as it applies to children

One of the reasons why the *Williams* judgment remains so prominent in South African law is the court's thorough consideration of the interpretation, application and limitation of the fundamental constitutional right to personal freedom, and security, particularly when applied to vulnerable individuals, particularly children. Obviously, this right is extremely important when considering the past discriminating practices of the previous apartheid government and the gross violations of the right to freedom of the person which occurred during this era. From the outset, the court emphasised the role of the judiciary in creating a "new culture 'founded on the recognition of human rights'".[8] The court further stated that this duty meant that courts should be particularly careful when considering the impact that the exercise of their functions had on the individuals before it, in particular the interests of the vulnerable and the weak, which must be protected and not ignored.[9] One of the implications of this new role of the courts, the court argued, was that "old rules and practices can no longer be taken for

granted; they must be subjected to constant re-assessment to bring them into line with the provisions of the Constitution".[10] Regarding the matter of adult whipping, the court stated that it was common cause between the parties that adult whipping was not consistent with the Constitution,[11] notwithstanding that it was still permissible for males between 21 and 30 years of age amidst growing criticism and condemnation of the practice, both here and abroad.[12] The state, however, stressed the importance of the differences between adult and juvenile whipping, particularly regarding the manner in which the punishment was executed and restricted only to male youths.[13] The court was, however, correct in asserting that it is not tasked to assess the differences between adult and juvenile whipping, but to ascertain the constitutionality of juvenile whipping on its own merits.[14]

Regarding the provisions related to juvenile whipping,[15] the age limit was set at a minimum of nine years of age, while a sentence of whipping was not allowed in the case of "the existence of some psychoneurotic or psychopathic condition contributed towards the commission of the offence",[16] the maximum number of strokes that may be imposed on a juvenile is seven on one specific instance,[17] the whipping must be inflicted over the buttocks, which must be covered with regular clothing,[18] a parent or guardian may be present during the whipping.[19] Furthermore, no whipping may be inflicted unless a district surgeon or an assistant district surgeon has certified that the juvenile "is in a fit state of health to undergo the whipping",[20] while juveniles over the age of 17 years may be sentenced to a whipping in addition to another sentence, provided that where the juvenile has been given a prison sentence, such prison sentence must be suspended in its entirety.[21]

The court briefly considered various rights applicable to the issues raised in this matter,[22] but for purposes of this discussion, this chapter only focuses on the right to freedom and security of the person in section 11 of the Interim Constitution. Section 11 of the Interim Constitution reads as follows:

> "(1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial. (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment."

The court pointed out that this provision explicitly refers to seven types of prohibited treatment, namely: "torture; cruel treatment; inhuman treatment; degrading treatment; cruel punishment; inhuman punishment and degrading punishment".[23] These prohibitions, the court held, are similar to those found in various international instruments, and are usually expressed in absolute terms – leaving no room for justification.[24] Regarding the definitions of the terms, the court referred to the meanings indicated in the Oxford English Dictionary, which defines "cruel" as "causing or inflicting pain without pity", "inhuman" as "destitute of natural kindness or pity, brutal, unfeeling, savage, barbarous" and "degrading" as "lowering in character or quality, moral or intellectual debasement".[25] In South African case law, the court held, there are not many references to the word "cruel"; it is mostly used in cases pertaining to animal cruelty.[26] The court pointed out that we could, therefore, learn much from the approaches of international law and foreign jurisdictions when giving meaning and content to provisions similar to our section 11.[27]

In terms of international law, the terms have not usually been interpreted on their own, but rather as phrases. For example, when the United Nations Human Rights Committee (UNHRC) had to interpret a similar section in the International Covenant on Civil and Political Rights (ICCPR), it held that it was not "necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied".[28] Accordingly, the UNHRC found that when assessing what actions constitute inhuman or degrading treatment, such a determination would depend on all relevant circumstances of the facts at hand; for

example, the type of treatment and its duration, the physical or mental effects of the treatment, as well as the sex, age and state of health of the individual involved.[29] In the European context, Article 3 of the European Convention makes a distinction between inhuman and humiliating treatment, according to the severity of the pain caused.[30] Severe mental or bodily anguish, therefore, results from inhumane treatment, while torture is an intensified version of this.[31] The European Court of Human Rights also draws a distinction between degrading and inhuman punishment, holding that a punishment cannot be deemed inhumane unless a specific degree of suffering is experienced.[32]

Both the Constitution of the United States (Eighth Amendment) and the Canadian Charter of Rights and Freedoms (Article 12) prohibit "cruel and unusual punishment".[33] In the case, *Furman v Georgia*, although with reference to capital punishment, the nature of "cruel and inhuman punishment" was said to be located in the fact that it objectified the individual, and not so much in the severity of the pain that is inflicted – thus nullifying an individual's human dignity.[34] This view was later confirmed in *Gregg v Georgia*.[35] In the Canadian context, in *Smith v The Queen*, it was held that "cruel and unusual punishment" was as a "compendious expression of a norm" and the applicable test, therefore, was "whether the punishment prescribed is so excessive as to outrage the standards of decency".[36] The court in *Williams*, however, remarked that since our Constitution is much different from the American Constitution, it does not seem necessary to adopt the same approach in considering evolving societal "standards of decency", as these would be akin to considerations of public opinion, which the Constitutional Court has previously found to be inconclusive.[37] The *Williams* court, therefore, rightly remarked that "[i]n determining whether punishment is cruel, inhuman or degrading within the meaning of our Constitution, the punishment in question must be assessed in the light of the values which underlie the Constitution" and can, therefore, not be assessed according to the standards followed in other systems which are very different from our own Constitution and constitutional history.[38]

The court remarked that the decisions of our neighbouring countries, with similar legal systems and history, could also be helpful in assessing the meaning and content of the constitutional rights to personal freedom and security.[39] In the Namibian context, even though the Namibian Constitution does not have a general limitation clause, the Namibian Supreme Court held in *Ex Parte Attorney-General, Namibia*, that corporal punishment (for juveniles and adults) amounted to "cruel or degrading punishment" and was, therefore, inconsistent with the Namibian Constitution.[40] The same conclusion was reached in the Zimbabwean cases of *S v Ncube; S v Tshuma and S v Ndhlovu*,[41] *S v F*[42] and *S v Juvenile*[43] – characterising corporal punishment as an "inhuman and degrading" punishment.

Finally, the court further held that there was a growing consensus in the international community on the impermissibility of the use of corporal punishment within the criminal justice system – various jurisdictions having already abolished the practice, including the "United Kingdom, Australia (except in the State of Western Australia), the United States of America, Canada, Europe and Mozambique".[44] Consequently, it seems that there was already strong international condemnation of the practice. The court, however, noted that when interpreting section 11(2) of the Constitution, regard should not only be had to other jurisdictions, but to the purposive approach to the interpretation of the rights enshrined in Chapter 3 of the Constitution and the need to seek the purpose of the particular rights within the context of our South African society.[45]

Regarding the state's argument related to the differences between adult and juvenile whipping as a justification for retaining juvenile whipping as a form of punishment, the court in *Williams* held that, in the court's view, the similarities between these forms of punishment far outweighed the differences:

> "There is a small difference in the dimensions of the instrument used; the adult is stripped naked and trussed, the strokes being delivered on bare flesh while the juvenile's strokes are inflicted on normal attire, without

> him being tied; there is no limit to the number of times a juvenile may be sentenced to receive strokes while the adult may only be so sentenced twice, and never within a period of three years of the previous sentence of strokes. Both occur in a state institution; the maximum number of strokes that may be imposed is seven in respect of both. Both involve a physical beating with a cane wielded by a State employee, a virtual stranger to the person being punished. The severity of the pain inflicted is arbitrary, depending as it does almost entirely on the person administering the whipping. Although the juvenile is not trussed, he is as helpless. He has to submit to the beating, his terror and sensitivity to pain notwithstanding. Nor is there any solace to be derived from the fact that there is a prior examination by the district surgeon. The fact that the adult is stripped naked merely accentuates the degradation and humiliation. The whipping of both is, in itself, a severe affront to their dignity as human beings."[46]

There are, therefore, very few differences between adult and juvenile whipping; it seriously affects their human dignity and personal freedom in a similar way.

Regarding other justifications for corporal punishment for juveniles proffered by the state, it was contended that the character of adults was already fixed, while those of children was still in the process of formation and, therefore, susceptible to correction and reform, which could entail that corporal punishment may still have an effect on children, while this is not the case for most adults.[47] The *Williams* Court, however, did not agree; the court argued that children, as a vulnerable group, should be protected from trauma and "experiences which may cause [them] to be coarsened and hardened", particularly because of their impressionable and sensitive natures.[48] Although the court briefly considered the similarities of judicial corporal punishment and corporal punishment practiced in schools, it found that the latter issue was not before it and that it could, therefore, not pronounce on that issue in this case.[49]

The court then moved on to contextualising the interpretation of the section 11 right within South Africa's constitutional history. The court remarked that, because of our history of apartheid, South Africa has already "lagged behind" the rest of the word with respect to recognition of rights, and moving away from punishments that emphasise "retribution and vengeance" rather than "correction, prevention and the recognition of human rights".[50] Since the 1980s, the court continued, our country has endured widespread private and public violence, including violent crimes, such as murder and armed robbery.[51] The negotiations that led to our new constitutional order, however, was founded on an agreement rejecting violence and retribution – it can, therefore, be said that "the institutionalised use of violence by the State on juvenile offenders as authorised by section 294 of the Act is a cruel, inhuman and degrading punishment".[52] The state has a duty to uphold the values on which our democracy is founded; it would undermine the Constitution if the state is allowed to disregard these values by inflicting violence on its subjects.[53]

Next, the court considered the second stage in the two-stage inquiry into the justifiability of the limitation of the right in question. In the first stage, which was discussed above, the court established that the right in section 11 of the Interim Constitution has been infringed.[54] In the second stage, a court must establish whether such limitation is reasonable and justifiable within the framework of the limitation clause in section 33 of the Interim Constitution.[55] According to the court, the test for justifiability in section 33 comes down to three questions:

> "(a) whether the means used are reasonable; (b) whether they are justifiable in the context of the civilised society we hope we are or which we, through this Constitution, are aspiring to be; and (c) whether they are necessary to attain the objective."[56]

Essentially, this amounts to a proportionality test – "a process of weighing up the individual's right which the State wishes to limit against the objective which the State seeks to achieve

by such limitation", which test must ultimately occur against the backdrop of the values underlying the Constitution and our constitutional history.[57] Referring to the application of the proportionality test by the court in *S v Makwanyane* and the way in which the German Constitutional Court applied their proportionality test, the court remarked that a court should consider the purpose of the limitation, whether the limitation achieves the purpose and whether there is a balance between the purpose of the limitation and the right in question.[58] Notably, these factors very closely resemble the factors in the current Constitution's limitation clause in section 36.

There were two purposes proffered by the state for the implementation of juvenile whipping, first that it "constitutes a better alternative to imprisonment" for juveniles, and second, that juvenile whipping acts as a deterrent.[59] With reference to the first purpose, the court remarked that it seemed that juvenile whipping was only an option because there is a distinct lack of alternative mechanisms to deal with juvenile offenders and that "the price to be paid for this state of unreadiness is to subject juveniles to punishment that is cruel, inhuman or degrading", which state of affairs, the court rightly remarked, is "untenable".[60] Pointing to the shift in emphasis regarding the aims of punishment, the court held that although the "traditional objectives of punishment, namely, prevention, retribution, deterrence and rehabilitation, are no doubt still applicable", there has been "a gradual shift of emphasis away from the idea of sentencing being predominantly the arena where society wreaks its vengeance on wrongdoers", rather focusing on rehabilitation and "humanising" the criminal justice system.[61] Approaches to sentencing in the juvenile justice system, the court held, are also changing, focusing more on alternative correctional supervision, community service, victim–offender mediation and juvenile offender schools.[62] The (Interim) Constitution, the court held, has created an important framework that allows for the implementation of major reforms to our criminal justice system. "Every person" is eligible for the rights outlined in its Bill of Rights, encompassing both adults and children, women and men, as well as convicts and detainees – human dignity and the prohibition against harsh,

inhuman, or degrading penalties are plainly highly valued in the Constitution; the State must meet extremely strict standards before these rights can be restricted.[63] Regarding the second purpose of juvenile whipping, namely deterrence, the state stressed that juvenile whipping makes crime unappealing is, therefore, a justifiable goal. However, the court pointed out, the methods must be appropriate and justified, and there is not any solid proof that corporal punishment is more effective than other forms of punishment in deterring crime.[64] Furthermore, the court argued that the marginal deterrence value of juvenile whipping, which involves physical pain, does not justify its existence. The court pointed out that, while retribution is a legitimate element of punishment, it should not be the sole reason for punishment and should not be the overriding factor.[65] The supposed benefits of juvenile whipping, the court stressed, must be balanced against the rights that it infringes upon.[66] Corporal punishment, the court held, unlike other forms of punishment, involves the deliberate infliction of physical pain by one person onto another, sanctioned by the state.[67] The level of pain inflicted can be unpredictable, as it depends on the individual administering the punishment, with the court only specifying the number of strokes.[68] There is no dignity in this process, either for the recipient or the person delivering the punishment, as it degrades all involved.[69] For these reasons, the court concluded that there are no interests that justify retaining the practice – "[i]t has not been shown that there are no other punishments which are adequate to achieve the purposes for which it is imposed. Nor has it been shown to be a significantly effective deterrent".[70] On the contrary, the court held, the imposition of corporal punishment is more likely to coarsen and degrade children, rather than rehabilitate them.[71] The court, therefore, concluded that the imposition of corporal punishment on children is, therefore, an unconstitutional infringement of sections 10 and 11 of the (Interim) Constitution.[72]

1.3 Impact of the judgment

1.3.1 Impact on the interpretation and application of the right to freedom and security of the person and other rights of children

Building on the legacy of the *Makwanyane* case, the *Williams* case's recognition of the rights to dignity and personal freedom and security, particularly considering the egregious human rights violations that occurred during the apartheid era, paved the way for developments regarding the interpretation and application of these rights relating to children in years to come. This part of the chapter considers the approach followed in several cases that dealt with the right to freedom and security of the person after the judgment in *Williams*, particularly regarding the children. In addition, some other cases are also highlighted which emphasise the movement towards "constitutionalisation of children's rights" following the *Williams* decision.

Following the judgment in *Williams*, administering corporal punishment in schools was abolished by the legislature in terms of section 10 of the South African Schools Act 84 of 1996. In *Christian Education South Africa v Minister for Education*[73] the Constitutional Court was called upon to decide the constitutionality of section 10 of the South African Schools Act, which banned the use of corporal punishment in schools. It is important to note that, by the time that *Christian Education* was decided, the 1996 Constitution had come into effect and that the wording of the constitutional provision on personal freedom and security was slightly different than when *Williams* was decided in terms of the Interim Constitution – now the right provided that everyone had the right to be free from violence from public *or* private sources.[74] The appellant, Christian Education of South Africa, an association representing 196 independent Christian schools, contended that this prohibition violated the right of parents to religious freedom and, furthermore, interferes with the right to establish independent schools, the right to participate in the cultural life of their choice, the right to enjoy their culture and to practise their religion.[75] The appellant argued that corporal punishment was part of their religious

beliefs and interfered with their right to religious freedom.[76] In support of their claims, Christian Education cited Bible verses which instructed Christian parents to use corporal punishment in raising and disciplining their children.[77] They argued that parents delegated their parental authority to teachers, and that the corporal punishment was, therefore, administered in terms of biblical prescription.[78]

The Minister of Education opposed the appeal, arguing that corporal punishment violates children's rights to human dignity, equality, protection from maltreatment, neglect, abuse, violence, torture, and cruel treatment.[79] The Minister argued that the Bible verses do not empower or prescribe corporal punishment by teachers, and that parliament has a duty to respect, protect, promote, and fulfil the rights in the Bill of Rights, which rights would be violated by administering corporal punishment.[80] Referring to the judgment in *S v Williams*, the court highlighted that the violence which was sanctioned by judicially imposed corporal punishment was contrary to the values underlying the Constitution and infringed on the rights to dignity and personal freedom and security of the young people concerned.[81] The court looked to a Namibian case similar to the *Christian Education* case, wherein the Namibian Supreme Court found corporal punishment in schools to be inconsistent with the Namibian Constitution and, therefore, unconstitutional.[82] From these cases, the *Christian Education* Court concluded that there was a trend in the southern African case law that considers corporal punishment to be a violation of the dignity and personal security of children.[83] The court further noted that the requirement in section 12 that prohibits violence from public and private sources does not substitute, but is in addition to "the right not to be punished in a cruel, inhuman or degrading way".[84] In terms of section 7(2), the court further argued, that the state has a duty to "respect, protect, promote and fulfill" all rights in the Bill of Rights, and must, therefore, take steps to limit public and private violence.[85] Finally, the court pointed out that "coupled with [the state's] special duty towards children, this obligation represents a powerful requirement on the state to act".[86] The court proceeded to compare the administration of judicially imposed corporal

punishment with corporal punishment in schools, finding that the two settings, although slightly different, shared some significant characteristics, namely both being "detached" and "institutional" environments.[87]

In addition, the court argued that it is important to note our painful history of meeting protesting youth with violence, as well as the extent of the child abuse and neglect prevalent in South African society – these "considerations taken from past and present are highly relevant to the degree of legitimate concern that the state may have in an area loaded with social pain".[88] The court noted that the purpose of the Schools Act was to make a decisive break with our "authoritarian past" by introducing new principles of learning in terms of which problems were solved by reason, rather than by force.[89] Accordingly, the court argued, that banning physical punishment in schools was more than just a practical attempt to address behavioural issues in a different way.[90] Abolition of corporal punishment served a moral and symbolic purpose that was obviously meant to uphold the inherent dignity and emotional and physical integrity of every child.[91] Supervising the use of physical punishment in schools is another significant challenge, as it is inevitable that it will be administered by different teachers or institutions with varying degrees of force and may be excessive.[92] The court, therefore, concluded that the entire symbolic, moral, and educational purpose of abolishing corporal punishment would be compromised if some schools were exempted from this prohibition. It would also call into question the state's ability to uphold its obligation to protect all individuals from violence.[93] The court, however, chose not to decide the issue of corporal punishment by parents in their own home.[94]

Almost a decade later, the courts had another opportunity to consider the constitutionality of corporal punishment, this time in the context of parents regarding their own children. In *YG v S*[95] the High Court found that the common law defence of "reasonable chastisement" on a charge of assault for parents regarding the physical punishment of children, was unconstitutional as it infringed on the human dignity, equality,

the right to be free from all forms of violence from public or private sources, the rights of children and the right not to be treated in an inhuman or degrading way.[96] Referring to both the *Williams* and *Christian Education* judgments, the High Court held that the arbitrary nature of physical chastisement is a very relevant consideration when ascertaining the justifiability of the infringement of children's rights in the case of physical punishment.[97] Consequently, the High Court found the arbitrary nature of physical punishment to be "out of line" with "the child-centred model of rights demanded by our Constitution".[98] In addition, the High Court highlighted that the reference in section 12 of the Constitution to the prohibition of violence from public *and* private sources, entails that victims of violence in the home should have the same protections as those who are the victims of assault from the public domain.[99] Put differently, a child who endures violence from a parent in the home should have the same legal protections as in the case of abuse of children originating from a third party.[100] According to the High Court, the defence of "reasonable chastisement" against a charge of assault infringes on children's right to dignity in the following way:

> "the defence of reasonable chastisement permits (and obliges) the State to treat him or her with a lesser level of concern and gives the State less power to protect her or his rights. This is inherently degrading for children who are effectively treated as second-class citizens by the law in this regard."[101]

In this sense, the High Court argued, the defence of "reasonable chastisement", therefore, not only undermines the human dignity of children, but also infringes on the equality of children by treating them differently from adults who endure similar incidences of assault.[102] Furthermore, the High Court held that the defence infringes on the physical integrity of children and is "antithetical to the constitutional right prioritising the best interests of the child"; undermining the special duty of the state towards children to protect their best interests in all matters.[103] Consequently, the High Court found

the common law defence unconstitutional.[104] One of the parties in the matter, Freedom of Religion South Africa, however, appealed against the High Court's ruling to the Constitutional Court.

Regarding the appeal, the Constitutional Court in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development*,[105] Freedom of Religion South Africa sought to challenge the declaration of unconstitutionality of physical punishment of children by their parents issued by the High Court. The Constitutional Court, basing its argument on the right to personal freedom and security in section 12 of the Constitution, the court held that because of our "painful and shameful history of widespread and institutionalised violence", the government had a duty to protect everyone against "all forms" of violence, from public, as well as private sources.[106] Within the context of the corporal punishment of children, the court once more referred to the *Williams* judgment, stating that a society that legitimises violence goes against the founding values of the Constitution.[107] The court reiterated that "all forms of violence" in terms of section 12 includes all types of violence, regardless whether such violence is categorised as "moderate, reasonable or extreme",[108] therefore, the court held that

> "parental chastisement of a child, however moderate or reasonable does, in my view, meet the threshold requirement of violence proscribed by this constitutional provision and, therefore, limits the right in section 12(1)(*c*)."[109]

Referring to *Williams* and *Christian Education*, the court further emphasised the importance of children's right to human dignity[110] and the paramountcy of the best interests of children in terms of section 28 of the Constitution.[111] The court stressed that the best interests of children is of paramount importance in *every matter* concerning a child, "regardless of the belief behind the practice".[112] The court concluded that, as there were other less restrictive means available to discipline children, for instance the positive parenting approach, as well as "the right to be free from all forms of violence or to be treated with dignity,

coupled with what chastisement does in reality entail… speak quite forcefully against the preservation of the common law defence of reasonable and moderate parental chastisement".[113] Consequently, the court declared parents' common law defence of reasonable chastisement against a charge of assault, unconstitutional and invalid.[114] Although this conclusion should be welcomed as a triumph for constitutional values, some uncertainty remains. Bekink rightly points out that the prosecuting authority may experience difficulties in applying the decision in practice, while the broad public may also not support the judgment and continue to use physical punishment at home.[115] Greeff also indicates that, regardless of the *Freedom of Religion SA* judgment, the practice of corporal punishment in South Africa continues both at home and at school:

> "As recently as October 2016, the Committee on the Rights of the Child stated in their concluding comments on the second periodic report that corporal punishment is still practiced extensively throughout South Africa in homes and schools. In the General Household Survey of 2011, ninety-two per cent of the child respondents indicated that they experienced corporal punishment at school. Fortunately, this number dropped to 5.7 per cent nationally in 2018104 but jumped again in 2019 to 6.8 per cent of respondents."[116]

Considering the unconstitutionality of physical punishment of children, the provision of government sponsored parental education programmes on positive disciplinary methods will, therefore, be key in educating parents on alternatives to corporal punishment.[117]

Perhaps one of the most important effects of the *Williams* case is the trend it initiated to emphasise the importance of the protection of the constitutionally enshrined rights of children and upholding their best interests in various contexts, also referred to by Binford as the "constitutionalisation of children's rights".[118] So, for example, in *Fraser v Children's Court Pretoria North*,[119] the court held that the best interests of the child must be considered and balanced in disputed adoption cases, while

in *Fraser v Naude*, the Constitutional Court denied any further appeal and confirmed an order stating that the best interests of children must be considered in adoption.[120] Furthermore, the Constitutional Court in *Du Toit v Minister for Welfare and Population Development*, held that it was in the best interests of a child to be adopted by both partners of a same-sex couple, and (amongst other things) invalidated certain legislative prohibitions on the adoption of children by same-sex couples.[121] In addition, regarding sentencing, in *S v Howells*[122] a sentence of imprisonment was upheld regarding a mother, provided her children would be cared for during her imprisonment, while in *S v M* the court considered the best interests of the child when sentencing the mother, converting her sentence to a non-custodial one in order for her to continue taking care of her children.[123]

In *AB v Pridwin Preparatory School* the Constitutional Court was called upon to pronounce on the constitutional permissibility of depriving children of their right to education by a private school expelling them because of the behaviour of their parents.[124] The court held that the school failed to indicate how it considered the best interests of the children in making the decision to expel them, and, therefore, infringed on the best interest of the children.[125] In the context of the registration of births, the Constitutional Court in *Centre for Child Law v Director General: Department of Home Affairs* held that the Births and Deaths Registration Act 51 of 1992 treated the registration of the births of legitimate and illegitimate children differently was consistent with the principle of paramountcy of the interests of children and stigmatised children based on the circumstances of their birth.[126] In *Centre for Child Law v Director of Public Prosecutions, Johannesburg,* the court held that certain provisions criminalising the possession or usage of cannabis by children should be declared unconstitutional as the criminalisation of such conduct does not achieve the intended purpose of protecting children and that there are better and less limiting measures to deal with children who engage in such conduct.[127] These are just some of the cases that have focused on the importance of the protection of children and upholding their best interests in matters that affect them following the decision in *Williams*.

1.4 Conclusion

From this discussion it has become clear that the *Williams* case has had a profound and lasting impact on the South African legal system, especially regarding safeguarding the rights and best interests of children. The *Williams* case, although decided in terms of the Interim Constitution, highlighted the importance of protecting the human dignity and personal freedom and security of children – both of which were severely limited by the imposition of corporal punishment by the state. In addition, it was found that the imposition of judicially sanctioned corporal punishment was contrary to the values underlying our constitutional order and could also be regarded as a cruel, inhuman and degrading punishment.

Building on the *Williams* decision, the court in *Christian Education* invalidated the imposition of corporal punishment in schools. Again, the court stressed that the imposition of corporal punishment in the institutionalised setting of schools had a very similar effect on children than that of state-sanctioned corporal punishment, severely infringing children's human dignity and personal freedom and security.

Protecting children from all forms of violence, both from public and private sources, was a further welcome and necessary development in our law. In *YG v S* and *Freedom of Religion SA* the courts invalidated the common law defence of reasonable and moderate chastisement regarding the physical punishment of children by their parents. Recognising that children are not mere extensions or possessions of their caregivers, but individual persons worthy of the same protection against all forms of violence as any adult person, is arguably an even more important development in recognising the equality of children.

In addition, the decision in *Williams*, as well as the subsequent cases highlighted above, set in motion a judicial trend of considering the rights and best interests of children in all matters that concern them. Here one may think of cases like: *Fraser v Children's Court Pretoria North*, *Fraser v Naude* and *Du Toit v Minister for Welfare and Population Development* (in the context of adoptions), *S v Howell* and *S v M* (in the context of sentencing a care giver), *AB v Pridwin Preparatory School* (concerning limitation

of the right to education), *Centre for Child Law v Director General: Department of Home Affairs* (regarding legitimacy of one's birth), and *Centre for Child Law v Director of Public Prosecutions* (regarding criminal prosecution of children for cannabis use or possession). This trend is to be welcomed, and it is hoped that this trend will continue to be developed by our courts in the years to come. Children are indeed vulnerable and inexperienced, which is why it is imperative that we hold their best interest in the highest regard in all matters that affect them.

Endnotes

1 1995 3 SA 632 (CC); also see Sarkin "Problems and challenges facing South Africa's Constitutional Court: An evaluation of its decisions on capital and corporal punishment" 1996 *SALJ* 71 80-84.
2 *Williams* (n 1) par 8.
3 *Williams* (n 1) par 13.
4 *Williams* (n 1) par 15-19.
5 *Williams* (n 1) par 19-53.
6 *Williams* (n 1) par 52.
7 *Williams* (n 1) par 54-92.
8 *Williams* (n 1) par 8.
9 *Williams* (n 1) par 8.
10 *Williams* (n 1) par 8.
11 *Williams* (n 1) par 10.
12 *Williams* (n 1) par 10-11.
13 *Williams* (n 1) par 13.
14 *Williams* (n 1) par 13.
15 *Williams* (n 1) par 14; also see *S v Du Preez* 1975 4 SA 606 (C).
16 s 295(2) of the Criminal Procedure Act; *Williams* (n 1) par 14.
17 s 294(1)(*a*) of the Criminal Procedure Act.
18 s 294(2) of the Criminal Procedure Act.
19 s 294(3) of the Criminal Procedure Act.
20 s 294(5) of the Criminal Procedure Act.
21 s 294(1)(*b*) of the Criminal Procedure Act.
22 These are: the right to equality (s 8), the right to dignity (s 10) and the rights of children (s 30) of the Interim Constitution; see *Williams* (n 1) par 16-18.
23 *Williams* (n 1) par 20.
24 *Williams* (n 1) par 20-21.
25 *Williams* (n 1) par 24.
26 *Williams* (n 1) par 24; see *R v Mountain* 1928 TPD 86 88; and *Hellberg v R* 1933 NPD 507 510.
27 *Williams* (n 1) par 23.
28 *Williams* (n 1) par 26; General Comment 20.4 of the Human Rights Committee 1992 Report.
29 *Williams* (n 1) par 26; also see *Vuolanne v Finland* 96 ILR 649 657.
30 *Williams* (n 1) par 27; also see Van Dijk and Van Hoof *Theory and Practice of the European Convention on Human Rights* (1990) 226-227.
31 *Williams* (n 1) par 27; *Denmark et al v Greece*: Report of 5 November 1969 *Yearbook of the European Convention on Human Rights* XII (1969) 186; also see *The Republic of Ireland v The United Kingdom* (1979-80) 2 EHRR 25 80 par 167.
32 *Williams* (n 1) par 27; see *Tyrer v United Kingdom* (1979-80) 2 EHRR 1 9 par 29.
33 *Williams* (n 1) par 28.
34 *Williams* (n 1) par 28; 408 US 238 (1972) 273.
35 *Williams* (n 1) par 29; 408 US 153 (1976).
36 *Williams* (n 1) par 30; (1988) 31 CRR 193 213-214.
37 *Williams* (n 1) par 37; also see *S v Makwanyane* 1995 3 SA 391 (CC) par 88; also see Laubscher "The death penalty decision: A triumph for human rights and the value of *ubuntu*" in Laubscher and Van

Staden *Landmark Constitutional Cases that Changed South Africa (Vol 1)* (2023) 16-17.

38 *Williams* (n 1) par 37.
39 *Williams* (n 1) par 31.
40 *Williams* (n 1) par 31; 1991 3 SA 76 (NmSC).
41 *Williams* (n 1) par 32; 1988 2 SA 702 (ZSC).
42 *Williams* (n 1) par 32; 1989 1 SA 460 (ZHC).
43 *Williams* (n 1) par 32; 1990 4 SA 151 (ZSC).
44 *Williams* (n 1) par 39-40.
45 *Williams* (n 1) par 51.
46 *Williams* (n 1) par 44-45.
47 *Williams* (n 1) par 46.
48 *Williams* (n 1) par 47.
49 *Williams* (n 1) par 48-49.
50 *Williams* (n 1) par 50.
51 *Williams* (n 1) par 51.
52 *Williams* (n 1) par 52.
53 *Williams* (n 1) par 52.
54 *Williams* (n 1) par 54.
55 *Williams* (n 1) par 54; s 33 of the Interim Constitution reads as follows: "The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation (a) shall be permissible only to the extent that it is (i) reasonable; and (ii) justifiable in an open and democratic society based on freedom and equality; and (b) shall not negate the essential content of the right in question, and provided further that any limitation to (aa) a right entrenched in section 10, 11… shall, in addition to being reasonable as required in paragraph (a)(i), also be necessary."
56 *Williams* (n 1) par 58.
57 *Williams* (n 1) par 58-59.
58 *Williams* (n 1) par 60.
59 *Williams* (n 1) par 61.
60 *Williams* (n 1) par 63.
61 *Williams* (n 1) par 64-67.
62 *Williams* (n 1) par 73-75.
63 *Williams* (n 1) par 76.
64 *Williams* (n 1) par 80.
65 *Williams* (n 1) par 86.
66 *Williams* (n 1) par 89.
67 *Williams* (n 1) par 89.
68 *Williams* (n 1) par 89.
69 *Williams* (n 1) par 89.
70 *Williams* (n 1) par 91.
71 *Williams* (n 1) par 91.
72 *Williams* (n 1) par 92.
73 2000 4 SA 757 (CC); also see the discussion by Bekink "Suid-Afrika se hoogste hof gee die gemeenregtelike verweer van ouerlike bevoegdheid tot redelike en matige tugtiging 'n doodskoot: Nabetragting oor die saak van *Freedom of Religion SA v Minister of Justice and Others* 2020 (1) SA 1 (KH)" 2021 *Tydskrif vir Geesteswetenskappe* 39-56.

74 See Sloth-Nielsen "Southern African perspectives on banning corporal punishment – A comparison of Namibia, Botswana, South Africa and Zimbabwe" in Leviner and Naylor (eds) *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (2019) 245 256; and Skelton "*S v Williams*: a springboard for further debate about corporal punishment" 2015 *Acta Juridica* 336-359.
75 *Christian Education* (n 73) par 2.
76 *Christian Education* (n 73) par 2 4.
77 *Christian Education* (n 73) par 4.
78 *Christian Education* (n 73) par 5.
79 *Christian Education* (n 73) par 8.
80 *Christian Education* (n 73) par 8.
81 *Christian Education* (n 73) par 44.
82 *Christian Education* (n 73) par 46; *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 3 SA 76 (NmSC).
83 *Christian Education* (n 73) par 47.
84 *Christian Education* (n 73) par 47.
85 *Christian Education* (n 73) par 47.
86 *Christian Education* (n 73) par 47.
87 *Christian Education* (n 73) par 49.
88 *Christian Education* (n 73) par 49.
89 *Christian Education* (n 73) par 50.
90 *Christian Education* (n 73) par 50.
91 *Christian Education* (n 73) par 50.
92 *Christian Education* (n 73) par 50.
93 *Christian Education* (n 73) par 50.
94 *Christian Education* (n 73) par 48.
95 2018 1 SACR 64 (GJ); also see Sloth-Nielsen (n 74) 259-262.
96 *YG v S* (n 95) par 36.
97 *YG v S* (n 95) par 68.
98 *YG v S* (n 95) par 68.
99 *YG v S* (n 95) par 69.
100 *YG v S* (n 95) par 69.
101 *YG v S* (n 95) par 72.
102 *YG v S* (n 95) par 74-76.
103 *YG v S* (n 95) par 76.
104 *YG v S* (n 95) par 85.
105 2020 1 SA 1 (CC); also see Bekink (n 73) 47-55; and Greeff "Corporal punishment: Law reform lessons for Australia from South Africa and New Zealand" 2021 *Comparative and International Law Journal of Southern Africa* 1 10-13.
106 *Freedom of Religion SA* (n 105) par 42.
107 *Freedom of Religion SA* (n 105) par 43; see *Williams* (n 1) par 52.
108 *Freedom of Religion SA* (n 105) par 43.
109 *Freedom of Religion SA* (n 105) par 44.
110 *Freedom of Religion SA* (n 105) par 45-48.
111 *Freedom of Religion SA* (n 105) par 55-56.
112 *Freedom of Religion SA* (n 105) par 57-60; also see *S v M* 2008 3 SA 232 (CC) par 26; and *Christian Education* (n 73) par 41.
113 *Freedom of Religion SA* (n 105) par 69-71.
114 *Freedom of Religion SA* (n 105) par 73.

115 Bekink (n 73) 54–55.
116 Greeff (n 105) 14.
117 Bekink (n 73) 55.
118 Binford "The constitutionalization of children's rights in South Africa" 2016 *New York Law School Law Review* 333.
119 1997 2 SA 218 (CC).
120 1999 1 SA 1 (CC).
121 2003 2 SA 198 (CC).
122 1999 2 All SA 233 (C).
123 *S v M* (n 112); see Binford (n 118) 351.
124 2020 5 SA 327 (CC); also see Laubscher "Overview of the Constitutional Court judgments on the bill of rights – 2020" 2021 *TSAR* 311 321–323.
125 *AB v Pridwin* (n 124) par 152; Laubscher (n 124) 322.
126 2022 2 SA 131 (CC); also see Laubscher "Overview of the Constitutional Court judgments on the bill of rights – 2021" 2022 *TSAR* 356 367.
127 2022 2 SACR 629 (CC); also see Laubscher "Overview of the Constitutional Court judgments on the bill of rights – 2022" 2023 *TSAR* 316 327–328.