

Legal Ban on Corporal Punishment of Children: European States' Regulations and Current Legal Status in Poland

Excerpts from the article by Violetta-Konarska Wrzosek. Published in *Dziecko Krzywdzone*, no 3 (23) of 2008.

Several Member States of the Council of Europe have already introduced legal bans on corporal punishment of children and other forms of humiliating treatment of children by their parents. Poland is still one of the countries where parents are allowed to use corporal punishment of children. Therefore, there is an urgent need to introduce a clear ban on any use of physical force against one's own children in Polish legislation. Such a ban should be included in the Family and Guardianship Code, which defines parents' rights and obligations accruing from parental power and should categorically exclude corporal punishment from permitted child-rearing and disciplinary measures.

The choice of the majority of countries which have introduced the ban on corporal punishment of children was to pass it in a form of an amendment to the codes or laws regulating the relations between parents and children, and in few cases in laws on preventing domestic violence. No country has decided to introduce such a provision in the Criminal Code.

Such a solution constitutes a great example of *lex imperfecta*, or imperfect law, in that it does not envisage sanctions for those that disobey. Some people in Poland argue that it is not a good choice, that the fact of there being no specific sanction will make the law be commonly disrespected. The question then is: can it nevertheless be efficient in protecting personal rights and guarantying safety to minors?

It seems that indeed it is a right solution and the only reasonable one, as it can and should bring positive results without further antagonizing parents and children, but firmly defining educational methods that can be used towards children by their parents or guardians, excluding and making illegal application of physical force.

Outlawing corporal punishment, even without providing for sanctions, is advantageous for several reasons. It guarantees bodily inviolability to minors; it is an affirmation of a rearing model without violence, which is beneficial for both adults and children, as it strengthens basic values of respect towards others and disseminates positive patterns of creating relations both within the family and the society as a whole. What is more, introduction of a ban on corporal punishment of children makes it easier to define the group of children that are being castigated in this way and single out those who are castigated too often or excessively. It also enables adequate bodies to undertake early intervention and prevent further maltreatment of the child.

The countries that have already introduced the ban seem to have had exactly the aforementioned objectives in mind. It has been stressed many times that the ban is not aimed at punishing parents, but at activating assistance both for the maltreated child and his/her parents in eliminating unacceptable and harmful educational methods. In many countries, the introduction of the ban was accompanied by a wide-spread awareness-raising campaign on the purposefulness of the ban and on the rights of both children and parents.

Furthermore, the fact of introduction of the ban on corporal punishment of children without providing for a specific sanction should not be identified with the lack of possibilities of applying negative consequences for disrespecting it.

It should be remembered that in Poland there are Family Courts that act as guardian authority and have the right to intervene in parental authority if the good of a minor is at risk. According to article 109 of the Family and Guardian Code, if the good or safety of a minor is endangered, the Court shall pass a resolution limiting in fact the exercise of parental authority towards this minor. In particular the Court is entitled to:

- oblige the parents (and the minor) to a specific conduct, indicating the methods of control of the observance thereof;
- institute a warden's supervision over the family;
- send the minor to an adequate institution or organization that takes a partial care of children;
- decide upon placing the child in a foster family or a foster and education facility, in fact taking the child out of direct parental impact;
- in cases of a clear abuse of parental authority or glaring neglect of obligations towards the child, the guardian court may deprive the parents of their parental authority.

Hence, it is not that in the light of the binding rules of law in Poland parents may not face negative consequences of their reprehensible conduct towards children, especially when they maltreat their children or when they disrespect legal bans on using illegal and unpedagogical educational methods.

Instituting firm legal ban on certain practices has this advantage that it explicitly - and without the possibility or necessity of individual assessment - divides educational methods into acceptable and illegal ones, which prevents alternative judgement of a certain behaviour considering it as unacceptable in one situation, and as admissible in other, when it was deemed less drastic or deserved.

On the other hand, there might be cases when criminal sanction result necessary because of excessive castigation of a child or abuse. Generally, however, resorting to criminal laws in the parents-children relations because of application of inadequate or unacceptable educational methods is a particularly ineffective and harmful solution. Penal intervention in the family life does not help to bring the family together, to unite it, it does not do good to the domestic atmosphere, on the contrary – it escalates the conflict between parents and children who are blamed for the parent being punished. Consequently, it may result in more aggression in mutual relations and greater “refinement” in applying corporal punishment in such a way, so that no marks are left. It can also lead to coldness and total indifference, as well as distrust and tension in family relations.

Therefore, using criminal code instruments to eradicate undesirable educational methods does not seem to be correct. It should and must be applied only in extreme cases, when castigation of a child has the form of a child abuse and poses a real risk to the child's physical and mental health and its intellectual and emotional development. In such cases punishing parents is simply necessary because of justice and prevention-related reasons so as not to let the legal protection of child's rights and goods be an illusion and to prevent further abuse of the specific child as well as other children by their own parents.

As far as real and effective protection of the abused child is concerned, the legislative modifications introduced on 27 and 29 July 2005 have a great importance. They have enriched Polish law with a range of preventive and penal measures and probation obligations, in particular, towards the perpetrator of domestic violence in relation to conditional discontinuation of criminal proceedings or conditional stay of carrying out of a sentence.

The Law of 27 July 2005, amending the Criminal Code of 1997 and Criminal Proceeding Code of 1997 and the Law of 29 July on preventing domestic value have introduced into the Polish system very pragmatic solutions, which allow for effective interruption of domestic violence or physical abuse of

a child by physical separation of the perpetrator from the victim without resorting to drastic solutions such as an isolation preventive measure, that is preventive detention, or ruling on absolute sentence of imprisonment.

These less drastic measures include police surveillance, if the perpetrator decides to leave the apartment that he/she occupies together with the victim within the deadline fixed by the court. What is more, in such a case the perpetrator may be demanded also to refrain from contacts with the victim.

The aforementioned solutions provide for an almost immediate possibility to stop further abuse of the family members and to guarantee them peaceful staying in their home environment and even outside it in the light of the fact that the perpetrator has left the house and obliged himself/herself not to contact the persons he/she used to abuse in return for letting him/her stay at large.

Before the new law was passed, the family drama could be resolved in two ways: either by preventive detention of the perpetrator (which did not happen too often), or by victims fleeing the home they occupied together with the perpetrator, which disorganized their life and made them wander homelessly, while the perpetrator triumphantly stayed at home.

It should be stressed that if the perpetrator breaches the provisions of such an obligation it may result in changing the police surveillance into a stricter measure, e.g. preventive detention, which surely motivates the perpetrator to respect all the conditions of the measure.

Also at a further stage of criminal proceedings, when substantial criminal judgements are passed in the case related to the crime committed with the use of force or illicit threat towards a family member, specific possibilities have been created to guarantee personal safety to the victims. In particular, when the court deems it adequate and applies towards the perpetrator with no previous criminal record for a deliberate crime, for whom there is a positive criminological prognosis, an institution of a conditional discontinuation of criminal proceedings, in such a case - according to the amended provision of article 67 paragraph 3 of Criminal Code - it may oblige the perpetrator to refrain from contacts with the victims.

Article 13 of the law on preventing domestic violence further specifies that in the case of perpetrators charged with using violence in family or threatening to use it, the court defines the modality of contacts between the convict with the victim or it may even pass a restraining order forbidding the convict to approach the victim in certain circumstances.

If the convict disobeys, it is possible to resume the formerly conditionally discontinued proceedings and convict the perpetrator with the utmost rigour of the law, or in the case of a former conditional stay of carrying out of a sentence, the court may decide upon the exercise of the sentence.

Having in mind a more effective protection of the victims, a catalogue of penal measures has also been expanded. They may be decided upon as an addition do the sentence, or independently in some cases. In the light of the amended article 41 of the Criminal Code, when the Court sentences the perpetrator for committing a deliberate crime with the use of violence, including violence against a family member, it may decide upon a penal measure in the form of:

- obligation to refrain from staying in certain environments or places,
- ban on contacting certain people,
- ban on leaving a certain place without the Court's permission.

Such an obligation or ban may be accompanied by an obligation to present oneself at the police station or other indicated body with a specified frequency, which constitutes an additional factor of a regular, current control of the perpetrator's conduct.

It should be mentioned here that the disrespect of the penal measure by the perpetrator constitutes a separate crime subject to deprivation of liberty for a term of 3 years, which the perpetrator must be called to account for as it is a crime prosecuted *ex officio* (article 244 of the Criminal Code).

Such legal provisions not only assure a correct implementation of the bans and obligations, but they also make the protection of rights and interests of the domestic violence victims more effective.

In such a context of a quite big determination of the Polish legislator to create an effective and firm protection of persons abused in their own family, it might be surprising why the decision on banning the use of physical force by the parents towards children has not been taken.

It should be reminded that a proposal of the law on preventing domestic violence envisaged a measure in this respect, according to which: *persons exercising parental authority, care or custody of a minor child are forbidden to apply forms of castigation that violate the minors' dignity* (article 6 of the proposal). Despite proposing such a little concrete provision, excluding only some forms of physical or other type of castigation, if it violated child's dignity, not enough support was acquired in the parliament and the law on preventing domestic violence was passed without this ban.

In this way, Poland, despite being a signatory of the Convention on the Rights of the Child and other international laws and a member of the Council of Europe, still remains among those countries that have not fulfilled their commitments in protecting children against all forms of violence from adults, including application of corporal punishment as an educational method.

Therefore, it seems purposeful and urgent to introduce in Poland a legal ban on application of corporal punishment of children by their parents and Family and Guardian Code seems to be the most appropriate way of doing it, and not the law on preventing domestic violence, as it has lately been planned. For it should be reminded that the problem does not consist in protecting children against violence in the family and unjustified beating by their parents, as it is already forbidden. The problem lies in forbidding parents to apply corporal punishment towards their own children – which is still consented by law.

By postponing the introduction of a legal ban on corporal punishment of children in many cases in fact we allow for their abuse and at the same time we delay the process of eliminating violence from the family and social life.