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The 2013 Constitution of Zimbabwe: A positive step towards ending corporal punishment against children

Cowen Dziva
Nehanda Centre for Gender & Cultural Studies, Julias Nyerere School of Social Sciences, Great Zimbabwe University, Zimbabwe
E-mail: cowendziva@gmail.com / cdziva@gzu.ac.zw

Prior to the adoption of a progressive Constitution of Zimbabwe in 2013, corporal punishment was regarded as one of the best ways in which children could be controlled when they misbehaved. This article draws insights from the human rights based approach and proceeds on the assumption that the outlawing of corporal punishment ushered in a new era and opportunity to effectively advance children's rights in Zimbabwe's highly conservative society. Drawing lessons from South Africa, this paper goes beyond acknowledging the constitutional clauses against corporal punishment to unearth implications thereof. Evidently, the promulgation of the 2013 Constitution ushered a new era for improved promotion, protection and enforcement of children's rights as a direct consequence of increased awareness, litigation, advocacy and lobbying against corporal punishment. While the constitutional ban on corporal punishment remains a starting point to ending the practice, evidence from South Africa shows that banning corporal punishment in terms of law is different from its total eradication in conservative societies with high moral and traditional overtones. Beyond the constitutional ban, this study recommends speedy alignment of child laws to the new constitution and international best practices, and widespread efforts to enlighten society on the constitutional provisions against the practice, and other alternative ways to discipline misbehaving minors without violating their fundamental rights and freedoms.

***Keywords**: constitution; corporal punishment; child rights; banning and morality*

INTRODUCTION

In 2013, Zimbabwe enacted a new Constitution with a strong bias towards the protection and promotion of human rights (Sloth-Nielsen & Hove, 2015). The Constitution is progressive when it comes to the protection of children from corporal punishment at the hands of teachers, parents and guardians. Prior to the 2013 Constitution, corporal punishment was regarded as one of the ways in which children could be controlled when they misbehaved. Children used to be disciplined through corporal punishment and judicial caning for different acts of misconduct which include but are not limited to the following: "indiscipline", abuse of drugs, stealing and sexual offences. In learning institutions, the practice was administered to students in cases of poor performance, insubordination and engaging in counter-productive behaviours including late- coming, absenteeism, possession of cell phones and alcohol, not abiding to school dress code and disrespecting elders (Korb, 2011).

Influenced by the human rights based approach, this article proceeds on the assumption that outlawing corporal punishment remains a positive move that any civilised and democratic society should take towards the advancement of children's rights. Specifically, the article analyses constitutional declarations against corporal punishment, and the implications these have on the protection, promotion and enforcement of children's rights. In this analysis, the writer draws vital insights from South Africa, one of the pioneers in banning corporal punishment in Southern Africa. South Africa prohibits corporal punishment through many of its legal documents including the 1996 Constitution, National Education Policy Act, and the South African Schools Act 84. All these laws protect the rights of the child by compelling educators, law enforcement agents and society to promote, protect and respect the rights of children (Maphosa & Shumba, 2010). The Abolition of Corporal punishment Act of 1997 also prohibits the use of the practice as a sentence for crime. The Act was enacted following a Constitutional Court judgment in the *S v Williams et al, 1995* case, in which the court made it clear that whipping is unconstitutional.

With over two decades after banning corporal punishment, the South African experience remains critical for Zimbabwe which only thought of banning this grave affront to dignity in 2013. Lessons from South Africa are especially important in terms of projecting the challenges likely to be faced as Zimbabwe moves towards total eradication of this practice in the post constitutional reform and the 2019 Constitutional Court confirmation of the abolishment. The writer is sanguine that insights from South Africa remain an important reminder to policy makers and child rights advocates to brace for the work ahead of them in their pursuit for total eradication of corporal punishment. While the article primarily focuses on

Zimbabwe, it nevertheless raises important issues for all African cultural relativist countries that are in the process or will consider banning corporal punishment in society.

This article starts with this introduction, followed by an analysis of the extent of corporal punishment prior to the 2013 Constitution in Zimbabwe. After this section, the article analyses the value of the Constitution and the constitutional clauses against corporal punishment. Thereafter, the article discusses the implications of promulgating the 2013 Zimbabwean Constitution with reference to litigation, advocacy and other measures for fighting corporal punishment. With lessons from South Africa, the article concludes the argument, proposing a raft of measures regarding what it takes to effectively eradicate corporal punishment beyond the constitutional and judicial pronouncement in Zimbabwe. This article adopts a qualitative methodology as informed by descriptive and comparative designs to understand the constitutional and judiciary banning of corporal punishment and implications thereof. The study utilised extant literature from books, journal and newspaper articles, and court cases on corporal punishment.

SITUATING CORPORAL PUNISHMENT BEFORE CONSTITUTIONAL REFORM IN ZIMBABWE

Since independence in 1980, Zimbabwe had been governed by the Lancaster House Constitution of 1979, a document that offered little in terms of child protection. The Lancaster House Constitution failed to speak against various forms of corporal punishment to which children are exposed to in society. In her judgement against corporal punishment in the case of *S v Chokuramba*, Justice Muremba rightly stated that corporal punishment had continued to exist because section 15 (3) of the Lancaster House Constitution permitted its use as a sentence for juveniles, and tolerated it in schools, homes, and society (High Court of Zimbabwe, 2014). Without constitutional protection, corporal punishment became a routine way to control children in schools and society.

The practice had and still has legal backing from several local statutes, including the Children's Act [Chapter 5:06] of 1987, Criminal Law (Codification and Reform) Act [Chapter 9:23] of 2004, and the Criminal Procedure and Evidence Act [Chapter 9:07] of 2004. Under section 241 (2) of the Criminal Law (Codification and Reform) Act, corporal punishment is permitted in schools, homes and alternative care settings, such as children's homes. The clause in question states that a "…parent or guardian shall have authority to administer moderate corporal punishment for disciplinary purposes upon his or her minor child or ward". It is also permissible under section 353 (1) of the Criminal Procedure and Evidence Act for courts to sentence a male juvenile to moderate corporal punishment, not exceeding six strokes. Children that have been sentenced to judicial caning are therefore examined by a medical practitioner first to determine whether they are fit to undergo judicial caning.

In the education system, the Criminal Law (Codification and Reform) Act of 2004 empowers a school teacher (defined as the head or deputy head of a school) under section 241 (2) (b) to 'have authority to administer moderate corporal punishment upon any minor male pupil or student for disciplinary purposes'. Similarly, section 69 (2) (c) of the Education Act of 1987 authorises regulations to provide for "discipline in schools and the exercise of disciplinary powers over pupils attending schools, including the administration of corporal punishment". In the same way, circular P35 of the Ministry responsible for education allows only heads of schools and superintendents or housemasters, in the case of boarding schools to administer corporal punishment as a last resort on boys. Courtesy of these statutes, children continued to be patently discriminated against, exposed to inhumane and degrading treatment in the name of the undefined 'moderate corporal punishment'. In a majority of schools 'moderate corporal punishment' has been administered to misbehaving children by every teacher against the provisions of the Education Act and Criminal Law (Codification and Reform) which only prescribe the head teacher to be the only member of staff to administer corporal punishment to students.

It can be noted that the prevailing situation in Zimbabwe, whereby the Constitution is the only legal document speaking against corporal punishment is different from the South African case where a number of laws abolish this practice in the same way with the supreme law. While many of the South African laws prohibit corporal punishment, the practice remains tolerated in the home with the support of common law. As revealed in the *R v Janke and Janke* case, common law empowers parents or anyone acting in the parent's place the power "to inflict moderate and reasonable chastisement of a child" in South Africa (GIECPC, 2018). Nevertheless, the High Court of South Africa in a 2017 case of *YG v The State* made a decision that common law's defence of "moderate and reasonable chastisement" breaches the rights of

children as stipulated in the 1996 Constitution, and declared this to be unconstitutional (GIECPC, 2018). While the court decision was a clear confirmation by the judiciary that no level of corporal punishment is tolerated, the cases speak to the need for alignment of laws in South Africa for total abolishment of all forms and levels of corporal punishment in society.

In Zimbabwe, and many other societies of developing countries, the use of corporal punishment is entrenched in social norms and values that tolerate the practice. A UNICEF (2008) study conducted in Uganda found biblical scriptures to support corporal punishment. The Holy Bible in Proverbs 13:24, states that whoever spares the rod hates their children, but the one who love their children carefully disciplines them. Other social norms and statements that influence use of corporal punishment include the following '[W]ithout pain there is no gain'; '[T]hose who turned out well in life are so because they were beaten as children' and that '[A] person in authority has to exert control always' (Mushohwe, 2017: 2). The practice is widely accepted as a method which enhances moral character development in children or that increases children's respect for authorities (Gwirayi, 2011). Based on these societal misconceptions, corporal punishment has remained part of a cultural way of building a well-behaved, obedient and law abiding child.

Notwithstanding its continued use, corporal punishment is against best human rights norms and standards. The United Nations Committee on the Rights of the Child (2007) has defined corporal punishment as 'any punishment in which physical force is used and intended to cause some degree of pain or discomfort'. Corporal punishment comes in various forms, including judicial caning, hitting, slapping, spanking, pinching, kicking, punching, shoving, use of objects like belts and sticks, with the purpose to cause physical pain in order to change behaviour (Busienei, 2012). Child victims of corporal punishment report pain, wounds, physical discomfort, nausea, injuries and embarrassment as well as feeling vengeful (Gwirayi, 2011; Mushohwe, 2017; UNICEF, 2008). The practice negatively affects the social, psychological and educational development of the child (Jenny, 2009).

In extreme cases, corporal punishment has resulted in death of the victims in both Zimbabwe and South Africa (Zulu, Urbani, Van der Merwe & Van der Walt, 2004; Marunda, 2016). Newspapers in Zimbabwe are awash with stories of parents and teachers beating children to death in an attempt to discipline them. A survey conducted by Marunda (2016) noted the following reported cases in 2015 and 2016:

- A Chitungwiza mother was reported to have beaten and killed her son for 25 cents;
- A Bikita man was reported to have beaten his 13-year-old son to death for farting;
- A Kwekwe woman was reported to have beaten her daughter to death for sexual promiscuity;
- A grandmother beat and killed her 4-year-old granddaughter;
- A Chitungwiza woman beat and killed her 10-year-old niece for stealing 1 Rand and
- A Gutu man was reported to have tortured his 4-year-old son to death for soiling himself in 2015.

In human rights lenses, corporal punishment is tantamount to violence, inhumane and degrading treatment, which is prohibited by international human rights instruments, including articles 16, 17 and 20 of the African Charter on the Rights and Welfare of the Child (ACRWC, 1990) and articles 28 and 37 of the Convention on the Rights of the Child (CRC, 1990). Under article 37, the CRC stipulates that "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment". Mindful of its impacts, the UN during its 2011 Universal Periodic Review on Zimbabwe, recommended the Southern African nation to prohibit corporal punishment in all settings, on the basis that is against the best human rights standards. Zimbabwe complied with this international abhorrence of corporal punishment by adopting a foundation instrument, namely the Constitution of Zimbabwe Amendment No. 20 Act of 2013 to replace a child insensitive Lancaster House Constitution of 1979. The 2013 Constitution has been hailed by many child protectors as a positive development for advancing children's rights and bringing an end to corporal punishment (Sloth-Nielsen & Hove, 2015). Now more than five years after it was promulgated, the Constitution deserves a full assessment on its implications in ending corporal punishment.

THE 2013 CONSTITUTION OF ZIMBABWE: A NEW ERA FOR CHILD VICTIMS OF CORPORAL PUNISHMENT?

The 2013 Constitution of Zimbabwe like the South African one, do not explicitly provide for a clear cut provision against corporal punishment. While the two constitutions may not expressly refer to corporal punishment, they have rather various clauses that promote and protect the rights of all human beings

including children to human dignity, physical integrity, personal security, and freedom from torture or cruel, inhumane or degrading treatment or punishment as discussed below.

The Constitution, under section 3 (1) (e) provides for the inherent dignity and equal worthy of each human being as one of the founding values and principles upon which the country is bed rocked. The right to human dignity and acceptance of children as equally worthy human beings is further reinforced under section 51, which states that, "[e]very person has inherent dignity in their private and public life, and the right to have that dignity respected and protected" (Constitution of Zimbabwe, 2013: 29). This clause has a direct implication to corporal punishment which directly and indirectly violates the dignity of the child. Accordingly, the inclusion of the inherent dignity and equal worthy of all human beings as one of the founding values and principles of the Constitution shows an appreciation for the equal worth of all human beings and has the effect to prohibit corporal punishment. In essence, the recognition of the inherent dignity of all human beings in the Constitution addresses the critical challenges of children in society, including corporal punishment.

In a similar way with the second chapter of the South African Constitution, the new Constitution of Zimbabwe provides for an expanded Declaration of Rights, and states in unequivocal terms the need to protect the rights of all human beings including freedom from torture, violence, inhuman and degrading treatment, psychological and physical harm. Under section 53 of the Constitution of Zimbabwe (2013: 23) "**no person** may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment". Speaking specifically for children, section 81 (1) (e) affords children the right to be protected from maltreatment and all forms of abuse. These rights are justiciable, and any law or conduct inconsistent with them may be declared invalid by the superior courts. With regards to the Zimbabwean case, the issue of "justiciability" is buttressed by section 86 (3) (c), declaring that no law may limit the following rights enshrined under the Constitution and no person may violate the right not to be tortured or subjected to cruel, inhumane or degrading treatment or punishment (Constitution of Zimbabwe, 2013). Thus, the rights provided in constitutions of the two Southern African nations are absolute and non derogable. This implies that there is no justification whatsoever for applying corporal punishment to anyone including children by any person, be it parents, teachers or institutions for child justice.

In other words, the crafting of section 51, 52, 53 and 81 of the Constitution of Zimbabwe is presumed to have been made with full consciousness of the desire to end corporal punishment on the basis of its inherent violation of the said rights. In terms of statutory interpretation, section 51, 52 and 53 of the Constitution must be given their literal meaning because the words used are ordinary, unambiguous and plain. There is no need for a 'golden' interpretation or 'mischief' rule because the interpretation is clear and loud from the words themselves.

Implications of the 2013 Constitution on Corporal Punishment

Zimbabwe ratified and is a state party to many international human rights instruments including the CRC and ACRWC, all which embodies best practices on non-discrimination and protection of children from corporal punishment. Thus, the constitutionalisation of clauses for the respect of children's rights to human dignity, personal security and freedom form torture, cruel, inhumane and degrading treatment or punishment resembles the spirit of United Nations and the African human rights system, which calls for member states to reform national laws to ensure effective promotion, protection and enforcement of children's rights. In terms of the CRC and ACRWC, children's rights are the indispensable and inalienable rights of all human beings. Specifically, article 19 of the CRC and 28 (2) of the ACRWC mandates state parties to come up with:

> *appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the case of parent(s), legal guardian(s) or any other person who has the care of the child.*

In addition, constitutionalising section 51, 52, 53 and 81 resembles a positive response to various treaty bodies that have been recommending Zimbabwe to abolish corporal punishment. In 2015, the *African Committee of Experts on the Rights and Welfare of the Child's* concluding observations on Zimbabwe's initial report, para. 26) stated that:

> *While appreciating the State Party for taking various legislative and administrative measures to protect children from abuse and torture, the Committee is concerned of the fact that children could still be sentenced*

by courts for whipping. The Committee, therefore, recommends the State Party to expedite the adoption of the General Amendment Bill as it has the effect of prohibiting child whipping and to abolish corporal punishment in all settings and to promote alternative positive disciplining measures.

Similarly, the 2016 Concluding Observation of the *Committee on the Rights of the Child* noted that:

With reference to its General comment No. 8 (2006) on corporal punishment, the Committee reiterates its previous recommendation (CRC/C/15/Add.55, para. 31) and urges the State party to:

a) repeal or amend, as needed, all legislation and administrative regulations in order to explicitly prohibit corporal punishment in all settings as a correctional or disciplinary measure…

Thus, the inclusion of section 51, 52 and 53 in the Constitution ensures the domestic accountability of Zimbabwe's obligations to already-accepted and ratified children's rights treaties such as the CRC and the ACRWC.

Constitutionalisation of the inherent dignity and equal worth, personal security and human freedoms empower child rights defenders and institutions to question the legality of behaviours or practices that undermine the dignity and value of children in society, including corporal punishment. Indeed, the Constitution has opened up opportunities for awareness raising work against corporal punishment. Civil society and state institutions have traditionally played a pivotal role in fighting corporal punishment and have gained even more momentum with the adoption of the 2013 Constitution. Upon the adoption of the Constitution in 2013, state and non-state actors have been raising awareness on the abolishment of the practice, through issuing of press statements and petitioning the Constitutional Court to confirm and abolish this inhumane and degrading practice in schools and society. Similarly, many civic organisations in the child rights sector have taken a lead in calling for the alignment of child laws to the constitution and best international practices on child development.

With the 2013 Constitution in Zimbabwe, the judiciary has been able to question the legality and rationale of corporal punishment, with a number of landmark judgements being made against this practice. Below are some of the cases and judgements passed:

In the case of S v Chokuramba, a 15-year-old boy was found guilty of sexually molesting a 14-year-old female neighbor and was sentenced to canning by the court. The High Court judge, Justice Esther Muremba ruled that it was unconstitutional, and therefore illegal, to use corporal punishment on children. In giving her ruling, Justice Muremba noted that the new Constitution had no room for the "cruel" act which has been described by international humanitarian organisations as "barbaric and ancient" (High Court of Zimbabwe, 2014).

In the case of Pfungwa & Anor v Headmistress of Belvedere Junior Primary School & Others, Lina Pfungwa, a concerned parent approached the High Court of Zimbabwe challenging corporal punishment at schools after her Grade One child was subjected to beatings by her teacher. In her affidavit, Pfungwa said she strongly believed that no one, whether at school, a teacher or parent at home, should inflict corporal punishment on a child. Justice Mangota ruled that corporal punishment is violence against children. In giving the ruling, Justice Mangota stated that, "I believe that corporal punishment is violence against children and I do not believe that children should be subjected to any form of violence. I further believe that corporal punishment is a physical abuse of children. It amounts to deliberately hurting a child, which causes injuries such as bruises, broken bones, burns or cuts. In my opinion, there is no excuse for physically abusing a child. It causes a serious and everlasting harm and in some cases death" (High Court of Zimbabwe, 2016).

The Judge further stated that,

"It is my respectful contention that corporal punishment at school and in the home, amounts to a breach of section 81 of the Constitution of Zimbabwe, which defines the rights of children … in addition, it is my respectful contention that corporal punishment, breaches the provisions of section 53 of the Constitution of Zimbabwe" (High Court of Zimbabwe, 2016).

It is noteworthy that all the above declarations of the constitutional invalidity of corporal punishment by High Court judges were upheld by the Constitutional Court of Zimbabwe on 3 April, 2019. This is in terms of section 175 (1) of the Constitution of Zimbabwe (2013: 74), which states that where any other court makes an order on a constitutional matter, "the order has no force unless it is confirmed the Constitutional Court". Thus, the Constitutional Court, on 3 April, 2019 upheld High Court decisions that it was unconstitutional for educators, parents and law enforcement agencies to subject children to corporal punishment. In these matters, the Chief Justice, Luke Malaba declared that the elimination of judicial corporal punishment from penal system is an immediate and unqualified obligation on the State. Thus, the judiciary has proved beyond any reasonable doubt that it remains a protector of children's rights against inhumane and degrading practices in Zimbabwe.

Impending challenges to eradication of corporal punishment: Lessons from South Africa

Despite these positive strides in outlawing corporal punishment, it appears to be a long way until this affront to human dignity is totally eradicated in society. Evidence from South Africa, a nation that banned corporal punishment before Zimbabwe largely points to some impending barriers to the total eradication of this practice beyond these judicial and constitutional abolishment. Studies from South Africa suggest the need for child rights advocates to be wary of the heavy moral overtones from conservatives and traditionalists who continue to view corporal punishment as the best way to discipline children (Ndoma, 2017; Maphosa & Shumba, 2010; Ntuli & Machaisa, 2014). These studies further suggests that the banning of corporal punishment has increased indiscipline and immoral behaviour amongst children and youths in society and institutions of learning. Indeed, conservatives have emerged since the 2013 constitutional reform in Zimbabwe to ignite a heated debate on the morality of abolishing corporal punishment. The results of a post-constitutional reform survey conducted by the Zimbabwe National Statistics Agency (ZimStats, 2015) point to about 38% of respondents who believed that corporal punishment is needed to up-bring, raise, or properly educate a child. These fears were also evident in the mind of the now late Chief Justice Godfrey Chidyausiku when setting aside a judgement on the *S v Chokuramba* case. In the case in question, Justice Chidyausiku argued that abolishing corporal punishment is not Zimbabwean and would result in higher levels of indiscipline among children. Thus, creating an impression that the practice is inherently African and that Africans have always relied on corporal punishment to discipline their children. These sentiments clearly indicate the influence of morality in creating an ambivalence and the ever-present temptation to instigate corporal punishment as a means of instilling fear and enforcing discipline amongst African societies.

With a specific reference to the education sector, this study noted how extant literature are correlating the increase in cases of discipline in schools and the prohibition of corporal punishment in South Africa (Maphosa & Shumba, 2010; Naong, 2007; Ntuli & Machaisa, 2014). These studies also lament the predicament that educators find themselves in trying to apply contemporary disciplinary measures amid inadequate training on alternative disciplinary measures by the ministry responsible for education (Matoti, 2010). Learning from these ambiguities, some key players in the Zimbabwean education sector, including the Progressive Teachers' Union of Zimbabwe (PTUZ) have chosen to vehemently oppose the outright outlawing of corporal punishment. The stance of PTUZ remains that corporal punishment is a moderate chastening of children to enforce good morals and proper behaviour on misbehaving children (Mbanje, 2015). Thus, the PTUZ views the total abolishment of corporal punishment to have a possibility of turning schools into jungles.

Another bone of contention regarding the banning of corporal punishment in South Africa and other countries regards to the option of sentencing and giving children found guilty of criminal offences a jail term or the option of paying fines amid the abolishment of corporal punishment. Before the abolishment of corporal punishment through the Abolition of Corporal punishment Act in South Africa, and the constitutional reform in Zimbabwe the courts had the option of resorting to judiciary caning, as an appropriate way of keeping juveniles found guilty of committing criminal offences out of the deplorable and overcrowded prisons, where children's right education and proper growth are compromised. In Zimbabwe, this option was stipulated under section 353 (1) of the Criminal Procedure and Evidence Act. Equally worrying is the remaining-likely option that in the aftermath of this ban the courts will resort to fining juveniles found guilty of criminal offenses. While this seems a better option compared to jailing them, the payment of fines by juvenile offenders means burdening guardians considering that a majority of young offenders are dependent on parents and guardians. This consequently reduces the opportunity for reformation and rehabilitation on the offender's part. Faced with these options, some sections of the society are tempted to believe that the outright removal of judicial caning and replacing it with a jail term or fines would be more harmful to child development.

CONCLUSION AND RECOMMENDATIONS

The obligations set by the Constitution of Zimbabwe in relation to corporal punishment are commendable as they resemble those taken by South Africa and other progressive constitutional democracies in line with international best practices. In a way, the constitutional declaration against corporal punishment confirms the inhumane nature of the practice, and how it no longer has any place in contemporary human rights

praxis. It is as a consequence of this move that there is steadfastness and opportunities have been created for advocacy, lobbying, and litigation against this affronting practice to the enjoyment of children's rights. Even with impeding challenges from traditionalists and conservatives as shown in the South Africa case, child rights advocates are delighted that the 2013 constitutional reform and developments thereafter made corporal punishment a thing of the past, at least in terms of the law. Indeed, the law is different from law as it ought to be or as wished by moralists, traditionalists and religious fanatics. Actually, the purpose of the law is to protect humans from potential prejudices that may arise from religion, tradition and morality as perceived.

Moving beyond this abolishment, stakeholders in child rights in Zimbabwe and South Africa are vouched to continuously engage in widespread advocacy and lobbying for alignment of child laws to the Constitutions and best international instruments against all levels of corporal punishment. Government departments responsible for child development and civil society organisations should also endeavour to raise awareness amongst traditionalists and conservatives to change their mind-set and adopt other ways of disciplining minors without exposing them to inhumane, cruel and degrading treatment. Equally important is for stakeholders including the judiciary and those in the education sector to research and envisage sustainable alternatives to judicial caning, and ensuring discipline amongst children. Indeed, research has the power to bring to light the best possible methods and strategies used in other progressive societies to deal with indiscipline while upholding human rights standards, and proper child development.

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