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element of legislation underpinning
an effective rights-based child protection system*



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Summary

No legal framework for child protection can be complete without explicit prohibition of all forms of corporal punishment in all settings, including the home. This paper sets out the reasons why challenging and prohibiting all corporal punishment and other cruel or degrading forms of punishment of children is important for children, and societies, and why this should be driven by recognition of the need to fully realise children's human rights.

Why prohibiting all corporal punishment is necessary

Challenging and prohibiting all corporal punishment, and all other cruel or degrading forms of punishment of children, is vitally important for children now – and for the positive and peaceful development of human societies.

In promoting effective child protection, ending currently legalised violence against children is a necessary foundation. There are people who are puzzled that anyone could see ending corporal punishment as a priority, given the extreme breaches of children's rights and the extreme forms of violence that children in so many states are still facing. But they are missing the point.

What is being challenged is not just one particular form of violence, but the whole idea that some arbitrary degree of violence against children should, uniquely, be legal and socially approved. Punitive violence against children in societies is administered casually, is a routine part of a majority of children's lives, is part of the scenery of childhood.

The acceptance and legality of this daily punitive violence is highly symbolic of children's low status in our societies, as possessions, not people. Challenging all corporal punishment, including the so-called little loving smack or tap or slap, is pursuing children's equal right to respect for their human dignity and physical integrity.

As is clear from the preamble to the Universal Declaration of Human Rights and the other core instruments, respect for human dignity is the foundation of human rights. States' obligation is to achieve full and equal respect for "everyone's" human dignity and physical integrity. "Everyone" includes all children: this is a fundamental human rights and equality issue for children.

As adults, we expect this basic respect and protection from deliberate violence: in our homes, on the streets, in our offices, in meetings and conferences. Every country has criminal laws on assault that protect us wherever we are.

But when it comes to children, the reality is totally different. Only in a very small minority of states do children share with adults equal legal protection from being hit and hurt. In most states globally, including all those in Southeast Asia and the Pacific except New Zealand, the law far from prohibiting violence against children, actually authorises it. In some states it authorises violence, including extreme violence, against all children in all settings – within their families, in schools and institutions where they can be beaten with canes or other implements, in penal systems where they can be whipped. Far from protecting children, the law is setting out just how much you can hurt children.

In Singapore and Malaysia, for example, the Criminal Codes state: "Nothing, which is done in good faith for the benefit of a person under twelve years of age ... by or by consent [...] of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to that person." And in these countries, the law makers felt it was necessary to go on and state: "Provided that this exception shall not extend to (a) the intentional causing of death, or to the attempting to cause death; (b) the doing of anything which the person doing it knows to be likely to cause death..." In other words, as long as you think you are benefiting the child, it is not a criminal offence to beat them right up to the point of killing them.

In challenging and seeking to prohibit and ultimately eliminate all punitive violence against children, laws need to be changed as well as deeply embedded social attitudes that authorise and approve it. This is as fundamental as anything can be to improving children's status and gaining recognition and respect for children as rights holders alongside the rest of us.

It is not just about protecting children from physical and mental harm, although most of the physical "abuse" that globally kills thousands of children – mostly very young – and maims and injures thousands more is done in the name of punishment or control, i.e. it is corporal punishment.

Canning kills boy

(Bangkok Post, April 2, 2009)

Kuala Lumpur: A boy of nine said to be suffering from a central nervous system disorder died after he was canned by his teacher. The boy complained of dizziness

after he was canned by the female teacher at a school in the Southern State of Negeri Sembilan. His parents were alerted and sent the boy to a hospital. However, he died early yesterday at home after being released. No police reports have been lodged against the teacher. Malaysian teachers are barred from publicly whipping students for disciplinary offence, but many still discipline pupils with the cane inside a classroom. dpa

Ending the legality of punitive violence against children is an essential strategy for ending all forms of violence against children: the idea that breaching a child's human dignity and physical integrity is acceptable, normal, or even as some still suggest "in their best interests", perpetuates their status as objects or possessions, and makes every other sort of extreme abuse and exploitation, including sexual exploitation, forced labour and trafficking, more likely and easier.

Why prohibiting all corporal punishment is so difficult

This should be a simple issue – hitting people is wrong and children are people too; one should not need to say more. But in fact it remains difficult and controversial in almost every state globally: why?

When we use human rights arguments, a common response is "But children are different". The babies and small children who research suggests are the victims of most corporal punishment in the home are different in that they are very small and very fragile. Children's fragility, their developmental status, their dependence on adults and the huge difficulties they face in seeking protection for themselves. These

differences suggest that they should have more, not less, protection from being hit and hurt.

The difficulty in persuading people to perceive the issue as one of equality and human rights comes from the personal dimension. Most people in most countries were hit as children by their parents. Most parents have hit their own growing children. None of us likes to think badly of our parents, or of our own parenting. When addressing politicians, or human rights experts, or child protection practitioners, the first responses will be personal responses, not professional ones.

Another difficulty in many countries is that some believe their religion gives them a right or even a duty to use corporal punishment. We all enjoy freedom of religious belief. But belief cannot lead to practices which breach others' rights, including their rights to respect for their human dignity and physical integrity. Globally, religious/faith leaders are increasingly speaking out against all violence against children, and supporting law reform to prohibit all corporal punishment.

Examples of public statements from religious leaders

1. At the launch of *Children in Islam* (2008), a report which aims to promote the rights of the child and eliminate harmful practices, prominent Muslim and Coptic Christian leaders in Cairo stated: *"Harmful traditional practices towards children have no foundation in religious texts of either Islam or Christianity."*

Children in Islam includes research papers and extracts from Koranic verses, hadiths and sunnas that provide useful guidance on children's rights. It states (page 9): "Shariah forbids any attack on the human body including smacking or other forms of corporal harm...."

2. In January 2008 the Bishops' Conference of Norway agreed: *"Outdated language used to justify corporal punishment of children should be replaced by a new translation of the Bible."*
3. During 2007 the South African Council of Churches, in a paper supporting legal reform, stated: *"There can be no biblical justification for corporal punishment."*
4. In June 2007, the international Day of the African Child, the Inter-religious Council of Kenya released a statement declaring their unified support to stop all forms of violence against children, headed *"Faith leaders Decry Widespread Violence against Children"*. It was signed by Hindu, Muslim and Christian leaders.

States have an obligation – a legal obligation under international human rights law – to protect all children from all forms of violence wherever they are, in all settings of their lives. "All forms of violence" includes mental, physical and sexual violence and all forms of exploitation. The purpose of child protection is to fulfil this human rights obligation. No country can claim to have an effective child protection system while its laws still authorise direct violence against children.

Developing a rights-based child protection system

States' obligations are to prevent all forms of violence, to respond to it effectively when it still occurs and to provide necessary treatment, rehabilitation and compensation to child victims of violence. States must also accurately monitor the extent of violence against children in all settings of their lives, in order to be able to develop appropriate policies and interventions and to measure progress towards its elimination.

The right to protection from all forms of violence is reflected in many articles of the Convention on the Rights of the Child (CRC) (for example, articles 6, 19, 34, 35, 36, 37, 39). Many other rights are relevant to effective prevention, including rights to social security and an adequate standard of living (articles 26 and 27), to health and health services (24), to state assistance for parents (18), to an appropriate education

(28 and 29), to play and recreation (31), etc.

The Committee on the Rights of the Child has identified certain articles and rights in the CRC as principles too. So all child protection activities must respect these:

- the non-discrimination principle – ensuring effective protection for all children (article 2);
- ensuring that the best interests of children are a primary consideration in all actions concerning children (article 3; and article 3 also requires standards to be set and observed for all services and institutions for children);
- the right to life and maximum survival and development for all children (article 6);
- respecting children’s right to be heard and to have their views given due weight, in relation to planning, implementation and monitoring of protection, and in all decision-making in individual cases (article 12).

Also, all children’s civil rights must be respected throughout the process of child protection, including, e.g., rights to freedom of expression, religious belief, freedom of association and the right to privacy. This has implications for record keeping, access to information, and safeguarding the child’s privacy in formal administrative or court proceedings etc (articles 13 to 17).

Children must not be separated from parents unless necessary in the best interests of the child, with an appropriate judicial test of the separation and with all parties including the child represented (article 9). And children’s own liberty must not be restricted except as a last resort and for the shortest appropriate period (article 37), including penal detention and ensuring appropriate safeguards are in place when children are taken into state or other care.

Just as states’ obligations under nearly the

whole of the Convention are relevant to child protection, similarly many varied government departments and services, national and local, are directly relevant. Persons controlling them and working in them need to know and fully understand the states’ overall human rights obligations and the particular contribution they should be making. Achieving effective prevention, response and monitoring demands coordination – at central and local government levels between levels, and between government and NGOs and the private sector.

It is not really possible to tackle the idea of designing an effective child protection system without addressing the broader issue of making government work for children, of achieving effective government structures sensitive to children’s rights.

The Committee on the Rights of the Child has provided detailed advice to states on what it terms “general measures of implementation” for the CRC, consolidated in its General Comment No. 5. This provides a list of linked measures that are required, all of which are relevant to child protection:

- legislative measures – which must be accompanied by policy and guidance, awareness-raising and training etc;
- a comprehensive national strategy or plan of action for children, built on the framework of the Convention;
- coordination of implementation of children’s rights;
- monitoring implementation, including child impact assessment and evaluation, data collection and analysis;
- budget analysis – making children visible in budgets;
- training and capacity-building (linked with article 42 obligations);
- cooperation with civil society, including with children (linked with article 12 rights);
- an independent human rights

institution for children, a children's ombudsman or commissioner for children's rights, or a focal point on children's rights within a national human rights institution.

Fulfilling children's rights to protection requires a clear foundation, reflecting in national law the states' obligations to prohibit all forms of violence against children, to prevent them occurring and to establish responsibility for effective

response and recovery as well as for basic monitoring, etc.

An attempt to construct a checklist of what must be covered to provide an adequate legal foundation for child protection is included below. Developing such a checklist and analysing existing national law against it is surely a necessary and early task for every state, if it has not already happened.

Draft child protection legal framework checklist

This checklist of legislation required to protect children from all forms of violence can be used to develop a national checklist and identify necessary law reform. It arises from States' obligations under the Convention on the Rights of the Child, its Optional Protocols and other international human rights law. The list is not exhaustive and should be reviewed to ensure that all forms of violence suffered by children within particular States is appropriately covered.

Prohibition of torture and all other cruel, inhuman or degrading punishment or treatment of children, in all circumstances

In relation to anyone who commits an offence under the age of 18, prohibition of:

the death penalty

life imprisonment without possibility of release

all other cruel, inhuman or degrading sentences and punishments, including all corporal punishment.

Ensure criminal law on assault applies equally to children, wherever they are and whoever the perpetrator:

Removal of any justifications for violence against children, including as a form of "discipline" or "control" (for example, removal from statute and common law of any defence of "reasonable chastisement" or "lawful" or "moderate" correction)

Explicit prohibition of corporal punishment and all other cruel, inhuman or degrading forms of punishment or treatment of children (in criminal and/or civil code, children's law or family law, repeated in sectoral laws and regulations applying to all schools, penal systems and all forms of institutional and alternative care of children).

Prohibition of deliberate neglect and negligent treatment of children

Prevention and prohibition of all forms of violence in all institutions and out-of-home placements:

Legislative requirement for the registration, regulation and regular independent inspection/review of all institutions and formal alternative care placements, with a statutory duty on inspectors to hear directly from children and to review measures taken to prevent violence.

Obligation to record and centrally report all incidents of violence in schools, other institutions and alternative care

Protection of “whistleblowers” who report violence against children

Obligation to ensure regular review of placement of children for care or treatment, of any detention of children, etc., respecting children’s right to have their views heard and given due weight.

Obligation on certain professional groups to report violence against children to services and establishing the duty of these services to investigate and take necessary action – being able to call on other services as necessary.

Obligation to hold public, independent inquiries into child deaths or serious injuries in which violence may be implicated

Establishment of a legal age of sexual consent, without discrimination on grounds of gender or sexual orientation (ensuring that children are not criminalised for sexual activities below that age)

Prohibition of all forms of sexual abuse and sexual harassment

Establishment of an equal legal age of marriage at 18, with prohibition of procurement, offering, forcing or conducting an under-age marriage

Prohibition of rape in marriage and all other domestic violence

Criminal laws prohibiting:

- All forms of child slavery

- Sale and trafficking of children up to 18

- Debt-bondage, serfdom, forced or compulsory labour

- Use, procurement or offering children up to 18 for illicit activities (including, for example, in drug production or trafficking)

- All forms of sexual exploitation of all children up to 18, including “grooming” for sexual activities, procuring including through the Internet, etc.

- Use, procurement or offering of a child for child prostitution or involvement in pornography

- Possession, production, dissemination, distributing, importing, exporting, offering and selling of child pornography (to be defined in law as in article 2(c) of Optional Protocol to CRC on Sale of Children, etc).

Criminal laws prohibiting female genital mutilation/cutting and any other identified harmful traditional practices and the arranging/offering of a child for them, where not covered effectively by the criminal law on assault

Employment laws prescribing:

A minimum age for admission to employment and prohibiting hazardous forms of employment and employment which may be harmful to the child’s education, health or development, creating offences for those who employ, or offer for employment, children in such situations

Also, in every case, ensuring that:

Legislation and child-sensitive procedures are in place to ensure that the best interests of child victims are considered throughout processes of child protection, including judicial processes, to ensure that they are not re-victimised; the child's views must be central to any assessment of their best interests;

Legislation requires that children are entitled to express their views and have those views given due weight throughout all processes of child protection for individual children, including judicial processes;

Children and their representatives have clear, well publicised and accessible means of challenging all forms of violence, including through appropriate complaints procedures and direct access to the courts when necessary;

Parents' permission is not required for filing of a complaint of violence or prosecution; children must be legal actors in their own right;

There is adequate redress and compensation for children who have been victims of any forms of violence;

Child victims of all forms of violence are not themselves criminalised for their involvement;

There are proportionate and appropriate penalties for perpetrators of violence against children;

Evidentiary requirements in law do not constitute unnecessary or unreasonable obstacles to prosecution for crimes against children, with due regard to the rights of defendants;

Investigatory and judicial processes are in conformity with relevant international standards, including the UN Guidelines on Justice in Matters concerning Child Victims and Witness of Crime;

Legislation allows for extra-territorial prosecution of nationals who perpetrate violence against children in other jurisdictions and who travel for that purpose (the fact that an offence is not considered an offence under the law of the state where it is committed should never be an obstacle to such prosecution);

The sale of children, child prostitution and child pornography should be deemed extraditable offences in any extradition treaty existing between states and shall be included in every extradition treaty subsequently concluded (Optional Protocol, article 5);

There is adequate training, in particular legal and psychological training, for those who work with child victims;

Unnecessary delay in the disposition of cases and the execution of orders granting compensation to child victims is avoided.

Development of a human rights consensus against corporal punishment

There is rapidly accelerating progress on this issue. The major context for it has been the almost universal acceptance of the Convention on the Rights of the Child, which confirms that children are holders of human rights alongside adults, including the right to equal protection of their human dignity and physical integrity.

The Committee on the Rights of the Child has paid particular attention to violence against children and systematically recommends prohibition of corporal punishment of children in all settings, including the home and family. In 2006, the Committee issued

its first General Comment on violence – on the right of the child to protection from corporal punishment¹ – confirming the obligation to prohibit and eliminate it and providing detailed guidance for states.

Other relevant UN human rights Treaty Bodies, together with regional human rights mechanisms, have also condemned corporal punishment and recommended prohibition. There have been many high level court decisions condemning corporal punishment as a human rights violation – in this region for example in Fiji in 2002.

UN Secretary General's Study on violence against children

An additional, recent context for progress has been the UN Secretary General's Study on Violence against Children. The Study was led by Professor Paulo Sérgio Pinheiro, and when his report was submitted to the

UN General Assembly in October 2006, it included the recommendation that states should prohibit all forms of violence, including all corporal punishment, setting an ambitious deadline of the end of 2009.

Global progress towards prohibiting all corporal punishment

So far globally, 23 states – 12% of UN member states – have prohibited all corporal punishment in all settings, including the home, including in this region New Zealand. At least 26 more states across all regions are committed to full prohibition and/or

are actively debating prohibitionist bills in parliament – as now in the Philippines; in some states, reforms are imminent. If all these commitments are fulfilled, children in more than a quarter of UN member states will have full legal protection.

¹ General Comment No. 8 (2006) on “The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)”, available at <http://www2.ohchr.org/english/bodies/crc/comments.htm>

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