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## REGULATING CORPORAL PUNISHMENT IN FAMILY SETTINGS: GAPPING THE BRIDGE BETWEEN THE CULTURAL PRACTICES OF THE EAST AND THE CONCERN OF THE WESTERN TREATY-STANDARDS

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*Corporal Punishment has existed for a long time in different cultures as a form of disciplining and correcting the behavior of the child. But in modern times, many states have prohibited or even criminalized the practice; recognizing the trauma, such punishments can inflict and its negative impact on the development of a child. Convention on the Rights of the Child, the flagship international human rights treaty for the protection of child has in strong words prohibited the use of punishment on a child. The fact that the treaty is universally ratified and globally accepted as a standard for child rights makes a strong argument in favor of such prohibition. But on the other hand, corporal punishment is the prevalent norm in different cultures, and while stripping the authority of school teachers to inflict corporal punishment has been welcomed by all, the same has not been the case in terms of parents. Taking away a parent's authority to discipline their child makes it harder for the parents to rear the child in a culturally appropriate manner. The conflict displays the ongoing tug of war between the western-centric treaty approach and the society-specific cultural norms of the east. However, the concerns regarding the abuse and trauma that can be caused by corporal punishment are genuine. This paper aims to explore how to regulate the manners and methods parents devise to discipline their child, without disturbing the fiber of the cultural norms.*

### INTRODUCTION

Childhood is a delicate time in every human's life. Most often it shapes how we are going to turn out once we grow up and possess the ability to do both good and bad. As such a child is vulnerable and needs special care. Every possible decision by parents may have a long-term impact on a child's life. Hitting a child, even if such act does not result in any physical injury or long-term bodily harm, can leave a stain on everyone's memory. But the practice has persisted for generations in different cultures. Many parents and their children would testify that it has been successful, while many would say how it scarred them for life. There has been some evidence that corporal punishment may cause

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irreparable harm to a child,<sup>1</sup> especially when the punishment is anything worse than a mild punishment.<sup>2</sup> But to develop a child in a way that the adult version does not become a menace to society, is indeed a very difficult task. The restless society around us bears testimony to the fact that how difficult it has become to raise a child. The impact of corporal punishment on a child's development and the need for its regulation is something that needs pondering. While parents must be provided the autonomy to raise their child in a culturally appropriate way, sometimes it is bound to clash with the developing regime of child rights. Child rights though is based upon the concern for the welfare and development of the child, cultures are tested ways of life that have been groomed to shape a child in the best possible way for him and the society. This clash between culture and the concerns stemming from child rights makes it hard to decide the question of corporal punishment. For the best interests of the child, this gap needs to be bridged.

### **CORPORAL PUNISHMENT**

Corporal Punishment is defined as a kind of punishment that is inflicted on the body.<sup>3</sup> Legally, any form of punishment that uses physical force and inflicts pain or discomfort, however, light it may be, is referred to as corporal punishment.<sup>4</sup> Based on the authority that is inflicting such kind of punishment, it may be classified into three categories, namely: (i) parental (ii) Quasi-parental, and (iii) as part of the punishment imposed by the courts. Flogging, mutilation, branding, stoning, pillory etc. were some of the common forms of corporal punishments that were inflicted by the courts and justice system on the criminals. Since the sentencing followed the retributive theory of justice, such types of punishments were not only common but also supported by the mass in general. But as our legal systems began to evolve and the notions of human rights began to get instilled in our minds; these forms of punishment became rare and even extinct in most countries. Although some jurisdictions still exercise some forms of corporal punishments, owing to the traditional, cultural and religious practices, they are either carried out very rarely or vehemently criticized by human rights

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<sup>1</sup> See Doriane Lambelet Coleman et al., 'Where and How to Draw the Line Between Reasonable Corporal Punishment and Abuse', *Law and Contemporary Problems*, 107 volume 73, 2010, p. 144-49; Robert E. Larzelere & Diana Baumrind, 'Are Spanking Injunctions Scientifically Supported?', *Law and Contemporary Problems*, 57 volume 73, 2010, p. 57, 69.

<sup>2</sup> See Diana Baumrind, 'Does Causally Relevant Research Support a Blanket Injunction Against Disciplinary Spanking by Parents?' *109th Annual Convention of the American Psychological Association*, American Psychological Association, San Francisco, 24 August 2001, p.1.

<sup>3</sup> Henry Campbell Black, *Black's Law Dictionary*, West Publishing Co., St. Paul, Minn., 4<sup>th</sup> Edition, 1971, p. 408.

<sup>4</sup> *GENERAL COMMENT No. 8 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)*, 2 March 2007, Forty-second session COMMITTEE ON THE RIGHTS OF THE CHILD, Geneva, p. 4.

organizations and other countries. Very recently, Saudi Arabia has decided to end the practice of flogging.<sup>5</sup>

In terms of corporal punishment inflicted by parents, the practice dates back to the time of the Old Testament.<sup>6</sup> These traditions are not only adhered to by the Jews, but also by many of the Christian denominations who follow the teachings of the Old Testament.<sup>7</sup> And these religious practices have also been reflected in the decisions of the courts of Israel,<sup>8</sup> but they later turned away from such justifications, citing the religious sources.<sup>9</sup> In Islamic traditions, beating a child is only allowed when the child reaches the age of 10 and does not perform his prayers.<sup>10</sup> But there are alternative explanations that suggest that the Hadith that prescribes this rule does not promote the culture of beating the child, rather talks about lightly smacking the children, without hitting the face or being harsh.<sup>11</sup> But due to the element of punishment that is associated with the act of beating, it has become a part of almost all traditions.

These traditions have also been adhered to by teachers, who are presumed to have the authority of a parent when the child is in their presence.<sup>12</sup> Although held as a legal justification against torts in the English Common Law tradition,<sup>13</sup> these notions are rooted in many traditions. It is a common presumption that a teacher has complete authority over a child in the absence of their parents. Since it is the teachers who are responsible for the moral and worldly education of a child in absence of parents or in many cultures, the child was sent to the teacher to get educated and skilled at a certain age; they must have the same authority over a child like the parents. Due to the respect and importance given to teachers in most cultures, parents usually do not interfere with the methods that a teacher utilizes to discipline a child. Recently, in Bangladesh, when an incident of a child being

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<sup>5</sup> 'Saudi Arabia to end flogging as form of punishment', *The Guardian*, 25 April 2020, available on <https://www.theguardian.com/world/2020/apr/25/saudi-arabia-to-end-flogging-as-a-form-of-punishment>, accessed on 05 June 2021.

<sup>6</sup> The Holy Bible (King James Version), Chapter: Proverbs, 13:24, 19:18, 22:15, 23:13, 23:14.

<sup>7</sup> Hazel Blum, 'Reforming (But Not Eliminating) the Parental Discipline Defense', *University of Michigan Journal of Law Reform*, 921 volume 49:4, 2016, p. 925.

<sup>8</sup> See CA 7/53 Rassi v. Attorney General, Israel, 7 PD 790 (1953) (the court stated that the "*parents are entitled to inflict corporal punishment upon their children in order to educate them in the correct paths and to teach them discipline*").

<sup>9</sup> See CA 4596/98 Anonymous v. The State of Israel, Israel, 54(1) PD 145 (2000) (the court interpreted the term rod as verbal chastisement.).

<sup>10</sup> See Sunan Abu Dawud 495, Grade: Hasan Sahih according to al-Albani (cf. Musnad Ahmad 6650).

<sup>11</sup> See Sunan Ibn Majah 2340, Grade: Sahih (authentic) according to al-Albani.

<sup>12</sup> See *Fitzgerald v. Northcote*, England, (1865) 4 F. & F. 456; *Mansell v. Griffin*, England, (1908) 1 K.B. 160, on appeal (1908) 1 K.B. 497

<sup>13</sup> R.K. Bangia, *The Law of Torts*, Allahabad Law Agency, Allahabad, 15<sup>th</sup> Edition, 2014, p.90.

beaten by his teacher mercilessly, surfaced; the parents decided to abstain from taking any legal action.<sup>14</sup> This incident goes on to show how the cultural notion of corporal punishment along with the authority of the teacher in doing ‘whatever he pleases’ to discipline the child has been deeply rooted in the minds of parents. But adhering to international standards, the practice of corporal punishment by teachers and in educational institutions is being prohibited in many countries.

### **UNIVERSAL STANDARD AND ITS UNIVERSALITY**

The change of attitude towards corporal punishment started when the justice systems changed the notions of punishing a criminal from retribution and deterrence to more preventive and reformatory ones. The English Bill of Rights in 1688 abolished the use of cruel and illegal punishments.<sup>15</sup> The Universal Declaration on Human Rights, the first global instrument on human rights, prohibited the use of torture or cruel, inhuman or degrading treatment or punishment.<sup>16</sup> But this prohibition was directed towards the use of torture and other forms of punishments against the prisoners.

Convention on the Rights of the Child, the flagship international treaty for the protection of the child, at the very beginning emphasizes the responsibility of the states to take appropriate measures to protect a child from all forms of punishment.<sup>17</sup> Article 37 more explicitly sets out the prohibition against the use of torture or cruel, inhuman or degrading treatment against a child. Since the whole article talks about the rights and protection of a child during legal proceedings and in sentencing, literal interpretation could point to the fact that the prohibition against corporal punishment is only prescribed when it is used by courts and in other legal settings. But article 19 which prohibits the use of all forms of physical or mental violence against a child in the care of parents, legal guardians or any other person who has the care of the child along with article 28(2) which obliges states to take ‘*all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the Convention,*’ indicates that the prohibition against the use of corporal punishment against a child applies to all aspects of child’s life.

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<sup>14</sup> ‘Madrassa teacher mercilessly beats child in Hathazari, parents against legal action’, *The Daily Star*, 10 March 2021, available at <https://www.thedailystar.net/crime/news/madrassa-teacher-mercilessly-beats-8-year-old-ctg-viral-video-draws-flak-2058229>, accessed on 05 June 2021

<sup>15</sup> *Bill of Rights*, 1688, England.

<sup>16</sup> *Universal Declaration of Human Rights*, 10 December 1948, UNGA 217 A (III), article 5.

<sup>17</sup> *Convention on the Rights of the Child*, 2 September 1990, E/CN.4/RES/1990/74, Geneva, 7 March 1990.

The convention is one of the most successful international documents in terms of number of parties.<sup>18</sup> The number of signatories and ratifications is a testament to the concerns of the states towards ensuring the human rights of the children. The convention is a success because it shifted the conventional view of children as objects of the authority of parents and governments to individuals with rights.<sup>19</sup> But that does not imply global acceptability of the convention. The participation from the Asia Pacific, the Middle East and Latin America in the drafting process of the convention was extremely poor.<sup>20</sup> A group of NGOs even raised concern to the United Nations Commission on Human Rights over the lack of participation of developing states.<sup>21</sup> Senegal, supported by Morocco and Egypt, further complained that the drafting process *‘failed to take account of the concerns of the developing countries and also expressed concern over the imbalance of the draft, which did not reflect the universality that was desired...’*<sup>22</sup> The complaint was dismissed.<sup>23</sup> Senegal however voiced their concern about the desired universality of the draft convention, especially regarding the cultural needs of the developing countries, the year after.<sup>24</sup> There are arguments that the concept of *‘family’* in the convention ignores the contribution of the members of the extended family in raising a child and is thus, more euro-centric.<sup>25</sup> However, the responsibilities, rights and duties of the members of the extended family have been recognized in article 5.

Even if for the sake of argument, we consider the convention as universal, not all provisions pass the test of universality. In regards to corporal punishment, there is a consensus among the mass and increase in practices regarding the prohibition of corporal punishments in educational and penal institutions.

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<sup>18</sup> The convention has been signed by all the Members of the United Nations, except the United States of America.

<sup>19</sup> See Cynthia Price Gohen, ‘The developing Jurisprudence of the Rights of the Child’, St. Thomas Law Review, volume 6:1, 1993.

<sup>20</sup> See Lawrence LeBlanc, ‘The Convention on the Rights of the Child: United Nations: Law Making on Human Rights’, The American Political Science Review, 1076 Volume 89:4, 1995.

<sup>21</sup> Ibid.

<sup>22</sup> Working Group, Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child, UN Doc E/CN.3/1988/28 (6 April 1988) (‘1988 Working Group Report’), [180].

<sup>23</sup> Ibid, at [252].

<sup>24</sup> Working Group, Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child, UN Doc E/CN.4/1989/48 (2 March 1989) (‘1989 Working Group Report’) [12]

<sup>25</sup> Russell Barsh, ‘The Convention on the Rights of the Child: A Re-Assessment of the Final Text’, New York Law School Journal of Human Rights, 142 volume 7, p. 146–7.

## **CLASH BETWEEN CULTURE AND RIGHTS**

It is a common complaint against the international human rights treaties that they are Western-centric and most often ignores the moral, religious and cultural values of the developing countries along with their socio-economic realities. Although it is not correct to evaluate the efficacy of a treaty by the 'universality' reflected in its provisions, ignoring the cultural and socio-economic realities makes its implementation very hard. Rights that are based on moral values that are accepted in every society are easily accepted and implemented without much objection. Prohibition against corporal punishment towards children in prisons and detention centers has caught up more easily since it reflected the change in attitude in the notions of justice and punishment. But the idea of prohibiting corporal punishment in other contexts was not so easily accepted.

Still lot of countries have either prohibited or decriminalized the use of corporal punishment by teachers in educational institutions. This has been somewhat possible due to the change of roles of teachers in a child's life. Although a teacher is still held in high esteem in cultures all around the world, they are hardly responsible for the entirety of a student's moral and worldly education. Since formal education is institutionalized and education is seen more like a service rendered in exchange for money, the deep connection between a student and teacher like in the old days is no more visible. Parents do not conceive as teachers being their 'replacement' in their absence, but more like a service giver.

But when it comes to the relation between a child and a parent, the culture change has not been much drastic. Nuclear families may have gradually replaced the joint family settings of the old days, but the role of the parents and their authority over the child has not changed in most cultures. This is assumed keeping in mind that traditions change and evolve with time, the change in the socio-economic reality of a society and the influence of western cultures via TV, the internet etc. Non-western societies value the needs of the community, family over that of an individual. Families stay together maintaining a hierarchy, where the words of the elder are considered as law. Children, though are the most loved members of the family and usually in a healthy family environment gets the most attention, they do not hold any sort of authority. Thus, the infusion of the concept of a child as a possessor of rights as encouraged by the convention is not compatible with the eastern cultural setting of a family. Thinking from a western perspective, it might be easy to give priority to treaty-based rights over traditional practices, considering them as antiquated, old-fashioned and

impractical. But the reality of the eastern societies holds traditional and moral values above the western imposed practices. Not to mention these tradition dates back hundreds and thousands of years and have been enriched by generation after generations.

### **PRINCIPLE OF 'THE BEST INTERESTS OF THE CHILD' AS A UNIVERSALLY ACCEPTED STANDARD**

As stated before, the number of signatories and ratifications in the Convention is due to the general concern of all the states regarding the development and welfare of the child. Irrespective of traditions and approaches, children are given priority in every society. This is one of the conciliatory points between the western and non-western approaches that both want the 'best for the child.' Thus, the application of the principle of 'the Best Interests of the Child' is worth exploring in the attempt to bridge the gap between culture and rights.

The principle has found a place in all the relevant international documents that dealt with the protection of the child, starting from the Declaration on the Rights of the Child<sup>26</sup> to the more recent instruments like Convention of the Rights of the Child<sup>27</sup> and African Charter on the Rights and Welfare of the Child.<sup>28</sup> More important than its inclusion in the international instruments is its presence in different legal systems and similar concept in diversified cultural, religious and other traditions.<sup>29</sup> For example, in Bangladesh, the Guardians and Wards Act, 1890; a colonial-era law that regulates the matter relating to appointment, duties and responsibilities of guardians of a minor, mentions the consideration of the welfare of a child in many of its provisions.<sup>30</sup> The principle is so much celebrated that it is claimed that the principle embedded in Article 3 of the convention itself provides 'a complementary ground of protection in its own right' for the refugee children.<sup>31</sup> Although the principle is usually invoked in matters relating to custody, guardianship, etc. of a child, the courts could probably use it as a tool of interpretation in every issue related to a child.

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<sup>26</sup> Declaration of the Rights of the Child, A/RES/1386(XIV), 20 November 1959, Geneva, Preamble.

<sup>27</sup> *Convention on the Rights of the Child* (n17) Article 3.

<sup>28</sup> African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49, 29 November 1999, Article 4.

<sup>29</sup> Philip Alston, 'The best interest principle: towards a reconciliation of culture and Human Rights, reconciling culture and Human Rights,' *International Journal of Law, Policy and the Family*, 1 Vol. 8:1, 1994, p. 5.

<sup>30</sup> The Guardians and Wards Act, 1890, Bangladesh, section 7, 17, 25, 43.

<sup>31</sup> J McAdam, *Complementary Protection in International Refugee Law*, Oxford University Press, 2006, p. 173-4. See also J McAdam, 'Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection', *International Journal of Children's Rights*, 251 volume 14:3, 2006, p. 251.

## **DIFFERENTIATING 'CORPORAL PUNISHMENT FOR THE BEST INTERESTS OF A CHILD' FROM ABUSE**

In evaluating the practice of corporal punishment through the lens of the principle of 'the Best Interests of the Child,' there are predominantly two points of view that are to be considered. One argument states that hitting a child, no matter how softly it might be, violates the dignity of the child and is a major obstacle behind their mental development and thus, can never be in the best interests of a child. Another aspect argues that at times to save a child from going into the wrong path; to discourage developing habits and manners that are not socially approved, hitting a child can be acceptable. Apart from the legal conundrum of interpreting violation of rights and the cultural idiosyncrasies, it is necessary to understand the psychology behind using corporal punishment against a child.

The extreme need for hitting a child may arise when a child commits a very unacceptable act, which if the child continues to do, may be very harmful both for him and the society or when a child refuses to listen to the instructions that concern behavioral accept, even after repeated emphasize. Thus, the necessity to hit a child comes from the need to mold its conduct in a socially acceptable manner. For example, if a child develops a bad habit, say for example stealing, and repeated warnings and rebuking has not proven sufficient to derail the child from such habit, it might require to inflict a certain amount of discomfort and inconvenience to discourage the child from such habit. The best interest principle dictates that a particular course of action is to be taken when it serves the optimum welfare of the child. So, to justify hitting it is essential to show that the harm that may befall the child is much more significant than the temporary inconvenience faced by the child due to the punishment. For example, in England, law allows the defense of reasonable chastisement, where the punishment results in assault, without any actual bodily harm.<sup>32</sup> As such corporal punishment may be a last resort. If we draw an analogy with the practice of curtailing rights in a society for the greater welfare, we may observe that sometimes a particular right is restricted for a limited time for preserving peace, law and order in the society. For example, freedom of religion can be limited for public safety, protection of public order, health, or morals, or the protection of the rights and freedoms of others.<sup>33</sup> This limitation in no way demeans the importance the freedom of religion in a

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<sup>32</sup> Children Act, 2004, England, §58.

<sup>33</sup> International Covenant on Economic, Social and Cultural Rights, 3 January 1976, 993 UNTS 3, 16 December 1966, New York, article 18.

society. Similarly, at times, to ensure freedom of religion in society, some other rights can also be subjected to limitation. If for the greater welfare of a child, it becomes necessary to slightly hit a child, the temporary inconvenience to the child could be something that can be acceptable. But similar to curtailment of rights, hitting a child must fulfill the requirement of necessity and proportionality. Since inflicting corporal punishment on a child is based on the idea of promoting its general welfare, any form of discipline that jeopardizes the overall health or safety of the child will never be in the best interests of the child.

In regards to the Convention, it prohibits '*violence, injury or abuse*' by the parents, legal guardians etc.<sup>34</sup> Thus, from a legal point of view, the punishment inflicted by parents must qualify as '*a violence or injury or abuse*' to be regarded as impermissible. However, there is no mention of the term 'corporal punishment' in the convention or neither does the travaux préparatoires show any deliberations on corporal punishment during the drafting sessions.<sup>35</sup> It would be open for interpretation in a court of law to adjudge whether a particular act of hitting constitutes '*violence, injury or abuse.*' But the standard that is applicable for an adult will not be applicable for a child and since the convention prohibits both physical and mental form of violence, a point could be made that an act of hitting even if does not amount to physical violence, may nonetheless amount to mental abuse.

From a cultural point of view, to adjudge a particular culture as acceptable and not bordering as abusive, the practice must be consistent with cultural standards according to the members of that particular community and the particular people to whom it applies.<sup>36</sup> But even such accepted traditional practices may be cruel and abusive in general standards. The courts in the USA have usually imposed their cultural standards in questions regarding immigrant parents' disciplining methods.<sup>37</sup> Such determinations may be faulty. The European Court of Human Rights holds severe form of corporal punishments as a violation of article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>38</sup> that prohibits violence.<sup>39</sup> Those punishments that do

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<sup>34</sup> *Convention on the Rights of the Child* (n17) Art 19.

<sup>35</sup> *GENERAL COMMENT No. 8* (n4), page 6, para 20.

<sup>36</sup> Alison Dundes Renteln, 'Corporal Punishment and Cultural Defense,' *Law and Contemporary Problems*, 253 Volume 73, 2010, p. 257.

<sup>37</sup> *Dumpson v. Daniel M.*, N.Y. L. J., Oct. 16, 1974, at 17, col. 7; *In re Jertrude O.*, 466 A.2d 885, 888 (Md. Ct. Spec. App. 1983).

<sup>38</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, 3 September 1953, ETS 5, Rome, 4 November 1950.

<sup>39</sup> See *Tyrer v. the United Kingdom*, European Court of Human Rights, No. 5856/72, 25 April 1978.

not satisfy the threshold of severity can be considered as a violation of the right to physical and moral integrity, though there have been no such cases till now.<sup>40</sup> Rather than judging a cultural practice from the standpoint of a particular instrument or jurisdiction, it is better to formulate a set of rules by child-care professionals that would gain acceptance over diversified cultures and is only aimed at the welfare of the child. For example, Lisa A. Fontes and Margarita R. O'Neill-Arana, two leading experts in this issue have formulated a set of criteria that would help to assess whether the court needs to intervene in a particular act of disciplining. These are as follows:<sup>41</sup>

- The age of the child in question.
- Frequency of the use of punishment.
- Apparent physical and emotional effects of the punishment, such as marks, lingering pain, whether the child is upset or frightened by the punishment etc.
- The duration of the punishment.
- The severity of the punishment.
- The invasiveness of the punishment, i.e. interfering with natural processes such as eating, drinking, sleeping, moving the body, digesting food, using the toilet etc.

Besides there are whole range of suggestions from experts that suggests the punishment being control and planned, not impulsive; used in conjunction with reasoning and explanation; used privately etc.<sup>42</sup> This set of guidelines cannot be considered as exhaustive as the courts might need to evaluate whether a particular act of punishment constitutes violence and abuse from a case-to-case basis. Again, some forms of corporal punishment need to be prohibited without any concession, due to the nature of such to inflict excessive pain and discomfort, like birching, canning, etc.<sup>43</sup>

### **TRANSFORMING CULTURE BEFORE LEGISLATING**

Although it has been settled that corporal punishment might be required as a last resort for the welfare of the children, it has also been held that corporal punishment may easily result in violence, injury and abuse. Thus, to ignore such practices without any oversight would amount to giving full

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<sup>40</sup> *Handbook on European law relating to the rights of the child*, European Union Agency for Fundamental Rights and Council of Europe, Luxembourg, p. 118

<sup>41</sup> See for example Lisa A. Fontes & Margarita R. O'Neill-Arana, *Assessing for Child Maltreatment in Culturally Diverse Families*, in Lisa A. Suzuki, Joseph G. Ponterotto & Paul J. Meller (eds.), *HANDBOOK OF MULTICULTURAL ASSESSMENT: CLINICAL, PSYCHOLOGICAL, AND EDUCATIONAL APPLICATIONS*, 2008.

<sup>42</sup> Baumrind (n2) 1.

<sup>43</sup> *A. v. United Kingdom*, European Court of Human Rights, 90 Eur. Ct. H.R. 2692, 2699 (1998).

autonomy to the considerations of a cultural way of life over the rights of a child. The principle of best interests of a child, that justifies corporal punishment in a limited capacity, also entails that there must be an oversight in a parent, legal guardian, or a caregiver's capacity to punish a child. This raises the question of whether there is a need to regulate the parental authority to inflict corporal punishment upon a child. While some may argue that legislating on family issues is always a tricky thing as court cases often harm the family's integrity, it should also be understood that acts of violence fall under the purview of criminal sanctions. Till now, over 100 countries have banned the use of corporal punishments as a form of disciplining in educational and penal institutions,<sup>44</sup> with 23 countries banning it in all settings, including home.<sup>45</sup> This shows that countries are more reluctant to legislate when it comes to banning corporal punishment in family settings.

Ban in educational settings has been possible due to the change in attitude among the parents and also due to the change in the role of teachers as stated before. Thus, legislating on a ban in family settings can only be successful through a widespread change in attitude. Even General Comment No. 8 by the Committee on the Rights of the Child recognizes the futility in prohibiting corporal punishment without bringing change in the attitude and practices.<sup>46</sup> But not taking any action is again not an option. Legislating only for the sake of banning corporal punishment would amount to over-legalization for the fact that it would imply encroachment of cultural values by western-centric laws. Traditional practices are subject to change, but not rapidly. To discourage the use of corporal punishment in family settings, it is essential to ensure its total prohibition in educational and penal settings. With outright eradication in other aspects of life, masses will gradually become more indifferent towards its utility in family settings.

Social change before legislating is more appropriate to regulate a practice that has its origin in the traditional norms of a society. This is also compatible with the standard set in the Convention that obliges states to '*take all appropriate legislative, administrative, social and educational measures*' to protect the child from violence and abuse.<sup>47</sup> But this step contemplates taking social and educational steps for limiting corporal punishment before resorting to legislative and administrative ones.

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<sup>44</sup> Joan E. Durrant et al., 'Protection of Children from Physical Maltreatment in Canada: An Evaluation of the Supreme Court's Definition of Reasonable Force', *Journal of Aggression, Maltreatment & Trauma*, 64 volume 18:1, 2009, p. 64-65.

<sup>45</sup> *Ibid*, at 65.

<sup>46</sup> *GENERAL COMMENT No. 8* (n.4), Page 11, para 45.

<sup>47</sup> *Convention on the Rights of the Child* (n17) Art 19.

## **REGULATING BEFORE LEGISLATING**

Since the transformation of traditions takes time and so will the legislation, it is not acceptable to let cases of corporal punishment, which reeks of violence and abuse, go unnoticed. However, some of the incidents of corporal punishment could be judged through the current laws.

Matters of violence and abuse, without any special reference to children, are often subject to penal sanctions. Not to mention, violence against a child would also fall within the purview of domestic violence-related legislations. In Bangladesh, violence and causing injury to a child may fall within the purview of hurt and grievous hurt under Penal Code, 1860,<sup>48</sup> and in terms of special legislation, Section 3 of Domestic Violence (Prevention and Protection) Act, 2010 contains violence against a child under its purview. Again, the Children Act, 2013 of Bangladesh, criminalizes cruelty against a child, which although mostly talks about the negligence and other mental sufferings of children, also mentions assault and injury to a child.<sup>49</sup> These provisions, in practice, cover the entirety of the aspect of corporal punishment. While the threshold for initiating a case under these provisions may be high, it usually reflects the current societal attitude towards corporal punishment. Courts however have a wider discretion to accommodate incidents under these provisions but since these are penal provisions, courts are expected to have a higher threshold to sentence the parents for violence against their child. With the gradual change in the perceptions of society regarding corporal punishment, new legislations that allow less serious cases of violence and abuse to be brought to the court will surely surface. And such legislation may contain more diverse punishments such as warnings, community sentencing, fines etc. which may help the regulation of corporal punishments in a family without any tears in the relations.

## **CONCLUSION**

Although the concern for the welfare of the child may inspire the notion of outright banning or heavily regulating the practice of corporal punishment, lawmakers should not make any haste into it. Legislating without having the society ready for it will do no good; rather distort the family settings

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<sup>48</sup> The Penal Code, 1860, Bangladesh, section 319, 320.

<sup>49</sup> The Children Act, 2013, Bangladesh, section 70.

that have been enriched with traditions of generations. While there is an aversion towards the severe form of corporal punishment, its utility in mild form is yet to be discarded by societal practice and even by experts. Sweden, the first country to impose a total ban on corporal punishments, is said to have raised a '*nation of ill-mannered brats,*' who are self-centered and lack manners.<sup>50</sup> It is to be kept in mind that the goal of child rights is not only to provide a healthy and trauma-less childhood but also to raise them as law-abiding adult who will uphold the legal and moral values of a society. Thus, considerations that will ensure a child's wellbeing temporarily as well as in the long term should guide any decisions regarding the children.

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<sup>50</sup> Richard Orange, 'Soft Swedish parents raising nation of brats-Psychiatrist', *Independent.ie*, November 02 2013, available in <https://www.independent.ie/world-news/europe/soft-swedish-parents-raising-nation-of-brats-psychiatrist-29720884.html>, accessed on 05 June 2021.