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# ‘AN ANALYSIS OF THE LEGAL FRAMEWORK RELATED TO CORPORAL PUNISHMENT AGAINST CHILDREN’

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## **Abstract**

The main concern in terms of corporal punishment is that it is a violation of the basic human rights of the child. There is one view which believes that infliction of pain is necessary upon the children in order to keep them on the right track. However, in light of the various national and international instruments, it amounts to violation of human rights in general and child rights in particular. So, what is the current legal approach to tackle the problem needs to be understood well. An attempt to do the same has been made in this research paper.

The method of the research includes an analysis of the physical and psychological impacts of corporal punishment vis – a – vis the arguments for and against the issue. In this paper, the researcher analyses the legal framework that is present in the national and the international sphere to deal with the issue of corporal punishment inflicted upon children. The first part of the paper deals with the concept of corporal punishment, its definition and scope. The next part discusses the legal framework present at the international level with special reference to the Convention on the Rights of the Child. Thereafter the research paper deals with the legal framework at the national level which focuses upon the Indian take on CRC along with important judicial pronouncements. The fourth part reflects upon the physical and psychological impacts of corporal punishment. After this analysis the paper is concluded with findings and suggestions.

**Keywords:** Corporal Punishment, Convention on the Rights of Child, Best Interest Theory, UN Charter

## **INTRODUCTION**

“The hallmark of culture and advance of civilization consists in the fulfilment of our obligation to the young generation by opening up all opportunities for every child to unfold its personality and rise to its full stature, physical, mental, moral and spiritual. It is the birth right of every child that cries for justice from the world as a whole”<sup>1</sup>

Government of India has recognized that 65 per cent of school going children are inflicted with corporal punishment.<sup>2</sup> This discourse has been active since before 1979 when Sweden became the first country to prohibit ‘all corporal punishment of children (in schools and home)’ by law.

In **Ingraham v Wright**<sup>3</sup>, the US SC considered the question whether corporal punishment in public schools constituted cruel and unusual punishment. The Court explained the origin of the controversy surrounding the use of corporal punishment in schools:

“ At common law, a single principle has governed the use of corporal punishment: Teachers may impose reasonable but not excessive force to discipline a child...The prevalent rule in this country today privileges such force as a teacher or administrator ‘reasonably believes to be necessary for (the child’s) proper control, training, or education. To the extent the force is excessive and unreasonable, the educator is subject to possible civil and criminal liability.”

The trend in public schools has been away from using corporal punishment. A vast majority of American states permitted corporal punishment as late as 1974, but now more than half the states prohibit using it.<sup>4</sup>

### **1. Meaning of Corporal Punishment**

When we talk of corporal punishment, the forty second session of the Committee on the Rights of the Child held in Geneva in 2006 assumes a lot of importance. It focused on corporal punishment and other cruel or degrading forms of punishment, which are currently very widely accepted and practised forms of violence against children. It has defined Corporal Punishment as:

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<sup>1</sup> V. R. KRISHNA IYER, JURISPRUDENCE OF JUVENILE JUSTICE : A PREAMBULAR PERSPECTIVE as in MAMTA RAO, LAW RELATING TO WOMEN & CHILDREN 413 (2<sup>nd</sup> Ed., Eastern Book Company, Lucknow, 2011).

<sup>2</sup> Ministry of Women and Child Development, GOVERNMENT OF INDIA, STUDY ON CHILD ABUSE: INDIA 2007, (2007).

<sup>3</sup> 430 US 651 (1977).

<sup>4</sup> Loenard P. Edwards, *Corporal Punishment and the Legal System*, 36 SANTA CLARA LAW REVIEW 983 (1996).-

“Any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting (“smacking”, “slapping”, “spanking”) children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children’s mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child.”

Corporal punishment and other cruel or degrading forms of punishment of children take place in many settings, including within the home and family, in all forms of alternative care, schools and other educational institutions and justice systems - both as a sentence of the courts and as a punishment within penal and other institutions - in situations of child labour, and in the community.

## **2. Human Rights Standards at the International Level**

Prior to the Convention on the Rights of the Child (hereinafter CRC), the International Bill of Human Rights upheld “everyone’s right to respect for his/her human dignity and physical integrity and to equal protection under the law.” To prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment, the CRC builds on this foundation.

The preamble to CRC affirms that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.

Article 37 requires States to ensure that “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”. This is complemented and extended by article 19, which requires measures taken by States 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 care of parent(s), legal guardian(s) or any other person who has the care of the child”.

In addition, article 28, paragraph 2, of the Convention refers to school discipline. Article 19 and article 28, paragraph 2, do not refer explicitly to corporal punishment. But the Convention, like all human rights instruments, must be regarded as a living instrument, whose interpretation develops over time. Since the Convention was adopted, the prevalence of corporal punishment of children in their homes, schools and other institutions has become more visible, through the reporting process under the Convention and through research and advocacy by, among others, national human rights institutions and non-governmental organizations (NGOs).

The Committee on Economic, Social and Cultural Rights, in its general comment No. 13 (1999) on “The right to education” stated:

“In the Committee’s view, corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preambles to the Universal Declaration and both Covenants: the dignity of the individual. Other aspects of school discipline may also be inconsistent with school discipline, including public humiliation.”<sup>5</sup>

Corporal punishment has also been condemned by regional human rights mechanisms. The European Court of Human Rights, in a series of judgements, has progressively condemned corporal punishment of children, first in the penal system, then in schools, including private schools, and most recently in the home.<sup>6</sup>

When Committee on the Rights of the Child raised eliminating the issue with states, the representatives a few times suggested that some level of “reasonable or moderate” corporal punishment can be justified as in the best interest of the child. The Committee has specifically laid that “the best interests of the child should be a primary consideration in all actions concerning

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<sup>5</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 13, ¶ 41, Art. 13, (1999).

<sup>6</sup> Corporal punishment was condemned in a series of decisions of the European Commission on Human Rights and judgements of the European Court of Human Rights; see *Tyrer v. UK*, 1978; *Campbell and Cosans v. UK*, 1982; *Costello-Roberts v. UK*, 1993; *A v. UK*, 1998 available at <http://www.echr.coe.int/echr> (last visited on March 17, 2022).

children.”<sup>7</sup>

The Convention also asserts, in Article 18, that the best interests of the child will be parents’ basic concern. But interpretation of a child’s best interests must be consistent with the whole Convention, including the obligation to protect children from all forms of violence and the requirement to give due weight to the child’s views; it cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child’s human dignity and right to physical integrity.

### 3. Indian Position

The Indian Penal Code enacted in the British colonial period provides that a parent or guardian of a child under 12 is exempt from criminal liability in regard to ‘an act done in good faith for the benefit of the child’.<sup>8</sup> However, the Juvenile Justice Act prohibits such a treatment. This law therefore, reflects an ambivalent or permissive approach to corporal punishment.

Under the Indian Legal System, there are ample provisions wherein the State intervention has been provided for in relation to corporal punishment for children. Among these provisions, the most important ones are the right to life guaranteed under Art. 21 and Art. 39(e), (f) of the Constitution. However, Article 7 of CRC declares that ‘no child shall be subject to torture or cruel treatment’, but qualifies this by stating that ‘the act of scolding and minor beating to the child by his father, mother, and (any) member of the family, guardian or teacher for the interests of the child himself shall not be deemed to violate the Act’. Since ‘minimum punishment’ has not been considered unconstitutional, the question arises as to whether the use of corporal punishment will fall within the constitutional safeguard or not.<sup>9</sup>

Further, **The Juvenile Justice (Care and Protection of Children) Act, 2015** defines corporal punishment under its S.2(24) as “subjecting of a child by any person to physical punishment that involves the deliberate infliction of pain as retribution for an offence, or for the purpose of disciplining or reforming the child”. Further, S.82 further provides that any individual in charge

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<sup>7</sup> Art. 3(1).

<sup>8</sup> S. 92, IPC.

<sup>9</sup> Art. 21 as interpreted in *Inderjeet v State of U.P.*, AIR 1979 SC 1867.

of or working in a childcare institution who is found to be using corporal punishment to discipline a child, would be liable to be punished with fine (first conviction) and imprisonment (subsequent conviction).

**The National Charter for Children (2003)** acknowledges the principles and provisions of the Constitution and of the 1974 National Policy as comprising its “guiding frame, and includes ‘neglect’ and ‘degrading treatment’ in its listing of conditions from which children must be protected. The charter states its intent to ‘secure for every child its right to be a child and enjoy a healthy and happy childhood... and to awaken the conscience of the community in the wider societal context to protect children from all forms of abuse...’ and asserts that ‘the state and community shall undertake all possible measures to ensure and protect the survival, life and liberty of all children.’”<sup>10</sup>

**National Plan of Action for Children 2005 (NPA)** elaborates that one of its objectives is “to protect all children against neglect, maltreatment, injury, trafficking, sexual and physical abuse of all kinds, pornography, corporal punishment, torture, exploitation, violence, and degrading treatment.”

**National Commission for Protection of Child Rights Guidelines** emphasise that there is no room for corporal punishment in any deliberation with the child. It is in this context, that the onus of responsibility in safeguarding children from punishment lies with the schools teachers, education administration at all levels as well as all those responsible for management equally.

**Right to Education Act, 2009 (RtE)** recognises the long overdue rights of children – the need to provide them with free, uniform and good quality education and a positive, safe and robust teaching-learning environment where children are treated with dignity.

However, a few provisions in the RtE like the no detention policy, continuous and comprehensive evaluation and the ban against any form of punishment has caused some concern for teachers. While continuously and comprehensively evaluating children around a huge range of parameters and not detaining them has ensured that the school environment has become less stressful and that children seamlessly climb the educational ladder, there seems to be no one accountable in ensuring

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<sup>10</sup> Thukral and Abbasi, *Ensuring Child Protection*, 574 SEMINAR INDIA, 34, 32 (June, 2007).

that children learn and learn well.

Section 17(1) of this Act clearly prohibits the infliction of any sort of punishment be it physical or mental upon a child and whoever acts in contravention of 17(1) shall be liable to disciplinary action under the service rules applicable to such person.

Following the ban on punishment, almost all teachers expressed that it was a positive step and that instances of blatantly hitting children in schools had reduced. There is no denying the fact that the RtE somewhere tries to curtail the absolute authority of the teachers in the classroom and attempts to end violence perpetrated by them on children. This is also in tandem with the constructivist understanding of the child and teaching learning processes to be employed according to the National Curriculum Framework, 2005.<sup>11</sup>

In **Kishore Guleria v Director of Education**<sup>12</sup>, the Court talking in terms of the national Policy, 1992 observed as follows:

“In case corporal punishment was conducive to education, the CRC adopted by the General Assembly of the United Nations and the National Policy on Education would have been laudatory of the same and would have permitted it. Since physical punishment has a baneful effect on the child and on his education, the Convention and the National Policy have not endorsed the same. It seems to us that imposition of corporal punishment on the child is not in consonance with his right to life guaranteed by Article 21 of the Constitution.”

In **Parents Forum for Meaningful Education & Ors. v Union of India**<sup>13</sup>, the Hon’ble Court observed on the lines of the previous case as follows:

“the State cannot derive any consolation from the fact that the violators are schools and not the State. The State must ensure that corporal punishment to students is excluded from schools. The State and the schools are bound to recognise the right of the children not to be exposed to violence of any kind connected with education. The National Policy in tune with the Convention has adopted child centered approach, where corporal punishment has no place in the system of education. Even otherwise, India being a signatory to the

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<sup>11</sup> Disha Nawani, *Corporal Punishment in Schools*, ECONOMIC & POLITICAL WEEKLY (JUNE 15, 2013) available at [http://www.epw.in/system/files/pdf/2013\\_48/24/Corporal\\_Punishment\\_in\\_Schools.pdf](http://www.epw.in/system/files/pdf/2013_48/24/Corporal_Punishment_in_Schools.pdf) ( last visited on March 29, 2022).

<sup>12</sup> W.P.(C) 5765/2011, Delhi High Court

<sup>13</sup> AIR 2001 Delhi 212

Convention is obliged to protect the child from physical or mental violence or injury while the child is in the care of any person, may be educational institution, parents or legal guardian.”

In another important case of **Kendriya Vidyalaya Sangathan v Arunkumar Madhavrao Sinddhave**,<sup>14</sup> the Court decided the case in favour of the child who was physically tortured by his Physical Education instructor back at school. The instructor was inflicted with the requisite sanctions along with the termination from job.

Therefore, all these cases go on to establish that the Indian judiciary has adopted an attitude against corporal punishment and in favour of the right of children to safe and secure environment.

#### **4. Physical and Psychological Effects of Corporal Punishment (Arguments For & Against)**

Admittedly there is a considerable gulf between the flogging of an adult and the thrashing of a youngster, although both species of castigation come within the category of corporal punishment. It is difficult because here the field of punishment is necessarily very much restricted. Imprisonment and fines, two of the most widely employed methods for dealing with all but major offences of adults, are ruled out altogether.<sup>15</sup>

It is for these reasons that many persons especially in the initial days, including judges in both England and America, held the opinion that whipping, especially of young offenders, would have a salutary effect.<sup>16</sup>

At a Conference of the British Medical Association at Belfast, there were two arguments in support of corporal punishment to the children. While one argument supported by various doctors was that they have not seen any ill effects from the birching of the children, while another argument led by one Dr. Gilbert Orme, an ex – medical officer of an English public school was that there were certain children with such a character that there was only one way to deal with them, and that was to administer physical punishment.

In contradistinction of these views is a formidable array of opinion against whipping of every description as a punitive measure. When the question of birching of juveniles was discussed at the

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<sup>14</sup> Appeal (civil) 5452-5453 of 2004, SC.

<sup>15</sup> However, the imprisonment of children was abolished in England in 1908.

<sup>16</sup> News of the World, June 23, 1935 as cited in *Supra* Note 6 at 143.

meeting of the British Medical Association previously mentioned, the consensus of opinion was in fact that the practice should be abolished. One Dr. W. N. Maple said “I have not met one person who specializes in child psychology and who does not say that birching is responsible for infinite harm”; while in the opinion of Dr. P. B. Spurgin birching was a barbarous thing. Judicial birching, in his opinion, was not only unnecessary but was likely to be disastrous to the future of juvenile delinquents so treated; and Dr. Nunan, speaking as one who has witnessed judicial birching, said the effect it left on his mind was that it was revolting, degrading and inhuman.<sup>17</sup>

The main trouble with the corporal punishment of children lies in the dangers connected with any system which overlooks variations in the physical and mental health of the delinquents, and which allots a form of punishment that is so greatly dependent, as regards its severity, on the person who inflicts the punishment. Whether we are considering birching inflicted by parents or others at the moment the offence is committed, or by prison officials under adequate supervision and after an inquiry, matters little.

The degree of punishment which may have no deleterious physical effects in the case of a normal child, may lead to serious illness where a youngster in weak health is concerned. The flogging, light or severe, which may be born with equanimity or nonchalance by a child already introduced to a life of crime, may, in the case of a first offender, have psychological effects which can afterwards be never eradicated. The danger, in all cases, is that the infliction of corporal punishment will create sullenness, hypocrisy and cunning where these did not previously exist, or that it will develop or extend these undesirable characteristics in all instances where they were already in existence.

One must not overlook the possibilities opened up, if once the license to punish is given to parents and teachers, of brutality and sadistic impulses finding scope for indulgence. Finally, the child who has been severely whipped feels that he has a grudge against his prosecutors, and this applies not only to police – court and school punishments but also where the parents are the wielder of the rod, a point which looms large in any argument against home castigation.

## 5. Suggestions

There are several stakeholders in the present situation and the roles and responsibilities of each

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<sup>17</sup> *Ibid.*

towards securing children's rights have to be recognized. The important stake-holders are the teachers, the children, the parents and the community, the education departments and the State. If initiative is taken at each level then we would help deliver children from this abhorring practice.

The CRC makes it clear that legislative as well as other measures are required to fulfil States' obligations to protect children from all forms of violence. The Committee has welcomed the fact that, in many States, the CRC or its principles have been incorporated into domestic law. Many have constitutions and/or legislation reflecting international human rights standards and article 37 of the CRC, which uphold 'everyone's' right to protection from torture and cruel, inhuman or degrading treatment or punishment. Many also have specific child protection laws that make 'ill-treatment' or 'abuse' or 'cruelty' an offence.

In the light of the traditional acceptance of violent and humiliating forms of punishment of children, a growing number of States have recognized that simply repealing authorization of corporal punishment and any existing defenses is not enough. In addition, explicit prohibition of corporal punishment and other cruel or degrading forms of punishment, in their civil or criminal legislation, is required in order to make it absolutely clear that it is as unlawful to hit or "smack" or "spank" a child as to do so to an adult, and that the criminal law on assault does apply equally to such violence, regardless of whether it is termed "discipline" or "reasonable correction".

Article 39 of CRC requires States to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment. Corporal punishment and other degrading forms of punishment may inflict serious damage to the physical, psychological and social development of children, requiring appropriate health and other care and treatment. This must take place in an environment that fosters the integral health, self-respect and dignity of the child, and be extended as appropriate to the child's family group. There should be an interdisciplinary approach to planning and providing care and treatment, with specialized training of the professionals involved. The child's views should be given due weight concerning all aspects of their treatment and in reviewing it.

Implementation of the prohibition of all corporal punishment requires awareness-raising, guidance and training for all those involved. This must ensure that the law operates in the best interests of the affected children - in particular when parents or other close family members are the perpetrators. The first purpose of law reform to prohibit corporal punishment of children within the family is prevention: to prevent violence against children by changing attitudes and practice, underlining children's right to equal protection and providing an unambiguous foundation for child protection and for the promotion of positive, non-violent and participatory forms of child-rearing.

Advice and training for all those involved in child protection systems, including the police, prosecuting authorities and the courts, should underline this approach to enforcement of the law. Guidance should also emphasize that article 9 of the Convention requires that any separation of the child from his or her parents must be deemed necessary in the best interests of the child and be subject to judicial review, in accordance with applicable law and procedures, with all interested parties, including the child, represented. Where separation is deemed to be justified, alternatives to placement of the child outside the family should be considered, including removal of the perpetrator, suspended sentencing, and so on.

In addition, States must ensure that positive, non-violent relationships and education are consistently promoted to parents, care givers, teachers and all others who work with children and families. There are now many examples of materials and programmes promoting positive, non-violent forms of parenting and education, addressed to parents, other care givers and teachers and developed by Governments, United Nations agencies, NGOs and others.<sup>18</sup> These can be appropriately adapted for use in different States and situations. The media can play a very valuable role in awareness-raising and public education. Challenging traditional dependence on corporal punishment and other cruel or degrading forms of discipline requires sustained action. The promotion of non-violent forms of parenting and education should be built into all the points of contact between the State and parents and children, in health, welfare and educational services, including early childhood institutions, day-care centres and schools. It should also be integrated

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<sup>18</sup> The Committee commends, as one example, UNESCO's handbook, *Eliminating corporal punishment: the way forward to constructive child discipline*, UNESCO Publishing, Paris, 2005. This provides a set of principles for constructive discipline, rooted in the Convention. It also includes Internet references to materials and programmes available worldwide.

into the initial and in-service training of teachers and all those working with children in care and justice systems.

### **Conclusion**

In a civilized society, the importance of child welfare cannot be underestimated because the welfare of the entire community, its growth and development depends on the health and well being of the children. Thus, in light of the above study we can conclude that it is necessary for the all round development of the child that he is allowed to express himself freely. And this expression needs to be given a wide interpretation. Especially in schools, the children should be provided with an amicable and a hospitable environment which would enhance their growth and development. The stricter approach of punishing them physically on the slightest of the faults needs to go in the interest of children.

Everyone needs discipline, particularly self-discipline. But corporal punishment is not a form of inculcating discipline. Research has consistently shown that it impedes the attainment of respect for discipline. It rarely motivates children to act differently, because it does not bring an understanding of what they ought to be doing nor does it offer any kind of reward for being good. The fact that those parents, teachers and others have to repeat corporal punishment for the same misbehaviour by the same child testifies to its ineffectiveness. We have seen in this project that in the countries where corporal punishment is banned there is no evidence to show that disruption of schools or homes due to children has increased. This indicates that disruptions everywhere are conveniently blamed on children as they are the most vulnerable.

There are exceptional circumstances in which teachers and others like those working with children in institutions and with children in conflict with the law, may be confronted by dangerous behaviour which justifies the use of reasonable restraint to control it. Here too there is a clear distinction between the use of force motivated by the need to protect a child or others and the use of force to punish. The principle of the minimum necessary use of force for the shortest necessary period of time must always apply. Detailed guidance and training is also required, both to minimize the necessity to use restraint and to ensure that any methods used are safe and proportionate to the

situation and do not involve the deliberate infliction of pain as a form of control. The healthy development of children depends on parents and other adults for necessary guidance and direction, in line with children's evolving capacities, to assist their growth towards responsible life in society.

In this context, it would be apt to quote Kofi Annan, ex Secretary – General of the UN:

“ There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they grow up in peace.”

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