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Banning the physical punishment of children in the UK: a human rights imperative for children

Recently the Children's Commissioner for England, Maggie Atkinson, has expressed her view that the law should be reformed to ensure that parents are banned from smacking their children. The current laws prohibit adults from smacking, pushing or shoving other adults and indeed protect pets from violence. However the protection provided to children by the law on assault and cruelty is qualified by the common law defence of reasonable chastisement. The defence of reasonable chastisement allows parents to physically punish their child provided it does not escalate beyond reasonable chastisement. Therefore if parents use physical punishment that is considered to be reasonable chastisement, the parent cannot be convicted of assault. In this article I will examine the scope of the defence of reasonable chastisement, consider its conformity with international law and assess whether the current standards are providing appropriate protection of children's human rights in 21st century Britain.

The current law on the physical punishment of children in the UK.

The UK laws against cruelty to children endorse the common law defence of 'reasonable chastisement', which provides a legal defence for parents to punish their children using physical violence. Those with parental responsibility may lawfully chastise and inflict moderate and reasonable corporal punishment for the purpose of correcting or punishing a

child. Under section 58 of the Children Act 2004 parents, in England and Wales, accused of causing actual bodily harm to their children cannot invoke the defence of reasonable chastisement if their smacks cause mental harm, bruising, scratching or reddening of the skin. The 2004 Act thus limits reasonable chastisement to mild smacking and provides a defence of reasonable chastisement only when the punishment amounts to common assault, but not when it results in actual bodily harm. While section 58 of the Children Act 2004 limits the defence of reasonable chastisement it still sends out a dangerous message that it is legally acceptable to assault a child as parents in England will be deemed to have used only 'reasonable chastisement' even where the punishment results in grazes, superficial cuts, or a black eye. The Children Act 2004 also lacks clarity as it leaves police, lawyers and prosecutors with the task of deciding when hitting is hurting a child, physically and mentally. How is a parent to know what degree of force to use? Will parents know the precise force and velocity required to hit a child without causing a bruise? Also making the visibility of bruising the test of whether a smack has been too hard is unfair as different children bruise in different ways, some children bruise quite easily, other children may only bruise after a severe smack. In Scotland section 51 of the Criminal Justice (Scotland) Act 2003 similarly seeks to restrict the defence of reasonable chastisement by prohibiting the use of implements in disciplining a child, a total ban on blows to the head and a ban on shaking. Circumscribing the occasions on which the defence can be used does improve the protection provided to children. However, it is not particularly clear and fails to send out a clear message about what behaviour is unacceptable in families, or what society feels about violence. To set out the activities, like hitting with a stick or belt, or the locations of blows, such as on the head, which were not acceptable, might do what is intended and send out a message that only mild physical punishment is acceptable. Equally, though, it could send out a message that all physical punishment, except those forms listed, is acceptable and even to be encouraged. For

example, a ban on hitting with sticks or belts does not make it clear that physical punishment with a fist or foot is equally undesirable.

European and International law on protecting the physical integrity of children

The position in the UK is increasingly at odds with its European neighbours. 24 European countries have abolished parents' right to use any forms of physical punishment: Albania, Austria, Bulgaria, Croatia, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Luxembourg, Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden and Ukraine. An outright ban on physical punishment would be easier to police than the compromises enacted in the 2004 Act and the Scottish 2003 Act and such a ban would be consistent with the UK's obligations under international law. For example the United Nations Committee on the Rights of the Child has urged the UK government to promote positive, participatory and non-violent forms of discipline and respect for children's equal right to human dignity and physical integrity (United Nations Committee on the Rights of the Child, 2002, para 38(b)). The UN Committee on the Rights of the Child has been extremely critical of any legal principle which allows parents to administer any form of physical punishment which could be described as 'reasonable chastisement'. The Committee on the Rights of the Child pointed to the imprecise nature of this expression and the risk of it being interpreted in a 'subjective and arbitrary manner' contrary to the provisions of the United Nations Convention on the Rights of the Child (United Nations Committee on the Rights of the Child, 1995, para 16). The defence of 'reasonable chastisement' allows punishment of children involving physical and mental violence in breach of Articles 19 and 37 of the Convention on the Rights of the Child. Article 19 insists that children must be protected from all forms of physical or mental violence, and Article 37 prohibits cruel and degrading treatment and punishment. At its 42nd session, held in Geneva

in May 2006, the Committee on the Rights of the Child adopted a new *General Comment* on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, which stressed the need for all states parties, including the UK, to move quickly to prohibit and eliminate all physical punishment of children.

The United Nations Committee on Economic, Social and Cultural Rights, the human rights treaty body which monitors states' progress in implementing the International Covenant on Economic, Social and Cultural Rights, has echoed the opinion of the Committee on the Rights of the Child and recommended that the physical punishment of children in families should be prohibited (United Nations Committee on Economic, Social and Cultural Rights, 2002). The Committee on Economic, Social and Cultural Rights considers corporal punishment as being inconsistent with the fundamental guiding principle of international human rights law enshrined in the preambles to the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. The preamble of the Universal Declaration of Human Rights asserts, "*Childhood is entitled to special care and assistance*" and the preamble of the International Covenant on Economic, Social and Cultural Rights recognises that "*the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*". Article 7 of the United Nations International Covenant on Civil and Political Rights similarly prohibits inhuman and degrading treatment, and the treaty implementation body for the Covenant, the Human Rights Committee, has also expressed disquiet at the UK's continued failure to introduce specific legislation banning all corporal punishment of children (Human Rights Committee, 2001, para 72).

In 1985 the Committee of Ministers of the Council of Europe drafted a formal recommendation on violence in the family, to which the UK are participants, saying among other things that member states should prohibit physical punishment. The Committee of Ministers recommended that member states should “*review their legislation on the power to punish children in order to limit or indeed prohibit corporal punishment, even if violation of such a prohibition does not necessarily entail a criminal penalty*” (Recommendation R85/4(1985) para 12). The explanatory memorandum noted that “*It is the very assumption that corporal punishment of children is legitimate that opens the way to all kinds of excesses and makes the traces or symptoms of such punishment acceptable to third parties*” (at p. 14). The Committee of Ministers supported the provision of services to help parents in child rearing and the promotion of public information campaigns on the subject of positive child rearing practices. Similarly the European Social Charter requires “*a prohibition in legislation against any form of violence against children, whether at school, in other institutions, in their home or elsewhere.*” The European Committee on Social Rights, which oversees implementation of the European Social Charter, stated that it “*does not find it acceptable that a society which prohibits any form of physical violence between adults would accept that adults subject children to physical violence*” (European Committee on Social Rights, 2001). In reaching this conclusion the Committee rejected the argument that there is an educational value in the corporal punishment of children that cannot otherwise be achieved. Here the European Committee on Social Rights are echoing similar views expressed at the same time by the Israeli Supreme Court in *Plonit v A.G.* (4596/98 54(1)P.D.) Prior to this decision, Israel followed the English common law approach to the physical punishment of children by their parents. However in *Plonit* the Israeli Supreme Court ruled that that “*corporal punishment as an educational method not only fails to achieve its goals, but also causes physical and psychological damage to the child, that is liable to leave its mark on him even in*

maturity.” The Israeli Supreme Court held that they could no longer leave open the definition of reasonable chastisement as this could endanger the welfare and physical well-being of children. The Israeli Supreme Court ruled that the use of punishment which causes hurt and humiliation can never contribute to the child’s personality or education, but instead serves only to damage the child’s human rights. Accordingly, the court decided that the physical punishment of children as a method of education by their parents, is entirely impermissible; “*let it be known that in our society, parents are now forbidden to make use of corporal punishment or methods that demean and humiliate the child as an educational system.*” Similarly the Italian Supreme Court in 1996 ruled that “ ... *the use of violence for educational purposes can no longer be considered lawful*” (Supreme Court of Cassation, 6th Penal Section, March 18 1996). Judge Francesco Ippolito predicted that the judicial abolition of corporal punishment would filter into society as a new norm and create an atmosphere in which the physical chastisement of children would no longer be socially acceptable. In 2008, the Council of Europe launched a Europe-wide campaign for prohibition of all physical punishment and the promotion of positive non-violent parenting in its 47 member states, seeking to achieve “*a continent free of corporal punishment*”.

Conclusion

The success of families in bringing up children will shape the future, not only of those individual children, but also of our whole society. Applying appropriate discipline, in the sense of responding consistently to a child’s behaviour, and setting clear boundaries, is part of bringing up children. A failure to provide guidance and set boundaries is in itself a form of neglect that can be very damaging to a child. On the other hand, discipline that is harsh can be damaging to a child both physically and emotionally. The use of corporal punishment is

associated with significant increases in physical abuse and long-term anti-social behaviour. The justification of an assault on a child on the basis of 'reasonable chastisement' should be removed, thereby putting the child in exactly the same position as adults and pets in respect of the law. Such reform would provide children with greater protection and ensure the law is clear, simple and workable, so that parents know where they stand. The Children Commissioner's recommendation to abolish parents' right to use physical punishment when disciplining their children would help to create an environment in which children are reared free from violence and bring UK law into full compliance with international law obligations.