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Chastisement and the Consideration of African Customary Law in Child Law Matters

MATHABO BAASE

ABSTRACT: Consideration of African Customary Law and its principles is usually excluded in matters related to child law even where the judgments handed down by the courts directly affect the lives of all South African children. Without disagreeing with the outlawing of corporal punishment in *YG v S* and *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others*, I raise several important questions with respect to the way courts reached their respective decisions. In particular, and in its historical context, I probe their overt reliance on inherently Euro-centric legal instruments and procedural law even as they continue to develop the legal system for a country in which some people subscribe to African Customary Law and identify with the norms, beliefs and values on which it is based. I highlight three key areas in which consideration of African Customary Law could have enabled the courts to reach a broader, more Afro-centric *ratio decidendi*. I further argue for the judicial consideration and application of African Customary Law principles in all child law matters. This paper cannot explore all child law related matters, so it focuses on the most recent nationally significant matter of chastisement to illustrate the approach recommended here in all child-law-related matters.

KEYWORDS: corporal punishment, pluralism, reasonable chastisement

AUTHOR: Lecturer, Private Law Department, University of Cape Town, South Africa.
Email: Mathabo.baase@uct.ac.za ORCiD: 0000-0002-0044-3624

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I INTRODUCTION

The Constitution of the Republic of South Africa, 1996 (Constitution) makes provision for the coexistence and equality of African Customary Law (ACL) and common law,[1] and includes the role for the courts in developing the common law in line with the Constitution.[2] The pluralistic nature of South Africa's legal system provides the judiciary with a plethora of principles to consider and apply as they fulfil this role. In doing so, however, courts freely refer to international law and broad constitutional principles but have assigned a narrow avenue through which ACL can be considered. ACL, I argue, can play a substantially greater role when the judiciary develops of the South African common law. I make this argument by using the history of the courts' jurisprudence regarding the chastisement of children.

Disregard for ACL by legal practitioners and the judiciary can be detrimental in several ways. It may prevent the court from considering alternative solutions to African legal problems and adversely impact the development of South Africa's legal culture.[3] Most affected are the country's citizens when bound by judgments which may not always reflect their cultural or religious norms, beliefs and values because the Constitution, in dealing with judicial authority, provides that an order issued by a court binds all persons to whom it applies.[4]

This paper argues for the judicial consideration and application of ACL in *all* child law related matters.[5] In doing so, it contests the internal limitation provided in section 211(3) of the Constitution.[6] I draw on recent jurisprudence on the constitutionality of corporal punishment as a lost opportunity to advance my broader argument that the judiciary has failed to draw on ACL principles to the detriment of its legal development in South Africa. A critical analysis of *YG v S*[7] and *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others*[8] illustrates a legal culture in which the judiciary emphasises international and foreign law, often to the exclusion of ACL. The paper then briefly summarises the history behind present-day South African substantive and procedural law, whose out-of-date and foreign basis, has a history which, I submit, provides a likely explanation for the current diminished role of ACL in the judicial process. The benefits that result from considering ACL are illustrated by considering how ACL could have aided the courts in *YG v S* and *FORSA v Minister of Justice and Constitutional Development* in formulating an Afro-centric and more comprehensive *ratio decidendi*,[9] and in proposing solutions to concerns arising in the academic analyses of these cases.

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1 Here ACL refers to both living and official ACL. Constitution Chapter 2 and s 211. C Himonga 'The Constitutional Court of Justice Moseneke and the Decolonisation of Law in South Africa: Revisiting the Relationship Between Indigenous Law and Common Law' (2017) *Acta Juridica* 101, 102.

2 Constitution ss 39(2) and 173.

3 KE Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 166. Here the term legal culture follows Klare's definition: 'By legal culture, I mean professional sensibilities, habits of mind, and intellectual reflexes.'

4 Constitution s 165(5).

5 This paper cannot explore all child law related matters, so it focuses on the most recent nationally significant matter of chastisement to illustrate the approach recommended here in all child-law-related matters.

6 Section 211(3) provides for the application of ACL when the law is applicable.

7 [2018] ZAGPJHC 290, 2018 (1) SACR 64 (GJ) ('*YG v S*')

8 [2019] ZACC 34, 2019 (11) BCLR 1321 (CC) ('*FORSA v Minister of Justice and Constitutional Development*')

9 Afro-centricity is here understood as the centrality of African 'culture, ideals, values and history' during the study of African communities or phenomena. L Schreiber 'Overcoming methodological elitism: Afrocentrism

A *YG v S*

At the time of writing in October 2021, *YG v S* was the most recent South African case involving the chastisement of a child. It first appeared before the Regional Court in Johannesburg in 2018. A Muslim father was charged with two counts of assault, on his wife and his 13-year-old son, respectively. After being convicted on both charges, and notwithstanding his fully suspended sentence, the father appealed to the Gauteng High Court (high court).[10] The charges arose from an incident at the family home when the appellant found his son viewing pornographic material on a family iPad. A verbal altercation between father and son escalated to physical abuse when the appellant concluded that his son was lying about what he had done.[11] The appellant relied on the common law reasonable and moderate chastisement defence and his constitutional right to freedom of religion. He submitted that he had merely disciplined his son in accordance with his beliefs and that his son was aware that pornographic material was forbidden.[12] The constitutionality of the moderate and reasonable chastisement defence was raised by Keightley J *mero motu*.[13]

The high court maintained that the common law defence should be considered in the interests of justice.[14] Keightley J provided three reasons for this consideration. First, it would clear up legal uncertainty regarding the constitutionality of the common law defence, which would be to the benefit of South African parents who could be implicated in future.[15] Second, the high court emphasised the role of the court in developing the common law in accordance with section 39, read together with section 8(1), of the Constitution.[16] Third, the high court maintained that its silence on the matter would be detrimental to children, as their rights would remain in jeopardy until the legislature decided to intervene.[17]

In detailing the existence and nature of the common law defence,[18] Keightly J referred to legal textbooks and the judgment in *Rex v Janke and Janke*.[19] Commencing its analysis of the constitutionality of the common law defence, the court listed the relevant rights afforded to the child by the Constitution. These include the right to human dignity; to equal protection; to be free from violence; not to be treated or punished in an inhumane, cruel or degrading manner; protection from neglect, degradation, maltreatment or abuse; and the paramountcy of the principle of the best interest of the child.[20] The court noted the submissions made

as a prototypical paradigm for intercultural research' (2000) 24 *International Journal of Intercultural Relations* 651, 652.

10 *YG v S* (note 7 above) at paras 1 & 2.

11 Ibid at para 3.

12 Ibid at para 4.

13 Ibid at para 10. While most courts rely on the arguments made and evidence placed before them, there are instances where a court hands down a judgment that goes beyond the legal issue between the parties in the matter.

14 Ibid at para 25.

15 Ibid at para 26.

16 Ibid at para 27. These provisions bind the courts to the Bill of Rights and place a legal obligation on the courts to develop the common law in a manner which promotes the objects, spirit and purport of the Bill of Rights. Section 39(3) emphasises the supremacy of the Bill and makes provision for the recognition of other legal systems 'to the extent that they are consistent with the Bill'.

17 Ibid at para 28.

18 Ibid at paras 31–35.

19 1913 TPD 382 ('*R v Janke & Janke*').

20 *YG v S* (note & above) at para 36. Constitution ss 10, 9, 12 and 28.

by Freedom of Religion South Africa (FORSA)[21] in defence of the rights of the parents, which included the right to freedom of religion; opinion and belief; human dignity; religious and cultural communities; and, last, the provision afforded to the protection of families (the 'natural' unit of society).[22]

In addition, the court considered South African cases dealing with the legal issue of corporal punishment. The first was *S v Williams and Others*,[23] in which the Constitutional Court had held that s 294 of the Criminal Procedure Act 51 of 1977 was unconstitutional because it provided for the corporal punishment of juvenile offenders (by whipping), which violated several of their constitutional rights.[24] Furthermore the Constitutional Court referred to the international trend of abandoning methods of punishment that do not recognise human rights but rather place great emphasis on vengeance and retribution. The Court stressed the obligation of the state to treat its weakest members in a manner that enhances their human dignity and self-esteem. It warned that the state's inability to do so may cause those adversely affected to increasingly disregard and disrespect the rights of others.[25] The second case considered by the Keightley J was *Christian Education South Africa v Minister of Education*[26] in which the Constitutional Court had held that corporal punishment under the South African Schools Act 84 of 1996 was also unconstitutional.[27] The high court noted the Court's reasoning regarding the difference between corporal punishment at home and that occurring in a school environment: it emphasised the Court's point that despite real and difficult challenges, which the state faces when called upon to intervene in matters of child abuse,[28] it could not shy away from this responsibility, particularly given its legal obligations under the United Nations Convention on the Rights of the Child (1989) (UNCRC). The high court also reiterated the importance of the principle of the Best Interest of the Child[29] and, after conceding that neither *S v Williams* nor *Christian Education South Africa v Minister of Education* directly considered the common-law defence of chastisement in the home, it commenced its final case discussion, viz., *S v M.*[30] Here the high court emphasised the views of the Constitutional Court in *S v M* relating to the legislative status of the UNCRC and its role as the international standard against which all legislation should be measured.[31] The high court also referred to the Court's call for 'a change in mindset' and realignment with the new vision of the Constitution as it accords with the provisions of UNCRC regarding the enactment of children's rights.[32] It furthermore emphasised the child rights specifically mentioned by the Constitutional Court in *S v M*, which included the child's right to dignity; the importance of seeing children as legal subjects

[21] Fourth Amicus Curiae in *YG v S*.
[22] *YG v S* (note 7 above) at para 37.
[23] [1995] ZACC 6, 1995 (3) SA 632 ('*S v Williams*').
[24] *YG v S* (note 7 above) at para 40. These rights include the right to dignity and protection from cruel, inhumane and degrading treatment.
[25] Ibid at para 40.
[26] [2000] ZACC 11, 2000 (4) SA 757 ('*Christian Education South Africa v Minister of Education*').
[27] *YG v S* (note 7 above) at para 41.
[28] Ibid at para 42.
[29] Ibid at para 43.
[30] [2007] ZACC 18, 2008 (3) SA 232 (CC) ('*S v M*').
[31] *YG v S* (note 7 above) at para 44.
[32] Ibid at para 45.

in their own right; and the right to live in a nurturing environment which is secure and free from 'violence, fear, want and avoidable trauma'.[33]

The high court referred to two Acts that place duties on the state and parents to provide for the rights of children, viz., the Children's Act 38 of 2005 and the Domestic Violence Act 116 of 1998.[34] The high court then focused on international law, maintaining that South Africa's ratification of the UNCRC had placed a positive legal obligation on the state to comply with the protections it affords. These include taking the necessary measures to protect children from harm; ensuring that discipline in schools is administered appropriately; and protecting children from torture as well as from treatment and punishment that is cruel, degrading or inhumane.[35] The high court acknowledged that the UNCRC does not explicitly address the matter of parental physical chastisement, but referred to two comments issued by the United Nations Committee on the Rights of the Child (UNCRC) regarding corporal punishment: General Comment No. 8 on The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment and General Comment No. 13 on The Right of the Child to Freedom From All Forms of Violence.[36] General Comment 8 states that corporal punishment is not compatible with the UNCRC, given the child's rights to be free from all forms of degrading and cruel treatment, and places a duty on state parties to detail the steps taken towards abolishing corporal punishment.[37] General Comment 13 addresses the intensity and extent of violence experienced by children. It explains that violence against children is unjustifiable and, furthermore, highlights the importance of a paradigm shift which would enable a child-rights-based approach to the protection and care of all children. In addition to recognising the dignity of the child and the primary position of the family unit, General Comment 13 stresses the fact that no national laws allowing for certain forms of violence should be enacted as these could endanger the child's absolute right to dignity and integrity.[38] The high court then noted two comments on South Africa's second report from the United Nations Committee on the Rights of the Child.[39] The first noted that the country had not outlawed corporal punishment, which remained a widely practised form of discipline; the second encouraged the state to adopt legislation prohibiting 'all forms of corporal punishment' and chastisement in the home.[40]

Having considered this legislation and case law, the high court analysed the effect of these legal instruments on the common-law defence of reasonable and moderate chastisement. It rejected the argument presented by FORSA that parents are entitled to administer corporal

[33] Ibid at para 46.

[34] Ibid at paras 48–52.

[35] Ibid at para 53.

[36] United Nations Committee on the Rights of the Child (UNCRC) (2 March 2007) CRC/C/GC/8, available at https://www.refworld.org/docid/460bc7772.html; and (18 Apr 2011) CRC/C/GC/13, available at https://www.refworld.org/docid/4e6da4922.html.

[37] *YG v S* (note 7 above) at para 54.

[38] Ibid at para 55.

[39] The UN Committee on the Rights of the Child is a body that monitors state parties' implementation of the provisions contained in the UNCRC's comments and conventions. The committee requires that state parties submit regular reports that illustrate how the rights are being implemented. See *UN Committee on the Rights of the Child (CRC)* (18 August 2021), available at https://www.refworld.org/publisher,CRC,,ZAF,,,0.html. Constitution s 231.

[40] *YG v S* (note 7 above) at para 56. The African Charter on the Rights and Welfare of the Child (1990) was cited once in relation to its concurrence with the international legal instruments at para 57.

punishment to their children as a means of childrearing on the grounds that this is ultimately in the best interest of the child.[41] FORSA further stressed the importance of differentiating between violence and chastisement that is reasonable and moderate, stating that the latter serves the child's wellbeing as it instils discipline.[42] The high court provided five reasons for considering even moderate corporal punishment. unconstitutional. The first reason pertained to the variation in the physical and psychological wellbeing (or robustness) of children.[43] The second stressed the absence of clear factors which determine what constitutes reasonableness in chastisement cases, thereby placing the question of reasonableness within a dangerously subjective frame, which would be detrimental to children as the question of physical punishment would be arbitrary.[44] The third reason was that physical punishment violates the child's rights to bodily integrity and to protection from all forms of violence.[45] The fourth reason was that corporal punishment is degrading as it treats children differently from the way adults are treated if they are physically assaulted.[46] The fifth reason followed from the fourth in emphasising that the unequal treatment of children and adults amounted to discrimination on the grounds of age, thereby contravening section 9 of the Constitution.[47] The high court ended its analysis by considering whether the common-law defence's infringement of children's rights could be justified under section 36 of the Constitution, and concluded that the protection of the rights of children outweighed the rights of parents to continue administering corporal punishment for disciplinary reasons.[48] The high court furthermore maintained that parents could still discipline their children in alternative non-violent ways, and that its judgment was geared towards the protection of children's rights and not the future incarceration of non-compliant parents.[49] Finally, it rejected FORSA's further argument that parents have a right to religious freedom on the grounds that this right did not trump the rights of their children.[50]

Following its consideration of the merits of the appeal, the high court held that the common-law defence of reasonable and moderate chastisement was unconstitutional and should therefore no longer be provided for under South African common law.[51] Freedom of Religion South Africa took the matter on appeal and appeared before the Constitutional Court in 2018.

41 Ibid at para 65.
42 Ibid at para 66.
43 Ibid at para 67.
44 Ibid at para 68.
45 Ibid at para 70.
46 Ibid at para 72.
47 Ibid at para 76.
48 Ibid at paras 80–81.
49 Ibid at para 81.
50 Ibid at para 84.
51 Ibid at para 107. This article does not contest the high court's judgment. However, it does raise problems with the approach. Notwithstanding the principle of constitutional supremacy, given the court's use of s 28 to develop the common law, the court could have provided a more Afro-centric *ratio decidendi*. While the international instruments may not have been 'determinative' they largely informed the Court's decision, while ACL was not considered at all.

B *FREEDOM OF RELIGION SOUTH AFRICA V MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT* 2020 (1) SA 1 (CC)

When the matter came before the Constitutional Court, Mogoeng CJ handed down the unanimous judgment. The Court commenced by discussing the facts of the case in *YG v S* and provided a brief social and legal history of corporal punishment in South Africa.[52] Having established that FORSA had the necessary standing to bring the matter before the Court,[53] it addressed the question of the application for leave to appeal, observing that the application pertained to several constitutional rights and was of public importance. The Court stressed the importance of the case and the need for a nationally binding judgment[54] that would have an impact on all the citizens within the Republic, including those who practice ACL.

The Court proceeded by limiting the grounds that it would consider during the adjudication process, as this would allow the Court to deliver a brief judgment while still addressing all the issues.[55] It identified two provisions that it would consider: the fundamental right to dignity and section 12(1)(c) of the Constitution.[56] After considering the parental right defence raised by FORSA, which again emphasised the need to differentiate between physical abuse and reasonable chastisement, the Court focused on the interpretation of section 12(1)(c) of the Constitution.[57] Having explored the technical and legal meaning of the word 'violence', the Court maintained that reasonable and moderate chastisement fell within the meaning of violence provided for by section 12(1)(c).[58] Here the Court emphasised the widespread and institutionalised violence prevalent in South Africa and the aim of section 12 to alleviate and abolish the nation's continued challenges in this respect.[59] In its discussion on the right to dignity the Court reiterated that it was not only a fundamental right but also one of the core constitutional values.[60] It emphasised that each child is an independent legal subject and is therefore entitled to the enjoyment of this right.[61]

The Court then addressed the question of whether a section 36 limitations analysis of the child's constitutional right to human dignity (section 10) and their right to freedom and security of the person (section 12) could yet be declared reasonable and justifiable under the Constitution. It acknowledged that the common-law defence is available to all parents regardless of religion or culture; it furthermore maintained that this defence infringed upon

[52] *Freedom of Religion South Africa v Minister of Justice and Constitutional Development & Others* [2019] ZACC 34, 2019 (11) BCLR 1321 (CC) ('*FORSA v Minister of Justice and Constitutional Development*') at paras 5–12.

[53] Ibid at paras 13–20.

[54] Ibid at para 21–28. The Court addressed the fact that this case bypassed the Supreme Court of Appeal. The Court allowed its occurrence here due to the similarity of the high court's declaration to other matters where legislation was declared unconstitutional. It maintained that the unconstitutionality of the common-law defence had far reaching and serious implications.

[55] Ibid at para 30. Even though there were no third parties who brought the matter of ACL before the Court, it may be argued that the Court could of its own accord have taken a more extensive legislative approach and considered ACL, because of the significant impact that its judgment would inevitably have on society.

[56] Ibid at para 31.

[57] Ibid at paras 32–35. This s makes provision for the right to freedom and security, which encompasses the right to be free from public or private forms of violence.

[58] Ibid at para 40.

[59] Ibid at para 42.

[60] Ibid at para 45.

[61] Ibid at para 46.

children's constitutional rights, specifically those provided by sections 10 and 12.[62] The Court highlighted and acknowledged the primary obligation that rests on parents to raise their children to be respectable and responsible members of society, and stressed that parents are accordingly to blame when their children behave in a delinquent manner.[63] The Court then observed that the invalidation of the common-law defence meant it was no longer available to parents who used moderate and reasonable chastisement as a means of childrearing. The principle of *de minimis non curat lex* (the court does not concern itself with trivialities) rule was presented and accepted by Mogoeng CJ as alternative legal recourse for those parents who may face legal prosecution for trivial forms of corporal punishment due to the invalidation of the common-law defence.[64] Regarding section 28(2) (the principle of the best interest of the child), the Court reemphasised the legal obligation that rests on the state to respect, fulfil, protect and promote the rights of the child provided by section 28. In addition, the court held that the judiciary is bound by this section and needs to ensure that the child's best interests are protected in all matters pertaining to the child. A court could, accordingly, justify the continued existence of the common-law defence only if it would be in the child's best interest to do so.[65]

The Court discussed four reasons why the defence of reasonable and moderate chastisement should no longer form part of the South African common law. First, it observed that there is no national or international legislation which expressly provides parents with the right to administer corporal punishment as a means of discipline, and contrasted this absence with the rights of children clearly contained in various national and international legal instruments.[66] The second reason pertained to evidence highlighting the harmful effects of corporal punishment.[67] The third reason pertained to the best interest of the child.[68] In further considering the true nature of the best interest of the child in relation to discipline, the Court acknowledged that the absence of all forms of discipline could not be in the child's best interest. It however held that the common-law defence relating to corporal punishment could not be retained as it infringes the child's right to dignity.[69] Fourth, the Court maintained that other non-violent parenting methods are available.[70]

In closing, the Court held that the violence involved in moderate and reasonable chastisement of a child constituted assault, which is a criminal offence. In addition, if someone other than a parent assaulted a child they would be convicted of a crime.[71] The Court therefore upheld the judgment handed down by the high court and called upon Parliament to draft a regulatory framework.[72] The Court concluded by maintaining that law enforcement agencies should consider future matters arising from this judgment on a case-by-case basis.[73]

[62] Ibid at para 50.
[63] Ibid at para 51.
[64] Ibid at para 52.
[65] Ibid at para 56.
[66] Ibid at para 63
[67] Ibid at para 64.
[68] Ibid at para 65.
[69] Ibid at para 67.
[70] Ibid at para 69.
[71] Ibid at para 72.
[72] Ibid at paras 73–74.
[73] Ibid at para 75.

Both courts in *YG v S* and *FORSA v Minister of Justice and Constitutional Development* acted in accordance with the authority extended to them by the Constitution;[74] they also followed legal protocol and reached fair and reasonable judgments.[75] Yet, as I discuss in section IV, neither seized the opportunity to consider ACL principles in their development of the common-law. This judicial approach did not, however, develop spontaneously. South African legal development provides an explanation for the narrow application of ACL in the development of the common law.

II HISTORICAL DEVELOPMENT

The process of colonialization led to the infiltration of foreign ideologies in legislative guise. Most pre-constitutional judges were well versed in Roman-Dutch and English Law owing to the various occupations of the Cape Colony by the Dutch and the British.[76] The dominance and survival of these legal systems were further ensured by continued recognition of Roman-Dutch Law as the common law of the Cape Colony and the future training and education of South African judges following the second British occupation of the Cape Colony.[77] These developments resulted in the subsequent adoption of Roman-Dutch rules, the most noteworthy for present purposes being the general rule of reasonable and moderate chastisement. While this rule was also received in English Law, the more significant influence of the British occupation of the Cape is found in the reception of English procedural law.[78]

A Pre-1994 Case Study: Chastisement in a Euro-centric Legal System

Courts that presided over pre-1994 chastisement cases found themselves in a Euro-centric legal framework.[79] The bench was trained in English Law and was functioning under the common Roman-Dutch Law, with little to no knowledge of ACL.[80] The courts accordingly interpreted

[74] Constitution Chapter 8 and s 173.

[75] Constitution ss 8 (3)(a) and 39.

[76] JR du Plessis *An Elementary Introduction to the Study of South African Law* (1981) 18. Roman-Dutch legal influence dates to the 16th and 17th centuries when it was applied by the courts of the Dutch colonial administration. M Paleker 'Civil Procedure in South Africa: the Past, the Present and the Future' (2011) 16 *Zeitschrift für Zivilprozess International* 343, 344.

[77] JR du Plessis (note 76 above) at 19.

[78] Paleker (note 76 above) at 345. The *Raad van Justitie,* was replaced by English judiciary in 1827 when the British government took over the Cape Colony from the Dutch. The British government established the Supreme Court of the Cape of Good Hope in accordance with the First Charter of Justice. This court was staffed with members of the Cape, English, Irish and Scottish bar. Those who were not members of the bar were required to have a legal doctoral degree from European institutions, primarily Dublin, Oxford, and Cambridge.

[79] The British government enacted legal charters which introduced detailed procedural rules including the way matters were to be raised, argued, and contested, and the procedure required for the presentation of evidence. Paleker emphasises such characteristics of English procedural law as the adversarial nature of this litigation process, the prominence of the parties, the presentation of oral argument, procedural immediacy, and public hearings. Paleker (note 76 above) at 343, 352.

[80] *Die Volksraad* enacted addendums to the *Grondwet* following the *Groot Trek*. These essentially reasserted Roman-Dutch Law as the substantive law and provided procedural rules for the *Hooggerechtshof*. Paleker (note 76 above) at 343–356.

and applied Roman-Dutch common law rules within an English procedural framework, even though the English procedural system was not designed for a South African legal system.[81]

The influence of Euro-centric law is evident in the earlier South African criminal justice system's reception of the European model of physical punishment,[82] according to which whipping was the preferred punishment for most juvenile offenders.[83] Pre-constitutional court records further indicate the extent to which the South African private law (family law) was influenced by Euro-centric law, as in the case most relevant to this paper, *Rex v Janke and Janke*. This was a criminal case involving the corporal punishment of a child that took the form of assault, which is a criminal offence. The Transvaal Provincial Division (TPD) discussed the circumstances under which a parent would be permitted to administer reasonable and moderate chastisement. The matter came before the TPD on appeals from a magistrate's court which had convicted the parents of assault and sentenced them to imprisonment with hard labour.[84] The appeal was against the sentence. The TPD discussed the rights and responsibilities of the parties, maintaining that parents have the necessary authority to administer corporal punishment to their children under a general rule drawn from Roman, Roman-Dutch and English Law.[85] This general rule provided for a parent's right to administer reasonable and moderate chastisement for misconduct by the child. The rule limited the form of punishment, however, by excluding occurrences where parents acted in an immoral manner and where the administration of the punishment was for reasons other than 'correction and admonition'.[86] The court in *R v Janke and Janke* cited the *Corpus Juris Civilis*: the *Digesta* 47.10 (*iniuria*); 32 & 33 (legacies and *fideicommissa*) and Codex 9.15 (the correction of relatives), and made reference to the writings of Voet, and M de Villiers, and WO Russell, as well as to *Queen v Soga Mgikela* (1892–1893) 10 SC 240. It also provided a short excerpt from the English court judgment in *Regina v Hopley* 2 F & F 202 ('*Regina v Hopley*'),[87] which maintained that parents or schoolmasters may inflict moderate and reasonable corporal punishment in attempting to correct 'what is evil in the child'. After listing several factors to be considered when chastising a child, the court in *R v Janke and Janke* emphasised the importance of administering corporal punishment only for correctional purposes.[88]

The precedent established in *R v Janke and Janke* was applied to similar cases over several decades.[89] Most of those that followed *R v Janke and Janke* centred on the pupil–schoolmaster relationship. Common law made provision for action *in loco parentis*, giving schoolmasters the authority necessary to administer moderate and reasonable corporal punishment on students

[81] The legislative changes made by *Die Volksraad* were not repealed when the British annexed the Republic in 1877. Roman-Dutch Law retained its national substantive legal status and English procedural law continued to govern the judiciary even in the Boer territories. Paleker (note 76 above) at 343–357.

[82] J Sloth-Nielsen 'Sideswipes and Backhanders: Abolition of the Reasonable Chastisement Defence in South Africa' (2020) 34 *International Journal of Law, Policy and the Family* 191, 192.

[83] Ibid.

[84] *Rex v Janke and Janke* 1913 TPD 382 (*R v Janke and Janke*) at 384.

[85] Ibid at 385.

[86] Ibid.

[87] In this case a schoolmaster obtained permission to chastise a 13-year-old boy. The schoolmaster administered corporal punishment for over an hour, causing the boy's death. The court emphasised the condition that punishment must be *reasonable* and *moderate*, most likely because of the devastating outcome of this case.

[88] *R v Janke and Janke* (note 84 above) at 386.

[89] B Clark 'Why Can't I Discipline My Child Properly? Banning Corporal Punishment and Its Consequences' (2020) 137 *The South African Law Journal* 335, 341.

in their care.[90] As in *R v Janke and Janke*, the courts relied on Voet and foreign case law.[91] Other courts considered the provisions of, inter alia, s 7(k) of the Orange Free State Provincial Ordinance 9 of 1913;[92] s 62(5) of the Ordinance of 1930 (the Education Consolidation Law of 1930); s 353 of Act 31 of 1917; and s 89 of Act 32 of 1917,[93] which gave the parameters of the *in loco parentis* common-law provision.[94] There were also cases that dealt primarily with family law and the rights of custodial and non-custodial parents.[95]

B African Customary Law Pre-1994

The courts established during the colonial rule paid little to no regard to ACL during their hearings.[96] However, the British policy which authorised the law of the conquered territory to remain in place until it was changed by the conqueror, as well as the limited initial reach of the colonisers, enabled most tribes in the country's interior to continue practising 'deep legal pluralism'[97] with little interference from the British. This situation changed towards the mid-19th century, when autonomous areas were established and administered in an attempt to 'civilise' the population and eradicate customs and laws considered 'barbarous'.[98] The British government introduced legal and administrative means to control these areas including the repugnancy clause and chieftain treaties,[99] and later during British rule established magistrates' courts. However, insufficient militia and police officers made it nearly impossible for the country's government to enforce foreign official law on the indigenous population.[100] The non-adherence to foreign law resulted in continued application of ACL by magistrates and traditional leaders, notwithstanding the government's non-recognition of deep legal pluralism. The application of ACL was so prevalent during the late 19th century that the Native Laws and Customs Commission of 1883 made a recommendation which encouraged the legal recognition of ACL as an uncodified common-law system. The Cape government did not give effect to the recommendation, but this did not deter continued application of ACL by customary institutions and magistrates in civil cases where the parties were African people.[101]

[90] *Rex v Schoombee* 1924 TPD 481.

[91] Voet's writings were applied in matters dating as early as 1892. *Queen v Soga Mgikela* (1892–1893) 10 SC 240.

[92] *Rex Respondent v Scheepers Appellant* 1915 AD 337. Section 7(k) provided principles with the necessary authority to administer corporal punishment to pupils who displayed 'habitual and gross neglect of duty, disobedience, obstinacy, or vice'. An internal limitation, however, required principles to launch a careful inquisition before administering the corporal punishment. Furthermore, to refrain from administering such punishment cruelly.

[93] *Rex v Theron & Another* 1936 OPD 166. The Criminal Procedure & Evidence Act 31 and the Magistrates' Courts Amendment Act 32 of 1917. The provisions in s 62(5) are similar to s 7(k) and add the further requirement of immoral conduct. Section 353 made provision for the moderate whipping of male persons who were under the age of 21 and limited the number of lashes to 15 cuts, while s 89 provided a magistrate with the necessary authority to administer punishment by whipping under special circumstances in common assault cases.

[94] *S v Lekgathe* [1982] 3 All SA 663 (B). This court did try to consider ACL in this case and consulted I Schapera *A Handbook of Tswana Law and Custom* 1938.

[95] *Germani v Herf & Another* 1975 (4) SA 887 (A); *Du Preez v Conradie & Another* [1990] 3 All SA 349 (BG). The court prohibited the non-biological stepfather from administering corporal punishment to his wife's children.

[96] C Rautenbach & JC Bekker *Introduction to Legal Pluralism in South Africa* (4th Ed, 2014) 7.

[97] Ibid at 8. 'Deep legal pluralism' refers to the everyday practices of the community that may not be codified in a legal document.

[98] Ibid.

[99] Ibid.

[100] Ibid at 9.

[101] Ibid.

ACL was accordingly observed and applied in certain legal matters prior to its legal recognition in 1910 and the enactment of the Black Administration Act 38 of 1927. Judicial notice was, however, limited to matters between 'Native and Native only' and primarily applied to civil and family disputes.[102]

Nationally, however, the colonisation process and subsequent segregation of courts had a detrimental effect on the courts' view of ACL,[103] as evidenced by the early courts' disregard for it in pre-1994 chastisement cases. This disregard perpetuated a legal culture that neglected ACL and hampered its development through the ordinary judicial process. It also deprived the higher courts of several ACL principles.[104]

III THE CONSTITUTIONAL ERA

Hope for rectification of earlier neglect came from the Constitution's recognition of ACL as an official and separate legal system, in accordance with the provisions of Chapter 12,[105] and the legal obligation on all courts to apply ACL, when applicable, in terms of Section 211 (3). Predominant reliance upon the Canadian Charter of Rights and Freedoms during the drafting of the South African Constitution, however, in addition to 'liberal borrowings' from the USA and Germany, produced a Constitution that remained centred on Euro-centric law.[106]

The governing document that resulted, as informed by foreign legal systems, created a South African judicial system that required constant reference to those external systems for proper interpretation of the legal principles adopted and for ensuring their correct application.[107] Davis observes that this continued practice was consistent with the earlier established legal culture, which saw the courts' frequent consideration of English, Dutch and Australian law prior to and following the constitutional era.[108] Multiple provisions in the interim and final South African constitutions perpetuated the pre-1994 legal culture. This includes section 211(3) of the Constitution, which provides that the court apply ACL *when it is applicable*. I submit that this internal limitation undermines the importance and value of ACL.[109]

[102] Black Administration Act 38 of 1927 Chapters 4 and 5.

[103] N Ntlama & DD Ndima 'The Significance of South Africa's Traditional Courts Bill to the Challenge of Promoting African Traditional Justice Systems' (2009) 4 *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinary* 6, 10.

[104] C Rautenbach & JC Bekker (note 96 above) at 38. The view of Western Courts' was shaped by the fact that ACL was subordinate to the country's legal order (state legislation which did not entail or reflect African jurisprudence). Furthermore, some courts could not take judicial note of ACL and its application was limited to instances where it was compatible with public policy and natural justice.

[105] Read with Constitution s 39(2) and (3).

[106] DM Davis 'Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience' (2003) 2 *International Journal of Constitutional Law* 181, 191.

[107] Ibid at 191–192. The borrowing does not make the Constitution beholden to its foreign origin. However, courts and legal practitioners still rely heavily on these sources when fulfilling the duties of their office. It is not unreasonable to refer to the original documents and countries of origin when domestic challenges arise which contest their validity.

[108] Ibid at 192.

[109] This article does not advocate for the disregard for an individual's choice to select their desired legal system. It merely advocates for the consideration of principles from all major legal systems in particular matters.

Development in the South African law of procedure (conceived without consideration of ACL) has been primarily structural during the Constitutional era,[110] with chapter 8 of the Constitution marking the final provision for the Courts and Administration of Justice.[111] The country's post-1994 judiciary finds itself, once again, in a predominantly English procedural legal framework based on that of a foreign country which, arguably, did not have an officially recognised pluralistic legal system, and whose procedures favour a textual authoritative adjudicative process which compels litigating parties to 'open proceedings with at least implicit reference to a pre-existing set of rules'.[112] The quasi-repugnancy nature of section 211(3) further influenced the procedural court rules in matters where choice of rule is applicable, requiring courts to consider the principles of the legal system chosen by the litigating parties or that is inferred by the surrounding circumstances in the case.[113] Further restriction on procedural law in relation to ACL is provided in s 1(1) of the Law of Evidence Amendment Act 45 of 1988,[114] which requires ACL to be readily ascertainable and sufficiently certain for it to be applicable.

These substantive and procedural limitations continue to chart the course of South African courts' interpretation and application of ACL in general.

A Post-1994 case study: chastisement in the constitutional era

The post-constitutional judiciary's interpretation and application of ACL in matters concerning chastisement was elucidated in *S v Williams and Others* and *Christian Education South Africa v Minister of Education*.

In *S v Williams* the court stressed the important role of the courts in cultivating a new culture founded on and recognising human rights.[115] It furthermore emphasised the need to define certain concepts in a manner that reflects the lived experiences and circumstances of South Africans. Its Afrocentric statement was however followed by the court's stance on the importance of valuable insights to be gained from public international and foreign case law,[116] and its consideration of provisions from, for example, the Universal Declaration of Human Rights (1948),[117] the International Covenant on Civil and Political Rights (1976),[118] and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953).[119] It briefly considered African case law and the provisions of the Banjul Charter on

[110] This structure was established prior to and maintained throughout the Unification of South Africa. The Administration of Justice Act of 1912 eradicated the legal procedural variations between the South African provinces. The Administration act was replaced by the Magistrates Courts Act 32 of 1944 and the Supreme Court Act 59 of 1959 due to pragmatic reasons. Paleker (note 76 above) at 358, 359.

[111] Paleker (note 76 above) at 340.

[112] TW Bennett 'Re-introducing African Customary Law to the South African Legal System' (2009) 57 *American Journal of Comparative Law* 1, 19.

[113] Ibid at 8. M Pieterse 'It's a Black Thing: Upholding Culture and Customary Law in a Society Founded on Non-Racialism' (2001) 17 *South African Journal on Human Rights* 364, 395.

[114] Pieterse (note 113 above) at 395.

[115] *S v Williams & Others* [1995] ZACC 6, 1995 (3) SA 632 ('*S v Williams*') at para 8.

[116] Ibid at para 23.

[117] Signed by South Africa in 1996. The preamble of the Universal Declaration of Human Rights recognises the South African government's pledge to cooperate with the United Nations in realising its objective to promote 'universal respect for and observance of' fundamental freedoms and human rights.

[118] Signed by South Africa in 1994.

[119] *S v Williams* (note 115 above) at paras 26, 27 and fn 24.

Human and Peoples' Rights (1981).[120] It furthermore maintained that the values articulated in the Republic of South Africa Constitution Act No. 200 of 1993 (the interim Constitution) and other legislation should be the backdrop against which the court makes its evaluations.[121]

Similarly, the court in *Christian Education South Africa v Minister of Education* emphasised international legal instruments. It considered provisions from, for example, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987),[122] the UNCRC,[123] the Universal Declaration of Human Rights (1948),[124] the International Covenant on Civil and Political Rights (1976),[125] and the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981).[126] ACL was referenced only twice. The first instance pertained to the Constitutional provisions which are geared towards the protection of individual rights, more specifically the right to freedom of association,[127] and section 211(3) of the Constitution was cited in highlighting the diverse and pluralistic nature of South African society. Second, the court referred to ACL in relation to the supremacy of the Bill of Rights and the Constitution.[128] The importance of the international instruments and the South African government's obligations to adhere to them is not contested.[129] What is being emphasised here is the disregard for unique ACL principles. The courts, holding true to pre-1994 legal culture, continue to prioritise international law over ACL. Not much has changed in the judicial approach of South African courts in chastisement cases. This has resulted in an 'either-or' reality as opposed to an approach which includes ACL alongside international and foreign law as lodestones for courts when developing the common law.

The high court and Constitutional Court's adjudicative approaches in *YG v S* and *FORSA v Minister of Justice and Constitutional Development* were informed by the substantive and procedural limitations that came out of the colonisation of South Africa. Present-day legal process would dictate that the courts primarily evaluate common-law legal principles as well as those arising from the relevant religious systems. There was no procedural obligation on the court to consider ACL as the parties neither conducted their lives in accordance with it, nor did any of them present ACL arguments before the court.[130] This method of litigation is in keeping with pre-1994 procedural rules that emphasised the role of the litigating parties.[131] Courts still primarily draw on the legal principles from within the selected legal sub-system, bolstered by relevant international and foreign law. This procedure is understandable in matters where the judgment handed down by a court directly affects only the litigating parties, but justification fails in matters where the decision binds the entire country, including those who do not subscribe to the legal system selected by the litigating parties. I submit that this situation places

[120] Ibid at para 40 and fn 58. South Africa acceded to this regional legal instrument in 1996.
[121] Ibid at para 59.
[122] Signed by South Arica in 1993.
[123] *Christian Education South Africa v Minister of Education* [2000] ZACC 11, 2000 (4) SA 757 ('*Christian Education South Africa v Minister of Education*') at para 13. Ratified by South Africa in 1995.
[124] Ibid at footnote 11.
[125] Ibid at para 19.
[126] Ibid at para 40.
[127] Ibid at para 24 and Constitution s 18.
[128] Ibid at para 26 and Constitution s 39 (3).
[129] Constitution Chapter 14.
[130] Pieterse (note 113 above) at 395.
[131] Paleker (note 76 above) at 352.

an obligation on the Supreme Court of Appeal and Constitutional Court to consider ACL in all nationally binding cases. At minimum, in cases where precedent would have a wide-ranging effect on the regulation of the behaviour of the country's inhabitants, ACL should stand to contribute as much as international or foreign law should in the development of common law.

My argument is made with understanding and support for the influential role of lower courts in shaping South Africa's legal culture and their adjudication over matters of public interest. It also comes with appreciation of the limited knowledge of ACL in some lower courts, their stretched resources, and the difficulty of considering legal systems beyond the scope of those contained in the arguments presented by legal representatives.[132] It can be argued that the Constitutional Court, with its greater access to financial and other resources, should consider ACL when adjudicating over legal matters that will directly affect society as a whole. Should the Court decide to do so, however, it would face additional procedural challenges in the form of the law of evidence and the adopted textual authoritative adjudicative process. Unlike international and foreign legal instruments, ACL is not always neatly codified and fixed, which makes it incompatible with an adjudicative process that compels litigating parties to 'open proceedings with at least implicit reference to a pre-existing set of rules.'[133]

The procedural limitations that these incompatibilities place on the South African judiciary are evident in both the high court and the Constitutional Court's reasoning.[134] Both courts extensively considered international and foreign legislative tools with no reference to ACL.[135] This is disconcerting from the perspective of the judiciary's role in developing South African common law.[136] The aspirations in the Bill of Rights place a weighty mandate on the judiciary.[137] This mandate as practised may be understood from the viewpoint of legal anthropology, and the concept of legal form for which Moore offers three explanations: law as culture, law as domination, and law as problem-solver.[138] If asked, present-day legal practitioners would emphasise the third explanation and, accordingly employ logic and reason in a pragmatic and legally technical manner to provide solutions to social problems.[139] This position is in keeping with the judiciary's often formalistic legislative approach. Judges would accordingly maintain that their primary function is to 'speak the law, not make it'.[140]

This latter reasoning is, however, flawed in two respects. First, when interpreting the law, judges are required to consider the wider context of the surrounding legal provisions and to ascertain the objective of the legislator, to better aid the courts in their legal adjudicative duties.

[132] Given their inherently Euro-centric legal education, judges cannot be expected to know what they do not know. This reality however problematises the existence of *mero motu* judgments in a legally pluralistic society. This matter, however, falls beyond the scope of this paper. Bennett (note 112 above) at 21.

[133] Bennett (note 112 above) at 19. The court's efforts in *Shilubana v Nwamitwa* [2008] ZACC 9, 2009 (2) SA 66 (CC) and *Mayelane v Ngwenyama* [2013] ZACC 14, 2013 (4) SA 415 (CC) should be acknowledged for their procedural development regarding the obtainment, interpretation and application of ACL. Yet legal practitioners and the judiciary's continued disregard for ACL cannot be denied.

[134] This does however not mean that the judiciary should not be limited. This question however falls beyond the scope of this paper.

[135] Constitution s 39.

[136] Klare (note 3 above) at 146, 147.

[137] Constitution ss 8 and 173.

[138] SF Moore 'Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949–1999' (2001) 7 *Royal Anthropological Institute* 95, 96-97.

[139] Ibid 97.

[140] Bennett (note 112 above) at 9. This is in accordance with the doctrine of the separation of powers.

Second, judges are required both to interpret the law and to hand down judgments which provide the court's decisions with the reasons for those decisions. The adjudication process, therefore, places judges in the position of not only interpreting and applying the law but also, in handing down reasoned and legally binding judgments, of acting as lawmakers *only in the matters brought before them*.[141]

Judgments matter. They are instrumental in perpetuating a certain legal culture, and they also steer societal norms, inform ideological values, and set the measure for legal morality in matters brought before them.[142] These real consequences are less problematic in a societal order where the people are governed by a singular legal system containing the beliefs, norms and values that are accepted by most of the population. The judgments reached by the court would take these into consideration during the adjudication process and create legal principles, and a legal culture, which would continue to reinforce these beliefs, norms and values. This is particularly true in a legal system where the judgments of the higher courts are used as precedents in future cases.[143] Herein lies the challenge of a Euro-centric substantive and procedural law in a *pluralistic* legal system.

IV AN ARGUMENT FOR AFRICAN CUSTOMARY LAW

The reception of foreign law provided South African legal practitioners with an array of legislative tools.[144] Often overlooked, however, is the culturally distant nature of some of the principles, values, beliefs and norms which underly these tools.[145] When adjudicating over disputes, courts are, therefore, not only considering legal issues but also contesting social practices which are often informed by differing sets of values, beliefs, principles and norms.[146] ACL encompasses a number of indigenously held dictums that are common across people groups. For example, the principle of *ubuntu* is accorded prominence. Similarities, however, do not stretch across both ACL and Euro-centric law. Ntlama and Ndima list five elements of ACL that illustrate the more obvious differences between Euro-centric law and ACL; these include the latter's emphasis on its acceptance by the community whose affairs are being regulated as well as its flexibility of ACL.[147]

Raising Euro-centric law above ACL in a hierarchy of legal systems, therefore, essentially constitutes a clash of ideologies, which often places courts in a difficult position.[148] Facing

[141] Klare (note 3 above) at 165.

[142] Klare (note 3 above) at 164 fn 39.

[143] Bennett (note 112 above) at 20.

[144] AJ Kerr 'The Reception and Codification of Systems of Law in Southern Africa' (1958) 2 *Journal of African Law* 82, 82.

[145] Moore (note 138 above) at 105. Here Moore refers to Comaroff & Comaroff who argued that the colonisations process was essentially an attempt to colonise consciousness. Due to the inconsistency of English law with the everyday workings of indigenous people.

[146] C Fuller 'Legal Anthropology: Legal Pluralism and Legal Thought' (1994) 10 *JSTOR* 9, 10. Fuller asserts that the dominance of the colonising state will always be challenged due to these ideological differences.

[147] Ntlama & Ndima (note 103 above) at 8. Bennet's first element is that African customary law rested 'not on the will of [a] sovereign or supreme legislature for its validity but rather on its acceptance by the community whose affairs it regulated' (Jobodwana 2000,31). Second, that customary law, 'to be valid and enforceable must be in existence at the relevant time it is sought to be enforced.' Third, that it is flexible. Fourth, that sanctions and punishment were not 'strictly institutionalised'. And fifth, that the rules of customary law were unwritten.

[148] S Burman 'The Best Interest of the South African Child' (2003) 17 *International Journal of Law, Policy and the Family* 28, 28.

this challenge, South Africa's post-constitutional courts have often deferred to legal positivism and relied on Euro-centric substantive law to be adjudicated according to Euro-centric legal procedures, which has resulted in a re-colonisation of ACL to bring it into alignment with the Constitution.[149] This legal culture becomes more prevalent when legal practitioners are unaware of this conundrum and do not approach it with the necessary caution and mindfulness.[150]

In section 211(3), the Constitution makes explicit provision for and regulates the way courts should consider ACL but, though it is afforded equal legal status, its use is restricted to matters where it is applicable. The question then becomes: when is ACL applicable?

Bennett provides some clarity by identifying three approaches to this issue. He views ACL to be applicable, first, to certain classes of disputing persons or matters disputed including 'succession, marriage and land tenure'. This approach posits that one can deduce the cultural orientation (European or African) of the parties by considering the 'cause or matter or class of disputants.'[151] The second approach limits the application of ACL to certain people groups, primarily members of certain tribes or cultural communities. The third approach pertains to the status of the parties (complainant or defendant), providing a level of judiciary discretion which allows courts to apply ACL when one or both of the parties observe ACL.[152]

From these approaches Himonga concludes that ACL is primarily applicable in private law matters concerning the African child. Without defining the 'African' child at this point, she explains that this legal system will not apply to children who belong to other racial groups.[153] Following this submission, she states that ACL deals with the rights of children and in this way intersects with the best interest of the child. She emphasises that, when dealing with matters pertaining to child law, the judiciary should apply the legal system which best serves the child's best interest.[154]

An argument can here be made to favour ACL and to encourage courts to consider its provisions in matters where this would be in the best interest of the child.[155] With regard to the judgment in *YG v S* and *FORSA v Minister of Justice and Constitutional Development*, both courts took pains to emphasise the element of public interest and the need to provide a nationally binding judgment.[156] Yet, although their judgments affect *all children* including

[149] JA Faris 'African Customary Law and Common Law in South Africa: Reconciling Contending Legal Systems' (2015) 10 *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinary* 171, 176.

[150] Bennett (note 112 above) at 11.

[151] Present-day legal discourse regarding an amalgamated South African law warrants notice. Some scholars would contest the assertion that there are only two primary cultures, but the feasibility of accomplishing a unified legal culture is doubtful, given the inherent value differences between the legal systems. A Claassens & G Budlender 'Transformative Constitutionalism and Customary Law' (2014) 6 *Constitutional Court Review* 75, 104.

[152] Bennett as discussed in C Himonga 'African Customary Law and Children's Rights: Intersections and Domains in a New Era' in J Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 73, 86.

[153] Himonga (note 152 above) at 86.

[154] Ibid at 87.

[155] R Songca 'The Africanisation of Children's Rights in South Africa: Quo Vadis?' (2018) 13 *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinary* 77, 81. In accordance with the preamble of the African Charter on the Rights and Welfare of the Child (1990) places an emphasis on the courts' consideration of African values in child law matters.

[156] *FORSA v Minister of Justice and Constitutional Development* (note 52 above) at para 23 & *YG v S* (note 8 above) at para 29.

those who subscribe to ACL, both courts neglected to consider the matter from an ACL perspective.[157]

A further argument for considering ACL in chastisement cases can be made, in the broader context of the aspiration for a coherent, realistic and representative South African legal culture and common law. In *S v Makwanyane and Another* [1995] ZACC 3, 1995 (6) BCLR 665 (CC) ('*S v Makwanyane and Another*') Sachs J recognised the importance of considering traditionally held beliefs and values when developing South African jurisprudence. He furthermore regarded recognition and consideration of ACL by courts in future as restoring dignity to its underlying ideas and values. Having identified the ability to exercise this consideration as one of the values of an open and democratic society, he emphasises the role of ACL in matters of public importance and urges courts to look beyond the values enshrined in previously exalted portions of the law that are rooted in Euro-centric legal systems. He also raises concerns about constant over-reliance on foreign law and the need to adhere to international law (evident in the cases discussed in this paper) and their perpetuation of stereotypes regarding knowledge systems and the social hierarchy that stemmed from the process of colonisation.[158]

A The way forward

Much has already been written on the judgments in *YG v S* and *FORSA v Minister of Justice and Constitutional Development*. To imagine how ACL could be used to shape the way the judiciary approaches cases involving a child's best interests, I draw attention to Lenta,[159] Clark[160] and Sloth-Nielsen.[161]

Lenta criticises the Constitutional Court's judicially minimalist approach. He notes that the Court's narrow and shallow analysis left its judgment vulnerable to misinterpretation, that those who disagree with its decision could become resentful, and that this resentment may, in turn, lead to disrespect for the Court and for the law. He also grieves the lack of an educational component, averring that the Court missed a chance to inform citizens of the wrongfulness of corporal punishment.[162] Clark echoes some of Lenta's sentiments. She also discusses the arguments for and against corporal punishment and emphasises the important role that transformation of societal attitudes and practices plays in successful implementation of the law.[163] Sloth-Nielsen's contribution concludes with disappointment at the Court's inability to use the opportunity to hand down a judgment which contributes to South Africa's standing as 'one of the leaders on children's rights in the world'.[164]

Could ACL have assisted the Court in providing a more robust and Afro-centric judgment, and could certain African principles address the points raised by Lenta, Clark and Sloth-Nielsen? Potentially, the Court could have made a unique contribution to jurisprudence had it considered ACL. This may have addressed Sloth-Nielsen's lament at the missed opportunity

[157] Himonga (note 152 above) at 84.

[158] JM Modiri 'Conquest and constitutionalism: first thoughts on an alternative jurisprudence' (2018) 10 South African Journal on Human Rights, 1, 11.

[159] P Lenta 'Corporal Punishment and the Costs of Judicial Minimalism' (2020) 137 *The South African Law Journal* 185.

[160] Clark (note 89 above).

[161] Sloth-Nielsen (note 82 above).

[162] Lenta (note 159 above) at 199–200.

[163] Clark (note 89 above) at 357.

[164] Sloth-Nielsen (note 82 above) at 203.

to contribute to the ongoing international conversation on chastisement, and to cement South Africa's standing in the international child law sphere. The following three ACL principles may have assisted the high court and Constitutional Court, and address the points raised by the remaining legal scholars.

1 *Ubuntu*

A fundamental characteristic of Euro-centric law is its emphasis on the rights of the individual.[165] By contrast, ACL places the wellbeing of the community above individual interests.[166] If 'I am because we are', there is irrefutable interdependence between the 'I' and the 'we'; the demise of the one would lead to the demise of the other. The important underlying values of *ubuntu* accordingly speak to the need to foster the child's sense of worth and dignity while also reinforcing the child's respect for the fundamental freedoms and human rights of others.[167] *Ubuntu* therefore emphasises the child's status as an integral participant in the community, and as one whose negligent treatment could therefore adversely affect the larger society. While children are considered to have rights, they also have responsibilities towards the community. Some scholars, however, view this non-child-centred approach as insensitive and potentially dangerous for the child.[168] Though disregard for children rights is a real danger in any society, few contain within their social contracts a philosophy that places the child firmly within the context of an immediate and extended family, all of whose members assume responsibility for the child.[169] More significantly, such a philosophy encourages the protection of children's rights and wellbeing on the grounds of their inherent worth as well as because of the detrimental effect that their demise would have on the community as a whole.[170] The Court alluded to this principle when it emphasised the need to end the cycle of violence prevalent in South Africa.[171] It is therefore incorrect to assume that ACL does not contain rules which promote the wellbeing of the child merely because these rules are not codified in international legal vernacular.[172]

The responsibilities of the child as a member of the community are provided in article 31 of the African Charter on the Rights and Welfare of the Child (1990) and include the child's duty to act in a manner that ensures familial cohesion, to respect their elders (parents and superiors), to 'preserve and strengthen' African cultural values, and to act as a contributor to the moral societal wellbeing.[173] These responsibilities address Lenta's argument that corporal punishment does not afford children the necessary real-life experiences to recognise the full extent of the implications of their misbehaviour, and that alternatives which require children to make reparations may better serve their development and develop their self-awareness. This

[165] P Jones 'Human Rights, Group Rights, and Peoples Rights' (1999) 21 *Human Rights Quarterly* 80, 80.

[166] Burman (note 148 above) at 31. Cf J Sloth-Nielsen & J Gallinetti '"Just Say Sorry?" *Ubuntu*, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008' (2011) 14 *Potchefstroom Electronic Law Journal* 63, 70.

[167] Sloth-Nielsen & Gallinetti (note 166 above) at 70.

[168] Burman (note 148 above) at 32.

[169] Songca (note 155 above) at 89.

[170] Himonga (note 152 above) at 81.

[171] *FORSA v Minister of Justice and Constitutional Development* (note 52 above) at para 42.

[172] Himonga (note 152 above) at 87.

[173] Article 31 of the African Charter on the Rights and Welfare of the Child (1990). Cf Songca (note 155 above) at 82.

line of reasoning falls squarely within the ACL's restorative justice agenda.[174] It acknowledges that the temporal nature of corporal punishment does not give the child the necessary time to self-reflect,[175] and it is able to accommodate effective alternatives to corporal punishment by which the child can honour his or her responsibility towards the community in ways that preserve and strengthen that community's values.

The communal nature of *ubuntu* brings further benefits, particularly in relation to the pragmatic and efficient implementation of the Court's judgment.

2 *Implementation*

The narrow top-down approach employed by courts, especially in matters of family law, means that adjudication at times neglects ACL and the principles that it could contribute. Had the Court considered the ACL approach to childrearing, particularly the notion that the child belongs to everyone, it may have found a solution to two further issues. First, the Court could have reached a more inclusive, bottom-up approach.[176] In doing so it would make the community aware of its own pre-existing values, in turn encouraging it to accept the Court's judgment without the necessity for an ideological shift. Second, this could have addressed the concerns surrounding the implementation of the Court's judgment as it provides for communal accountability.[177] The immediate intervention by fellow members of the community in matters where some may not be disciplining their children in a legal manner provides internal and or self-policing. Stated differently, if the child belongs to everyone then everyone must take responsibility for the child. This includes protecting the child from cruel and inhumane punishment which may endanger the child's wellbeing.

3 *Alternative Dispute Resolution*

The Court and legal academics voiced their concern about the possible future incarceration of non-compliant parents and the adverse ramifications this might have on the family dynamic.[178] Notwithstanding the Court's submissions regarding the *de minimis non curat lex* rule, the relevance of ACL and its promotion of alternative dispute resolution cannot be emphasised enough.[179] The necessity for state intervention is not disputed but the way it does so is important. Litigious state intervention which may lead to parental incarceration is not the ideal outcome – it could deplete government resources and add to the number of child-headed families. As an alternative, the state could hold sessions (facilitated, perhaps, by a family or child psychologist) akin to family meetings, to make non-compliant parents aware of the detrimental effects of corporal punishment as a disciplining method and to introduce the benefits of alternatives. This approach would also enable the parties involved in the dispute to apply a solution that would best serve the interests of the particular child as distinct from

[174] Sloth-Nielsen & Gallinetti (note 16 above) at 71. Cf Songca (note 155 above) at 83.

[175] Lenta (note 159 above) at 198.

[176] Bottom-up law is understood as case-by-case adjudication that 'produces law when courts adopt general principles to decide the outcome of individual disputes.' JJ Rachlinski 'Bottom-up versus Top-down Lawmaking' (2006) 73 *The University of Chicago Law Review* 933, 933.

[177] Himonga (note 152 above) at 82.

[178] *FORSA v Minister of Justice and Constitutional Development* (note 52 above) at para 52; Lenta (note 159 above) at 195–196; and Sloth-Nielsen (note 82 above) at 200.

[179] Himonga (note 152 above) at 85–86.

merely following general regulations that may not serve all children equally well. The overall long-term societal benefit would far outweigh the costs helping to address (and end) the cycle of violence; it would also empower families by enabling them to own the solutions to their disputes and to develop more effective parental skills.

In summary, I argue that incorporating core principles of ACL in issues of chastisement, as presented here, could create a platform for the development of legislation that is both child sensitive and culturally relevant. The principle of *ubuntu* presents a powerful tool to communicate the need to protect children's rights and to benefit the child and the family. It can galvanise members of the community to become invested in and actively ensure the wellbeing of its children. It can encourage the implementation of alternative intervention strategies to provide necessary rehabilitation, social educational programs and parental training services where needed.[180]

V CONCLUSION

This paper considered the approach of the pre- and post-1994 judiciary in cases in which the courts resolved the issue of corporal punishment by outlawing it in the juvenile criminal system, schools and home. Though these courts acted in accordance with the respective legislation, their over-reliance on international and foreign law in matters pertaining to the best interest of the African child limited their ability to hand down judgments which considered pertinent ACL. This in turn inhibited them from considering alternative solutions that could more easily be accepted by and work for most customary South African communities.

A consideration of ACL could have aided the courts in three ways. First, by considering the principle of *ubuntu,* courts could have employed the ACL principle that children have rights and responsibilities. Such consideration would communicate the detrimental effect that neglecting the rights of the child would have on the community. Explicitly furthering the principle of *ubuntu* could, in addition, have revealed the advantages of employing alternative methods of disciplining and rearing children. Second, formal support for the idea that the child belongs to everyone could have helped to ensure communal responsibility for the child, provide internal policing and by extension implementation. Third, alternative dispute resolution could offer a practical solution where non-adhering parents continue to exercise corporal punishment.

One wonders whether South African courts would have considered ACL *in all* South African cases if the Constitution had placed a positive obligation on them to do so, how such an obligation might have shaped their judgments and the South African legal culture, and whether it might have provided more certainty in some key areas. Contrary to views which may be held by certain legal pragmatists, it is not enough that the cases discussed here had positive legal outcomes in removing the use of corporal punishment. When law is seen as a means for cultural beliefs to be not only disseminated but also shaped, the approaches taken by South African courts matter, as do the legal tools that they consider and apply during the adjudication process.[181] Therefore, and despite the Euro-centric substantive and procedural limitations that dictate the South African judicial process, it is not far-fetched to expect the country's courts to consider the range of constitutionally recognised tools available to them, and actively include ACL when determining and ensuring the protection of the best interest of the African child.

[180] Lenta (note 159 above) at 196.

[181] Moore (note 138 above) at 99. The term 'cultural beliefs' includes the norms, values and morals of a particular cultural group, which in turn inform its behaviour.

Such inclusion should be paramount in the development of an inclusive and representative South African common law which aims to meet all the aspirations contained in the Bill of Rights while also restoring the dignity of indigenous African groups and their ideologies.