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SOCIAL AND LEGAL ISSUES OF CORPORAL PUNISHMENT OF CHILDREN

Children are not small people with a small human rights
The European Commission

Introduction

A democratic state is guided by the rule of law and the principles of the human rights and freedoms. Ratifying the European Convention on Human Rights and The European Social Charter or Revised European Social Charter, Member States undertake to respect all people of their jurisdiction rights, including all children. The child is not the family or the state property. Child is a citizen from birth, so it is necessary to look seriously into each such member public offense. When we talk about the criminal cruelty, especially in serious case of child rights violation (murder, sexual assault, and so on), everyone unanimity agree, that no one member of the society cannot tolerate such child abuse. But society begins to split into different camps – from the positive approach into the sentence, to the punishment classification into violence-category – when the discussion is tilting about the child’s upbringing without violence. This tendency is due to several reasons. First is that a deliberate arm lift against a child is the belief that slapping “educated” child will become better. Second, parenting is the natural values, or in other words, the right of parents to educate their children in their own training methods.

The aim of this article is to provide legal assessment of corporal punishment of children for educational purposes. In order to achieve this aim will

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be analyse the position of legislator of corporal punishment of children for educational purposes; by analyse proposals and ideas regarding delimitation of corporal punishment, to single out the theories of corporal punishment of children for educational purposes in criminal law jurisprudence.

American woman Megan Jobling about the historical and sociological context of violence against children, writes that violence against children is not a new and unique only our time phenomenon. There have always been parents who deliberately injured their children. At different times the public had a different understanding about the child and his parenting¹. Although the physical acts of violence against the physically weaker, i.e. child, is clearly seen as a physical expression of violence against children in society, however, one-third of parents and the same percentage of professionals working with children, in some cases tend to justify corporal violence against children. It is important that the use of violence would be justified by the customary law canons for physical abuse justifying adults, i.e. punishment must be legitimate². Mauerhofer argue that each sentence must be explained and justified that the child would understand why he is punished³. Second, parenting is the natural values, or in other words, the right of parents to educate their children in their own training methods. Any limitations and prohibitions in this context intrude into "private parent-child relationship space", violates "the right of parents to educate their children according to their beliefs". According to the Civil Code⁴ parents shall have a right and duty to bring up their children; they shall be responsible for their children's education and development, their health and spiritual and moral guidance. In performing these duties, parents shall have a priority right over the rights of other persons (Art. 3.165). Parenting is a continuous and purposeful effect to the child. The right to educate a child means that it is allowed for parents to take measures which are needed to achieve this aim. Physical and humiliating children's dignity punishments for a long time were considered to be an effective parenting methods. It was formed a provision, that these punishments should be applied not

¹ The Resolution of the United Nations Convention on the Rights of the Child report on the implementation validation, The Official Gazette, 2004, No. 24.

² *General basic training and specialized training programs: against the commercial sexual exploitation and sexual abuse*, Social Security and Labour, Vilnius 2001, pp. 101-131.

³ Cf. A. Mauerhofer, *Pädagogik nach biblischen Grundsätzen* (I), Holzgerlingen 2001.

⁴ Art. 3.155, 3.165 Civil Code of the Republic of Lithuania approval, entry into force and implementation of the law. Civil Code, The Official Gazette, 2000, No. 74-2262.

only for bad behavior, but also but for poor academic performance. It was considered that corporal punishments are most appropriate and they were used quite a lot in practice: stretching the ear, hitting with fist, hitting to head or face, etc. It was reflected in the operation law. For example, inter-war period Lithuanian civil law allowed parents to use “domestic application measures”⁵. In this case, if these measures were ineffective parents could apply for criminal legal protection. The Article 419 of the Criminal Statute regulated responsibility for persistent disobedience of parental authority, insolent behaviour with the mother or the legal father. For this offense was provided arrest punishment. Later legislator started to doubt or even condemn such sentences as education method. The modern approach hold the opinion that that corporal punishments must be banned because of their physical and mental harm and inefficiency. Over the past two decades in mostly European countries declare against the corporal punishments for children. Since the end of the the twentieth century, domestic violence is considered as a public offense, because violence against children harms the child’s personality and makes child feeble, cowardly and cruel individual⁶. For this reason are developed ensuring policy of childhood safety and well-being, the child is the public citizen which has fundamental rights. These legal and social rights of the child which ensure the basics of well-being are United Nations Convention on the Rights of the Child (1989) which consolidate state responsibility of child protection from all forms of corporal or mental violence, insults or abuse, neglect or negligent treatment, rough handling or exploitation, including sexual abuse (Art. 19); Council of Europe Committee of Ministers adopted on the 26th of March 1985 Recommendation No. R(85) 4 on Violence in the Family, which offered to Member States “to review their legislation, which provide power to punish children and limit corporal punishment or prohibiting them entirely, although the infringement of the prohibition does not have to be re-

⁵ Svod zakonov Grazhdanskih po sostojaniju na 1911 g. [Civil Laws as of 1911], <http://civil-law.narod.ru/wist/szg/szg111.html> [access: 01.02.2017].

⁶ P. Greven found that the corporal, causing pain, repressive punishment of children is directly related to their aggressive behavior, which often reveal as a crime in the future. Corporal punishment encourages, causes anger, supports it, it becomes a permanent impulses source. Reported violence can be directed not only to others but into oneself. Strong corporal punishment application has been inhibiting sensitivity, formation of compassion, especially for males, cf. P. Greven, *Spare the Child: The Religious Roots of Punishment and the Psychological Impact of Physical Abuse*, New York 1991, p. 197.

lated with criminal punishment” (Art. 12)⁷. Recommendation No. R(90) 2 of the Committee of Ministers on Social Measures Concerning Violence within the Family⁸, to condemn educational methods when is being used the corporal punishment or any other humiliating treatments and is emphasized the education without violence. The position of corporal punishment for children in Lithuanian law since the 1st of July 2018 is very clear – there is prohibited to use corporal punishment or apply methods which humiliate the child⁹. Regardless of legislative changes the point of view still associated with family privacy and parenting with corporal punishment is in the never ending discussion¹⁰. However, various analyses of legal science and judicial decisions lead to the conclusion that corporal punishment justification depends on priority whether is given to the child and society interests or family autonomy and the right of parents to educate their children. There are two opposing views on the rights of the child to be protected from all forms of violence. One of them has a view that family’s privacy or the right of parents to educate their children is more important than the child’s interests, so intelligent and moderate force use for education purposes is criminal responsibility eliminating factor. The second theory promoters say that the right of parents to educate and raise children is not absolute. Parental discretion is limited by the child’s needs, interests and rights, therefore is prohibited to use corporal punishment or apply methods which humiliate the child. As mentioned above, these theories primarily are different on whether the priority is given to family autonomy and

⁷ Council of Europe. Committee of Ministers, Recommendation No. R(85) 4 of the Committee of Ministers to Member States on Violence in the Family (Adopted by the Committee of Ministers’ on 26 March 1985 at the 382nd meeting of the Ministers’ Deputies), <https://rm.coe.int/16804f120d> [access: 05.07.2019].

⁸ Council of Europe. Committee of Ministers, Recommendation No. R(90) 2 of the Committee of Ministers to Member States on Social Measures Concerning Violence within the Family (Adopted by the Committee of Ministers’ on 15 January 1990 at the 432nd meeting of the Ministers’ Deputies), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804e91bc [access: 05.07.2019].

⁹ Cf. Law on Fundamentals of Protection of the Rights of the Child of the Republic of Lithuania, 14 March 1996 No I-1234 (As last amended on 26 June 2018 No. XIII-643), The Official Gazette, 1996, No. 33-807, TAR identification code No. 0961010ISTA00I-1234.

¹⁰ The Petition to Cancel Order of “Taking Children” out of Families which came into force since 1 July 2018. The requirement defines position there is no freedom for parents to educate their children, https://www.peticijos.com/reikalavimas_ataukti_2018m_liepos_1_d_vaik_paemimo_tvark?a=2 [access: 17.11.2018].

privacy and the right of parents to educate their children, whether it is given to the child and society interests. In the first theory usually corporal punishment is tolerated because of competing interests, when it is considered that the family's privacy or the right of parents to educate children is more important than the interests of the child. Family autonomy proponents argue that prohibition of corporal punishment violates parent's natural right and duty to educate their children. Scientists support public/private interest difference and non-interference to the family privacy. The state cannot dictate parents how to educate children, prohibition of corporal punishment would make families criminal¹¹. All corporal punishment criminalization is unjustified intervention in the family. As a result, thousands of parents will become criminals. Intelligent punishment elimination from remedies will involve a lot of parents which randomly use certain corporal punishments into the criminal justice sphere¹². Parents' right to educate their children allows corporal punishment because not all parenting methods are corporal violence; it is not reasonable and moderate punishment. It is acknowledged that it is possible to designate a reasonable, moderate penalty in accordance with circumstances and reasons which do not incur individual criminal responsibility¹³. Some German representatives of criminal law doctrine (J. Wessels, W. Beulke, K. Köhl) also takes the position that parents right to punish can be seen as a circumstance eliminating from criminal responsibility. To punish moderately is allowed and justified but corporal punishment as a parenting measure could be used only as an *ultima ratio*. It is allowed by legal when: a) there is sufficient reason to punish, and the punishment is objectively recommended in order to educate; subjectively penalty must be lead by the idea of parenting; b) the nature and size of punishment is proportional to the offense and the child's age; particularly necessary to take into the child's physical and spiritual development. Any suffering and health damaging unjustified humili-

¹¹ Cf. A. Noak, *Zur Abschaffung des elterlichen Züchtigungsrechts aus strafrechtlicher Sicht*, "Juristische Rundschau" 2002, vol. 10, pp. 402-408; G. Roellecke, *Keine Hiebe – und die Liebe? – Zur Gewalt als Erziehungsmittel*, "Neue Juristische Wochenschrift" 1999, vol. 5, pp. 337-338.

¹² Cf. R. Schuz, "Three Years On": an Analysis of the Delegalization of Psychical Punishment of Children by the Israeli Courts, "The International Journal of Children's Rights" 2003, vol. 11, pp. 235-256.

¹³ Cf. T. Hodny, *Corporal Punishment and Rules of Reason*, "The Journal of Contemporary Legal Issues" 2007, vol. 16, pp. 111-114.

ating punishment is unacceptable and is contrary to law¹⁴. In the light of this position, corporal punishment are tolerated but that does not deny the child's right to body inviolability, health and so on must be protected in other cases (for example, health impairment or cruel, inhuman treatment cases, etc.). The courts often consider the issue of what level risk the child's health is more important than the right of parents to use reasonable and appropriate educational measures. "Prudence, moderation" concept is a flexible system that leaves space for the specific circumstances of evaluation. On the other hand, "prudence, moderation" is only a reference point the courts often determined the "reasonableness" limits in relevant cases. Courts determining whether the action are intelligent, take into account the child's age, gender, maturity and physical and mental condition, sensitivity, character; child's conduct and behaviour motives; model of the influence to other family or group children; proportionality to the violation; also valued relationship between parent and child, the fact that the parents could apply other remedial measures, whether the measures were necessary to apply. There can not contain extensive lists of such circumstances.

The second theory proponents more focus on child's interests and say that children must be protected from all forms of compulsion. This theory is very well reflected in Israeli Supreme Court case *Plonit v. State*¹⁵, there was prohibited corporal punishment for all children's parents. The Supreme Court found that corporal punishment as a parenting method do not reach their goals, it causes physical and psychological damage that can leave traces when person reaches maturity. Law determined to the public authorities a duty to interfere in to the family and protect the child, as well as from parents when it is necessary. The state has a duty to protect those who can not defend themselves. Corporal punishment violates the child's body, feelings, dignity and proper development. When parents properly fails to fulfill his duties, abuse of discretion or authority of parents, when

¹⁴ Cf. J. Wessels, W. Beulke, *Strafrecht Allgemeiner Teil: Die Straftat und ihr Aufbau*, Verlag C.F. Müller, 2002, pp. 122-123; K. Kühl, *Strafrecht. Allgemeiner Teil*, München 2005, pp. 266-272.

¹⁵ In this case, the mother was convicted for their children beat on the buttocks, and smite their faces in various time intervals in 1994-1995. She also hit her daughter with a vacuum cleaner and hit him son with fist in the face and broke his teeth. Son was beat into the buttocks, head, neck with flip-flops, and sometimes threw shoes at him. The mother was convicted of abuse and assault. Mother denied her guilt on the ground that she used clever parenting measures.

it threatens or harms a child, the state must intervene to protect the child. Parental discretion is limited due to the child's needs, interests and rights. It can not be maintained evaluative the concept of "intelligent" in the law, which would allow compromise risking children's health and well-being. It is not allowed, that the child's physical and mental integrity would be threatened on account of the corporal punishment; allowable types of measures must be clear and unambiguous, corporal punishment is not allowed. Existing criminal liability barriers allows to distinguish force which has been used for "education purposes", which is unacceptable and forbidden, and reasonable use of force in order to prevent a child or any other person injuries or allow easy, but a strong contact with the child's body in order to maintain order. The court noted that the criminal law has enough filters that small, insignificant cases would not fall into the regulatory limits. First, the prosecutor has the discretion not to go to court due to lack of public interest. In addition, criminal law has a *de minimis* measures of defense, it can be light use of force cases. The Court emphasized that the parent-child relationship include the continuing physical contact and for each non-physical effects would not be a basis for criminal liability¹⁶. The first theory is criticised, because it is too absolutized family autonomy. Reasonable and moderate corporal punishment justifying theory is based on the argument that right of parents to use corporal punishment for children arises from parental authority, but such provisions *expressis verbis* does not contain any single legislative act. In contrast, family law provides parents right and duty to educate their children as required by the child and the public interest. The Code does not regulate the parenting methods and measures, but parents can not be undermined for interests of the child. Also the first theory is unable to justify and define "reasonable, moderate" concepts. Corporal punishment is incompatible with the child's honor and dignity, inviolability of body. It can be used a variety parenting methods, but they must comply the interests of the child. Corporal violence includes mild corporal punishment, even if they are applied to parenting purposes.

The term of corporal punishment is used in Lithuania since the 1st of July 2018. There is the prohibition of severe, mild or slight injury or illness to a person or cause physical pain (Art. 135, 138, 140 of the Criminal Code

¹⁶ Cf. Israel Supreme Court, Criminal Appeal 4596/98, *Plonit v. State*, 54(1) P. D. p. 145, http://www.endcorporalpunishment.org/pages/pdfs/Israel_Judgment.pdf [access: 01.02.2017].

of Lithuania). A person who abuses the rights of a father, mother, guardian or custodian or other lawful representatives of a child by physically or mentally harassing a child, leaving him for long periods without care or by maltreating him in a similar cruel manner (Art. 163). According to this, it is concluded that the duty to educate, including the use of physical force, is not absolute. The law protects children rights, especially from health disturbances under cover of upbringing. There is no dispute that you cannot beat a child for no reason and for acts made in the past. Each blow is prohibited without no aim to prevent possible injury to a child or a third parties. It is reflected in judicial decisions:

A. A. was convicted because he pushed minor's head under his arm and struck with fist into her head, grabbed her by the hair and extorted tuft of hair and hit for at least four blows to the face and head area; it caused O. A. non-severe health impairment. Court A. A. found guilty under the 1 paragraph of the Article 140 of the Criminal Code of Lithuania. Court found that the nature of the brutal physical abuse was used not like a corporal punishment but like degrading human dignity, scornful and causing not only physical suffering, but also a strong spiritual experiences. Motives of criminal offense are weak, poor and inadequate according to this physical violence¹⁷.

Another problem should be solved – minor relevance of a crime. There is a dispute about release from criminal liability due to minor relevance of a crime when moderate corporal punishment was applied. The provisions of Resolution No. 29 of Supreme Court of Lithuania due to *de minimis* crime in 15 paragraph referred that should not be considered *de minimis* crime which was done or the aim was to do physical harm to another person's health. Personal health must be protected by the Criminal Code. Arguments where the act objectives, motives, and amount of damage have not reached such a degree that could be assessed as a crime, does not conclude that causing physical pain is not significant to criminal law. According to this, it follows that in society the child is an independent entity with its own independent interests and rights. A child is not a property of their parents. The state must intervene to protect the child when the parents failed to duly perform their duties, abuse of discretion or authority of parents and it threatens or harms the child. The evaluative concept of "prudent punishment" can not be valid in law.

¹⁷ The Ruling of Kaunas County Court in a Criminal Case (case No. 1A-319-493/2009).

As far as Lithuania is concerned, the rights of children to health, personal immunity, dignity and protection against corporal punishment are granted by the means of criminal law, although there is no direct provision specifying that corporal punishment against children is forbidden. Incidents of the corporal punishment which match the criteria provided for in Criminal Code and defining damage to health, causing pain and physical abuse are punishable under Art. 135, 138, 140, 163 of the CC. Moreover, corporal punishment is a dangerous act and, therefore, it cannot be considered insignificant. In conclusion, it should be inferred that there are no restrictions holding a person criminally liable for applying corporal punishment against children.

Conclusions

Since the end of the twentieth century, domestic violence is considered as a public offense, because violence against children harms the child's personality and makes child feeble, cowardly and cruel individual. For this reason, are developed ensuring policy of childhood safety and well-being.

There are two opposing views on the rights of the child to be protected from all forms of violence. One of them has a view that family's privacy or the right of parents to educate their children is more important than the child's interests, the second theory promoters say that the right of parents to educate and raise children is not absolute. Parental discretion is limited by the child's needs, interests and rights, therefore is prohibited to use corporal punishment or apply methods which humiliate the child.

Key words: corporal punishment, children's rights, criminal responsibility

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KARY CIELESNE WOBEC DZIECI W ŚWIETLE SPOŁECZNOŚCI I PRAWA

Streszczenie

W artykule przedstawiono obowiązujące akty prawa międzynarodowego oraz wewnętrznego wybranych krajów dotyczące stosowania kar fizycznych wobec dzieci. Ukazano, że dziecko jest obywatelem od urodzenia i ma wszystkie prawa, które muszą być chronione. Kiedy mówimy o okrucieństwie kryminalnym, szczególnie w poważnym przypadku naruszenia praw dziecka (morderstwo, napaść na tle seksualnym itd.), wszyscy jednomyślnie zgadzają się, że nikt z członków społeczeństwa nie może tolerować takiego wykorzystywania dzieci. Ale społeczeństwo zaczyna się dzielić na różne obozy – od pozytywnego podejścia do zdania po klasyfikację kar w kategorię przemocy – kiedy dyskusja toczy się wokół wychowania dziecka bez przemocy. Ta tendencja wynika z kilku powodów. Po pierwsze, to wiara ze celowe podniesienie ręki przeciwko dziecku lepiej „wykształci” dziecko. Po drugie, rodzicielstwo jest wartościami naturalnymi i to jest prawo rodziców do wychowywania dzieci w ich własnych metodach. Celem tego artykułu jest ocena prawna kary cielesnej wobec dzieci w celach wychowanie. Aby osiągnąć ten cel będzie analizowana stanowisko ustawodawcy oraz orzecznictwo prawa karnego.

Słowa kluczowe: kary cielesne, prawa dziecka, odpowiedzialność karna

ТЕЛЕСНЫЕ НАКАЗАНИЯ ДЕТЕЙ В СВЕТЕ ОБЩЕСТВА И ПРАВА

Резюме

В статье представлены обязательные акты международного и внутреннего права отдельных стран в отношении применения физических наказаний детей. Было представлено, что ребенок является гражданином с рождения и имеет все права, которые должны быть защищены. Когда речь идет о криминальной жестокости, особенно в серьезном случае, нарушение прав де-

тей (убийства, сексуальные посягательства и т. д.), все единодушно согласны с тем, что никто из членов общества не может терпеть такого использования детей. Но общество начинает делиться на разные лагеря – из положительного подхода к мнению, к классификации наказаний в категории насилия – когда дискуссия вращается вокруг воспитания ребенка без насилия. Эта тенденция обусловлена несколькими причинами. Прежде всего, это вера что преднамеренное поднятие руки на ребенка будет лучше „воспитывать” ребенка. Во-вторых, родительство является естественной ценностью, и это право родителей воспитывать детей по-своему. Цель этой статьи является правовой оценкой телесных наказаний детей в целях воспитания. Для достижения этой цели, будет проанализировано законодателями и судебная практика уголовного права.

Ключевые слова: телесные наказания, права детей, уголовная ответственность