

The right not to be hit: the battle between children's rights, parents rights and cultural rights.

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Abstract

The extension of rights to citizens groups has been a notable feature of politics in the last sixty years. However, one group that is rarely acknowledged as rights-holders and has been significantly absent from key rights extensions is children. This paper looks at children's rights in the context of the debate about corporal punishment in New Zealand. It also considers public attitudes to corporal punishment of children as reflected in a recent survey about attitudes to children conducted by the Institute of Public Policy and the School of Social Sciences at AUT.

The development and expansion of international human rights has been a feature of the post-World War II period, and can be traced in large part to the determination of the international community never again to allow the gross abuses of human rights which characterized the treatment of Jews, gypsies, Poles, homosexuals and other minority groups under fascist rule. It is reflected in both the charter of the United Nations (UN) and in the Universal Declaration of Human Rights (UDHR). The charter, devised in the dying days of World War II, committed the fledgling international organization to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small".¹ That commitment was formalized in the UDHR, adopted without dissent by UN members in 1948. The UDHR has become, in status and significance, the Magna Carta of international human rights, and is now the core of a matrix of human rights conventions and covenants. This matrix is made up of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the UN Convention on the Rights of the Child (UNCROC). The latter convention, UNCROC, is now the most comprehensive statement in international law of children's rights, and is remarkable also for the near-universal ratification of the convention by the signatory states.

Article 19(1) of UNCROC requires states which are party to the Convention to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child.

¹ Preamble to the Charter of the United Nations.

The UN Committee on the Rights of the Child has been critical of those countries which retain legislation providing a statutory right for parents and caregivers to use corporal punishment to correct or discipline a child. Corporal punishment is defined in the *Oxford English Dictionary* as “punishment inflicted on the body”. Over the centuries corporal punishment has included punishments such as mutilation, branding, flogging and even death.² However, even “once it is differentiated from ‘capital punishment’, ‘corporal punishment’ remains a very broad term”.³ A variety of terms are often used to denote corporal punishment. Spanking, strapping, bashing, hitting, slapping, beating, paddling, belting, smacking and whipping are terms frequently used by people to describe corporal punishment. The corporal punishment of a child, then, is the physical disciplining of a child. Corporal punishment, however, “has a connotation of severity, and is associated with acts such as caning and belting.”⁴

Over the last twenty five years many countries around the globe have addressed this issue. Starting with Sweden in 1979 fifteen countries - Finland (1983), Denmark (1997), Norway (1987), Austria (1989), Cyprus (1994), Latvia (1998), Croatia (1999), Bulgaria (2000), Israel (2000), Germany (2000), Iceland (2003), Ukraine (2004), Romania (2004) and Hungary (2005) - have now abolished all corporal punishment of children.⁵ Two states in Australia – Tasmania and New South Wales - have also recently reformed their laws on corporal punishment of children. There are initiatives in New Zealand, Canada, the UK, and the USA, as well as other states in Australia to abolish corporal punishment of children.⁶ However, there is also reported strong public opposition for abolition.⁷

In New Zealand the debate about corporal punishment of children has been crystallized by the recent introduction into Parliament of the Crimes (Abolition of Force as a Justification for Child Discipline) Bill. This is a private member’s bill sponsored by the Opposition Greens party whose purpose is to repeal the current

² See Anthony, Edward (1995) Thy Rod and Staff: New Light on the Flagellatory Impulse, Little Brown & Co., London, pp.15-43.

³ Benatar, David (1998) “Corporal Punishment”, Social Theory and Practice, Summer 1998, No. 1, p.237.

⁴ Coalition on the Physical Punishment of Children and Youth (April 25, 2003) “Joint Statement on Physical Punishment of Children and Youth”, Ontario, Canada, p.2.

⁵ http://www.endcorporalpunishment.org/pages/progress/prohib_states.html

⁶ For instance, in Quebec “reference to a “right of correction” was removed from the Civil Code in 1994, and a number of rulings have stated that the right of correction is no longer recognised in Quebec’s civil law, but section 43 of the federal Criminal Code applies nevertheless”. In the USA corporal punishment in the home is lawful in all 50 states. However, “Twenty seven states and the District of Columbia have passed laws prohibiting corporal punishment in public schools. In Iowa and New Jersey, this prohibition also covers private schools. In the remaining 23 states, corporal punishment is permitted unless banned by local boards, though as at June 2005 legal prohibition was being proposed in Missouri, Pennsylvania and Texas”. Corporal punishment is lawful in the home, though the defence of “reasonable chastisement” has been limited by amendments to the law in England and Wales and in Scotland.” In Australia “corporal punishment in the home is regulated at state rather than at federal level, and is lawful throughout Australia under the right of “reasonable chastisement” or similar.

See http://www.endcorporalpunishment.org/pages/progress/prohib_states.html for more details of current initiatives in Canada, the UK, the US and Australia.

⁷ For example, several recent surveys in New Zealand indicate that around 80 per cent of respondents believe that “smacking” children should be allowed.

statutory defence of reasonable force in the disciplining of a child afforded parents or caregivers charged with criminal assault upon a child.

Currently, Section 59 the Crimes Act provides that:

- (1) Every parent of a child, and subject to subSection (3) of this Section, every person in the place of the parent of a child is justified in using force by way of correction towards the child, if the force used is reasonable in the circumstances.
- (2) The reasonableness of the force used is a question of fact.
- (3) Nothing in subSection (1) of this Section justifies the use of force against a child in contravention of Section 139A of the Education Act 1989.

In recent years the Section 59 defence has attracted media and public attention because the defence has been relied upon – and been successful – in cases in which parents or caregivers have admitted hitting children with, variously, bamboo canes, a horse whip, hosepipe and a piece of wood.⁸ In the context of these cases and their successful outcomes for the defendants, questions have been asked about what constitutes “reasonable force” in the disciplining of children. These questions have additional resonance because of the purported links and associations between the physical disciplining of children and child abuse. New Zealand has long been considered a good place to bring up children. However, a 2003 UNICEF report found that New Zealand had the fifth highest rate of child deaths from maltreatment in the OECD.⁹ The debate about the corporal punishment of children, then, is occurring in an environment in which the traditional orthodoxies about the privileged and protected nature of childhood in New Zealand are being challenged.

The corporal punishment of children is an issue which provokes strongly contested debates. There appear to be three main reasons for this. Firstly, corporal punishment is an issue which exposes competing binary constructions of childhood. Secondly, it is an issue which speaks to individuals’ core values and attitudes about control, power and social norms. Thirdly, corporal punishment is an issue which sharply divides opinion because every adult who offers an opinion on it can make the claim to have experienced childhood and, almost invariably, to have experienced corporal punishment during it. Actual participation in the two key elements at the heart of the debate on corporal punishment of children means that unlike other human rights debates, such as those concerning homosexual rights or refugee rights, all adults taking part in the debate feel qualified to offer an opinion about the corporal punishment of children and to speak with assurance about it on the basis of “experience” and “expertise”.

⁸ See “Jury Clears Mother Over ‘Six of the Best’”, New Zealand Herald, May 27, 2005; “Father Acquitted in Pipe Beating”, New Zealand Herald, November 2, 2001; “Parents Not Guilty of Assault Over Bamboo Stick Beating”, New Zealand Herald, September 9, 2001; “Smacking: A Question of Force”, New Zealand Herald, September 10, 2001.

⁹ UNICEF (2003) A League Table of Child Maltreatment Deaths in Rich Nations: Innocenti Report Card No.5, UNICEF, Innocenti Research Centre, Florence.

Smith has noted that childhood is “what we think it is or ought to be, and this influences the expectations we have for children.”¹⁰ Consequently, as Davin has noted, there “is no absolute definition of childhood, whether subjective or official, because it is always lived and defined in cultural and economic contexts.”¹¹ Childhood, therefore, has been constructed in very different ways at different times in history. Children in the eighteenth century, for instance, were generally expected to be “useful” whether this was expressed in domestic labour in the house or outside in agricultural work.¹² Later, industrialization brought employment opportunities in mills and factories for the children of the poor. However, the passage of child labour laws brought about the reform of children’s status, from “economically useful” to “economically useless but emotionally priceless” beings.¹³ Similarly, a wide variety of views about children exists from Augustinian-influenced ideas about children being born weak and tainted with original sin, through to Rousseauvian-influenced ideas about children being born innocent and becoming corrupted by society.¹⁴

That dichotomy in the envisioning of children is reflected in current conceptualizations of children which portray them as variously a “threat”, a “victim”, or an “investment”.¹⁵ In the first of these portrayals, children are seen as a threat to the social order. Because they are a threat, their behaviour should be carefully controlled to minimize the danger they pose to the community. Alternatively, as “victims” of family and social shortcomings children are perceived as being vulnerable to neglect and maltreatment. Protection thus becomes the key to safeguarding children from harm. The third characterization of children – the child as “investment” – centres on the potential of children and the part they have to play as members of the future workforce and participants in the nation of the future. In this construction the “quality and quantity of the population” is a major focus. Daniel and Ivatts suggest that traditionally this vision of children has been important at times of national renewal or self-analysis.¹⁶

The tension between these three differing conceptualizations of children is mirrored in the tension between attitudes to control, power and social norms. There are contrasts between ideologues in their positions on these matters. Tradition, pragmatism, human imperfection, organicism, hierarchy, authority and property are the elements around which conservative beliefs are centred.¹⁷ Consequently, conservatives favour corporal punishment as a pragmatic, traditional response to misbehaviour. Corporal punishment within the family is rationalized as an action which reinforces the

¹⁰ Smith, Anne B., Gollop, Megan M., Taylor, Nicola J. & Marshall, Kate A. (2004) The Discipline and Guidance of Children: A Summary Report, Children’s Issues Centre, University of Otago & the Office of the Children’s Commission, p.12.

¹¹ Davin, Anna (1999) “What is a child?”, Anthony Fletcher & Stephen Hussey (eds.), Childhood in Question, Manchester University Press, Manchester, p.14.

¹² Ibid, p.16.

¹³ Hutchison, Elizabeth D. & Charlesworth, Leanne W. (2000) “Securing the Welfare of Children: Policies Past, Present and Future”, Families in Society: The Journal of Contemporary Human Services, Vol.81, Iss.6, p.579.

¹⁴ Gittins, Diana (1998) The Child in Question, Macmillan Press, Hampshire, pp.22-31.

¹⁵ Daniel, Paul & Ivatts, John (1998) Children and Social Policy, Macmillan, Basingstoke, pp.11-14. Fawcett, Featherstone & Goddard label the competing conceptualizations as “devil”, “savage or barbarian” and “angel”. Barbara Fawcett, Brid Featherstone & Jim Goddard (2004) Contemporary Child Care Policy and Practice, Palgrave, Hampshire, p.19.

¹⁶ Daniel & Ivatts, p.14.

¹⁷ Heywood, Andrew (2002) Politics, 2nd ed., Palgrave, Hampshire, pp.47-48.

authority of the parents and their position as superior to children in the family hierarchy (a microcosm of social hierarchies). It also achieves the goal of correcting children's imperfections. It may be undesirable, but it is seen as necessary for keeping order. Parents should keep their use of corporal punishment to a minimum, only using "reasonable force".

Authority, family, tradition, religion and the nation are likewise the hallmarks of neoconservative thought. Neoconservatives favour corporal punishment as a punishment sanctioned by religious teachings. The Christian Right, for example, argues it is an appropriate and proportional method for parents to respond to transgressors and teach them important values about discipline, and to show that they care for and love their children. The parents are acting as God's surrogate to subdue children and conquer their wills, so that they will be protected from eternal punishment.

Libertarian beliefs focus on the market, the individual, self-help, personal responsibility and entrepreneurialism. Thus, libertarians take the view that decisions about whether or not to use corporal punishment are a matter for individual families to decide upon. They justify this stance on the grounds that it is a private matter to be decided within the family, and that the interventionist "nanny" state should not intrude into the sphere of parents' rights. Such intrusion is seen as antithetical to freedom and damaging to individuals and families. This produces an unlikely coalition on corporal punishment between the conservatives and the libertarians.

Liberals, on the other hand, would oppose corporal punishment of children on the grounds that it is a rights-based issue, that children are entitled to the same rights protection as adults, and that to deny children the right to be protected from corporal punishment would be to perpetrate injustice and inequality. However, there is a liberal dilemma about the corporal punishment of children. Liberals' strong belief in individualism has long regarded the family as a vital counterweight to state power and control – "a domain of voluntary self-regulating actions".¹⁸ The dilemma that liberals face is how to prevent corporal punishment of children without permitting the state unrestricted access to, and intrusion into, the family. Archard refers to this as the "liberal standard" – a "prescription that the State should not interfere in the rearing of children by their parents, unless it can be shown that the child is exposed to a serious risk of harm."¹⁹

This is not the only tension in belief-sets about children, rights and the state. Traditionally, a distinction has been made between children and adults in regard to rights. Children have been viewed as incompetent, vulnerable, dependent and immature – as "human becomings" rather than human beings.²⁰ Because of their undeveloped status, and because they are perceived as unable to fulfill the duties which partner rights, children have not been rights-holders. Instead, they have been treated by the state as a group serviced by rights-holders (adult caregivers) who can protect children and make decisions on their behalf and for their own good. Hence UNCROC can be seen as a watershed because it appears to end the disjunction between the rights protections given adults and the rights protections absent from

¹⁸ Daniel & Ivatts, p.15.

¹⁹ Archard, David (1993) *Children: Rights and Childhood*, Routledge, London, p.122.

²⁰ Hutchison & Charlesworth, p.2.

children. In this perspective, UNCROC gives rights to children as human beings and autonomous persons; in other words children are not treated as a separate category of rights-holders, but as persons entitled to rights on the same basis as other human beings and autonomous persons.

That construction is not uncontested. Duncan points out that there are two difficult issues attendant on the siting of children as autonomous persons and rights-holders:

The first has to do with the circumstances in which the rights of the child as an individual should be enforced over and above the wishes of the family, especially the parents.²¹

This raises the question of where the line of demarcation lies between parental authority and children's rights. The tension between the two competing sets of rights is succinctly summarized in the question asked by Tapp and Henaghan,

Is the concern that recognizing children's autonomy will erode the power of adults, the assumption that families know best, and that it will alter the balance of authority and responsibility which currently exists between the family and the state, thereby threatening the institution of the family?²²

Tapp and Henaghan also note that there is another concern amongst these competing rights – that “recognizing a child's autonomy may erode the dependent status of children and result in harm to children as a class”.²³ Another variable is noted by Duncan - that in some cultures “familial obligations override any individual rights” and that in and of themselves the extension of rights to children does not discharge families of obligations to children.²⁴

That latter variable is related to the second issue in the debate about rights and corporal punishment of children. The second issue concerns the debate within the international community about opposed “Eastern” and “Western” views on human rights, and involves the cultural appropriateness of children's rights in non-western settings. The “East West” debate in international relations signifies the division between “Eastern” states such as Malaysia and Singapore and “Western” states such as the USA and the UK over the question of whether rights are relative or universal and the consequent applicability of rights instruments such as UDHR and UNCROC within the different states. “Eastern” states have contended that such rights instruments are generated by wealthy western nations, are steeped in the language of universalism, and are insensitive to and inappropriate for eastern cultures. They are portrayed as another form of neo-imperialism. This debate has driven a sharp wedge between states and appears an increasingly intractable conflict. It is a division which has infiltrated UNCROC. Harris-Short has shown the extent of the disparity between Eastern and Western views of UNCROC in the Working Group Reports and *travaux preparatoires*. Her research also supports the contention that the “analysis of

²¹ Duncan, Grant (2004) Society and Politics: New Zealand Social Policy, Pearson Education, Auckland, p.262.

²² Tapp, Pauline & Henaghan, Mark (2000) “Family Law: Conceptions of Childhood and Children's voices – the implications of Article 12 of the United Nations Convention on the Rights of the Child”, Anne B. Smith, Nicola J. Taylor & Megan M. Gollop, Children's Voices: Research, Policy and Practice, Pearson Education, Auckland p.90.

²³ Ibid.

²⁴ Duncan, pp.262-264.

particular norms and practices” by UNCROC’s monitoring committee, the Committee on the Rights of the Child, “has been marked by a striking ‘Western’ bias”.²⁵

THE RIGHTS DEBATE

Parental rights

The rights of parents have been assumed rights rather than explicitly stated rights. While human rights declarations seemed to be inclusive and all-embracing there is an assumption that the human beings are adults. So Bills of Rights, such as the New Zealand Bill of Rights and the Canadian Charter of Rights and Freedoms give freedom of speech, movement, assembly, religious expression, and freedom from discrimination, as well as voting rights are based on the expectation that these rights do not apply to children. Also, most human rights legislation is concerned with citizen rights in relation to the state, rather than rights in respect of other human beings. There is likewise legislation which gives parents responsibility for their children, up to a certain age. For example, in New Zealand this age varies greatly according to whether it is about leaving children on their own, or funding them through university and tertiary education. However, although it seems reasonable to expect that parents should have some right to “a protective sphere to make decisions they think are in the best interests of children”²⁶ this is not a right which appears explicitly in human rights legislation.

The rights of parents have been asserted in the opposition to abolition laws permitting the corporal punishment of children.²⁷ The claim for parental rights is a rights claim which is in addition to their rights as persons or human beings. The argument is not only framed as parental rights versus the rights of children, but is also set in the context of paternalism with competing claims of parents and the state to decide the fate of children.²⁸ Ahdar and Allan argue that abolitionists are condescending “paternalists” who exhibit attitudes “hostile to the idea that each person knows what is best for him or herself” and want to implement changes which would result in the “criminalizing of the actions of the majority.”²⁹ They contend that parents “have a much more direct interest in their own children’s long-term interests, happiness and well-being than do strangers (however well-meaning the strangers).”³⁰ In the parental rights perspective, policy-makers should resist the blandishments of a “self-styled” elite who attempt to force the view of the state upon others and against the public will.

There are two other aspects to the claim for parental rights. One relates to a belief that parental rights previously existed, that existing rights are being threatened and that parents’ rights generally are being reduced and are being overtaken by competing

²⁵ Harris-Short, Sonia (2001) “Listening to ‘the other’?: The Convention on the Rights of the Child”, Melbourne Journal of International Law, Vol.2, Iss.2, p.304.

²⁶ Howe, R. Brian (2001) “Do Parents have Fundamental Rights?”, Journal of Canadian Studies, Vol.36, Iss. 3, p.63.

²⁷ See for example Durrant, Joan E. (1994) “The Abolition of Corporal Punishment in Canada: parents’ rights versus children’s rights”, International Journal of Children’s Rights, Vol.2, pp.129-36.

²⁸ Howe, R. Brian, pp. 61-79.

²⁹ Ahdar, Rex & Allan, James (2001) “Taking Smacking Seriously: The Case for Retaining the Legality of Parental Smacking in New Zealand”, New Zealand Law Review, Part I, p.16, p.19.

³⁰ *Ibid*, p.19.

rights for children. Up until the nineteenth century, parents had a relatively free hand with child-raising, although this was not framed in terms of their 'rights'. Rights talk was reserved for citizen versus state rights. In countries of 'empire' children were regarded as property and dependent objects with "no basic rights beyond the legal requirements that they not be killed, maimed or deprived of the bare necessities of life."³¹ The beginning of the shift away from the patriarchal family model also accompanied the development the idea of women's rights. Parents as a unit, rather than just fathers, were considered to have the primary responsibility for their children. At the same time, there was the recognition that in certain circumstances the state would be required to override parental authority to protect the children. However, children were still not considered to be independent rights-holders until after the Second World War. Then the state became increasingly interventionist in order to uphold the rights of children when these were being abused by their parents. So states began to intervene - for example, when parents refused medical treatment for their children.

Another aspect of the claim of parental rights is not only fear of the withdrawal of the rights of parents to decide what is in the best interests of their children, but also the fear of children being used to criminalize their parents. The 'anti-smacking campaign' is viewed as no longer allowing parents to use "reasonable force" to discipline their children, thus turning parents who "tap their child on the hand" into criminals.³² The difference between criminalization and repeal of statutory protection is a fine legal line. The weight of evidence which demonstrates that corporal punishment of children does no benefit and may cause harm is likewise a relatively subtle concept and difficult to use to convince parents of the need to change the legislation in order to protect those most at risk from abuse.

Survey research on corporal punishment of children in New Zealand

Survey research in New Zealand about corporal punishment since the 1960s has consistently reflected the belief that corporal punishment is an integral part of child-rearing practices and underlined the fact that it is widely practiced.

Surveys by Jane and James Ritchie - the first in 1963, the second in 1977 – found that "physical punishment persists as the major pillar of parenthood."³³ Gabrielle Maxwell's 1993 survey of attitudes and practices in corporal punishment garnered similar responses. In 2001 Sue Carswell reported the results of a survey on attitudes to physical disciplining of children. The findings from this survey demonstrated that 80% of participants felt that caregivers "should be allowed by law to smack a child with an open hand if they are naughty", although the "responses indicated that only a smack that left no mark was acceptable to the majority of people (75%)."³⁴

³¹ Howe, R. Brian, p.64.

³² Davies, E., Devere, H., Crothers, C., Hassall, I., McCormack, F., Verbitsky, J. (2005) *Report on 2004 Survey on Attitudes to Children in New Zealand*, Unpublished Report, Auckland University of Technology, Auckland.

³³ Ritchie, Jane & James (1981) *Spare the Rod*, George Allen & Unwin, Sydney, p.27.

³⁴ Carswell, Sue (2001) *Survey on Public Attitudes Towards the Physical Discipline of Children*, Ministry of Justice, Wellington, p.xii.

The latest survey, conducted by the Institute of Public Policy (IPP) at Auckland University of Technology in June-July 2004, confirmed the prevalence of physical discipline in child-rearing. Participants agreed that it was “okay to *smack* a child” (78.8%), although only 3.5% agreed that it was “okay to *beat* a child.”³⁵ The IPP survey results indicated that an overwhelming majority of participants in the survey reported in the previous week using a variety of non-physical means of disciplining their children. These included “discussion or explanation” (88.3%), telling off children (86.4%), yelling at children (39.8%), and making children “miss out on something” (51.4%).³⁶ However, that just under 4% of respondents reported using extreme methods of physically disciplining their children (methods that would constitute a violent assault if they were inflicted upon an adult) is a matter of considerable concern.

The survey responses then, confirmed, the prevalence of fear about the removal of parents’ rights in respect of corporal punishment, and fear about the perceived negative impact on children of that action. It emphasizes the fact that public opinion on this issue whilst changing in relation to actual disciplining practices is moving at a glacial pace. Few participants had heard of Section 59, but a clear majority did not want it removed. A majority also felt that there would be negative impacts if it were removed. Based on the results of the survey, then, there is not a climate for change in respect of abolition of corporal punishment.

These findings need to be placed in context, though. Sweden, in 1979, became the first country internationally to abolish all forms of corporal punishment. Durrant has noted that although Sweden’s innovation in abolishing corporal punishment was the end point of “a long evolution of corporal punishment legislation in Sweden” through the 20th century, attitudes in Sweden prior to that legislative reform showed persistence of belief that corporal punishment was necessary in child-rearing.³⁷ Examining shifts in attitudes as reflected in Swedish surveys from 1965-1981, Durrant concludes that “as each reform was made, public attitudes changed – and as attitudes changed, support for further reform increased.”³⁸ Changes in public attitudes, then, followed from legislative reforms – they did not drive the legislative reforms.

Childrens’ rights

Because they were regarded as the property of their parents, children were not included in the eighteenth century declarations of human rights.³⁹ As Ulrich has noted:

Children’s treatment and upbringing were considered the exclusive domain of the father. Children’s rights were protected only when they intersected with the rights of fathers, and the

³⁵ Davies et al.

³⁶ Ibid.

³⁷ Durrant, Joan E. (2003) “Legal Reform and Attitudes Toward Physical Punishment in Sweden”, International Journal of Children’s Rights, p.154.

³⁸ Ibid, pp.154-155.

³⁹ Robertson, Geoffrey (1999) Crimes Against Humanity: The Struggle for Global Justice, Allen Lane The Penguin Press, London, p.88.

state seldom intervened. The state played a minimal role, intervening between parent and child only if the minimum standards of care had been breached.⁴⁰

Most human rights statements until UNCROC did not mention children explicitly, but included reference to persons in general, with language such as ‘everyone’, ‘all human beings’, ‘men and women’. It is UNCROC which drew attention to the omission of children’s rights within traditional human rights legislation and recognized the principle that children should be considered to have the same fundamental rights as adults. At the same time, the connection between human rights and the subsequent duties and responsibilities of parents and adults was made. The principle of ensuring the best interests of the child is given expression in Article 3: “in all actions concerning children...the best interests of the child shall be a primary consideration.” This means that parents have a responsibility to make decisions in the best interests of the child, and it is the interests of the child which should take precedence over the rights of the parents. The right of the child, therefore, is for his/her interests to be protected, not that his/her wishes should be fulfilled. However, this still leaves the dilemma about who it is that determines what is in the best interest of the child – the parents or the state. That uncertainty is recognized by Ekman Ladd when she notes that the “right to protection and care and the right to liberty or self-determination are two distinct kinds of rights” which “foster very different attitudes and public policy concerning children.”⁴¹

Although the state has taken on an expanded role in the regulation of children’s welfare and supervision of children’s treatment by adults, children’s legal rights are “often unclear”⁴² and they must still rely upon adults to acknowledge, respect and assert those rights on their behalf. Consequently, in the current era in which the rights of increasing numbers of collectivities have been recognized, children remain one of the most rights-disenfranchised of all groups. Advocates of repeal of legislation allowing corporal punishment have argued that the extension of rights to children is required, that there “has been a change from the concept of the child being owned by the parent to the child as an autonomous person with his or her own rights.”⁴³ Opponents have disagreed, citing children’s vulnerability, dependence, incompetence and lack of capacity to reason as factors which distinguish them as a group from adults who are rights-holders. What this latter perspective suggests is that it is protection, rather than rights, which children need. Retentionists also point to what they see as a double standard used by abolitionists – that children should be entitled to the same rights as adults, but that they should also be entitled to different treatment by virtue of their status as children:

At times we hear that children are different from adults, that they need extra guidance and attention and even then that they cannot be considered fully autonomous. Then, when it comes to smacking, we hear from them that children are identical to adults.⁴⁴

⁴⁰ Urlich, Rochelle (1992-95) “Physical Discipline in the Home”, *Auckland University Law Review*, Vol.7, pp.856-857.

⁴¹ Ekman Ladd, Rosalind (2002) “Rights of the Child: A Philosophical Approach”, Kathleen Alaimo & Brian Klug (eds.), *Children as Equals: Exploring the Rights of the Child*, University Press of America, Maryland, p.89.

⁴² Ludbrook, Robert (1991) *A New Zealand Guide to Children and the Law*, Inprint New Zealand Limited, Wellington, p.17.

⁴³ Urlich, p.856.

⁴⁴ Ahdar & Allan, p.31.

There is, however, an apparent inconsistency in such justifications. Children must rely on adult rights-holders to protect and aid them, yet children are dependent and vulnerable to abuse and exploitation, often by those self-same adult rights-holders. Similarly, in relation to claims concerning children's inability to reason, Breen points out:

One characteristic or justification for the corporal punishment of children, in particular, tends to be advanced more than others and that is the perceived inability of the child to reason. If the distinction is simply this, why then do we not hit those adults incapable of reason, or even those whose reasoning simply differs from our own?⁴⁵

The two approaches of protection and autonomy need not, though, be seen as diametrically opposite, and it is possible, as Daniel and Ivatts suggest, to imagine both principles reconciled within a programme of children's rights.⁴⁶ Such an initiative could recognize children's vulnerability and special relationship with their family (for instance by specifying that caregivers exercise trustee rights over a child only in relation to the welfare of the child and in the best interests of the child), yet still acknowledge them as legal subjects with rights. In the context of corporal punishment, this would mean that children would have the same right not to be subjected to physical punishment as adults. They would have security of their person.

Adults freely give their opinions about the corporal punishment of children. However, although they are the ones who are subjected to corporal punishment, children's opinions on corporal punishment are – ironically - rarely sought. The absence of children's voices is a striking feature of the historical debate about corporal punishment and one that is only in very recent times being remedied.

Smith reported the results of qualitative studies in the UK and New Zealand about children's views of corporal punishment. In these studies children said that:

Smacking is hitting

They feel hurt when they are smacked, both physically and mentally

Some are hit on their heads

Only a minority are smacked when they are facing immediate or potential danger

Smacking interrupts children's behaviour, but has many other negative associated effects – children say they did not like their parents any more, they felt angry, upset, grumpy, unloved and sad after being smacked, and for many smacking made them be more naughty.⁴⁷

Smith also noted that “children are also well aware of the conflict caused by the double message being promoted when adults tell children hitting is bad, yet sometimes use smacking to discipline them.” Although accepting that smacking as a parental right, tellingly, most of the children who participated in the studies said “they do not plan to use physical discipline with their own children when they become parents in the future.”⁴⁸

⁴⁵ Breen, Claire (2002) “The Corporal Punishment of Children in New Zealand”, New Zealand Law Review, Part III, p.364.

⁴⁶ Daniel and Ivatt, p.19.

⁴⁷ Smith, Gollop, Taylor & Marshall, p.28.

⁴⁸ Idem.

Cultural Rights

The arguments against corporal punishment focus on the acceptability of corporal punishment to large numbers of the public, the importance of corporal punishment in some cultures, and the importance of corporal punishment in religion. The first argument relies on majoritarian principles for its impact – the fact that a majority approve of corporal punishment indicates its moral acceptability. However, the counter argument to this is that

“the fact that physical punishment is widely practiced and accepted does not mean that it should not be questioned. People accept physical punishment because it is something they have grown up with and are used to, perhaps having given little thought to whether it is morally right or not.”⁴⁹

There are other aspects to the assertion of corporal punishment being morally acceptable. In some Christian denominations physical disciplining of children is considered fundamental to achieving a proper relationship with God. Research suggests that among Conservative Protestants there is “a clear and generally coherent theological rationale underlying support for corporal punishment.”⁵⁰ Adherents believe absolutely that it is both the right and responsibility of parents to physically discipline children, and that such disciplining reflects both the doctrine of biblical inerrancy and the authority-centredness that is a hallmark of loyal submission to the faith – if the “sinful tendencies of youngsters go unchecked, their very souls are believed to be in jeopardy.”⁵¹

Not all Christians accept this position, though. Five Auckland church leaders have called upon the government to repeal Section 59. The spokesperson for the group, Bishop Richard Randerson, noted that the “expression ‘spare the rod and spoil the child’ is mistakenly used to endorse hitting children” and that the words were not “an accurate quotation of the biblical verse (Proverbs 13:24) which goes on to say ‘the one who loves a child is diligent in correction. Such correction does not need to be by way of physical hitting: non-physical alternatives are available.’”⁵²

The importance of the cultural context and the impact of cultural relativist arguments in human rights debates have already been intimated. These debates continue to have resonance. Nevertheless, a counter argument has been put forward about the cultural use of discipline in the Samoan context. According to Aiono Dr Fanaafi Le Tagaloa, Both in Samoa and overseas, a false notion has come about and is used as an explanation for the use of physical abuse, beatings, and cruel measures. The false notion is that beating is in accordance with Samoan culture, practice and philosophy...Use of the whip is not a Samoan way of disciplining. Rather,

⁴⁹ Physical Punishment of Children: Final Report No.4, Tasmania Law Reform Institute, October 2003, p.26.

⁵⁰ Ellison, Christopher G., Bartkowski, John P., & Segal, Michelle L. (1996) “Conservative Protestantism and the Parental Use of Corporal Punishment”, Social Forces, Vol.74, No.3, p.1006.

⁵¹ Ellison, Bartkowski & Segal, p.1007.

⁵² Freer, Lyndsay (8 October 2003) “New Zealand Catholic Bishops Support the Rights of Children”, Catholic Communications, “Clergy ask Government to Spare the Rod” (December 8, 2002) New Zealand Herald. The text of the church leaders’ statement is reproduced in Tasmania Law Reform Institute (October 2003) Physical Punishment of Children, Final Report No.4, p.20.

words and the use of appropriate speech as instructed by our Tofamanino and philosophy.⁵³

In a similar vein Alston has noted that just “as culture is not a factor which should be excluded from the human rights equation, so too must it not be accorded the status of a metanorm which trumps rights.”⁵⁴ These comments are echoed by the Australian National Children’s and Youth Law Centre:

...cultural considerations are often presented as prominent at the expense of children’s rights issues. Cultures have different attitudes towards physical punishment, both of children and in a more general sense. So called ‘cultural relativists’ have thus questioned the appropriateness of government intervention in this field, this time on the grounds that each culture has its own standards which cannot be judged by those outside. Again, however, the extreme vulnerability of children and their lack of representation within cultural decision making bodies must be recognized.⁵⁵

Conclusion

Competing notions of rights, then, are at the heart of the debate about corporal punishment of children. In New Zealand the issue has been given new impetus by the introduction of a bill which, if passed, will remove a statutory right to use physical force to correct or discipline a child. The Crimes (Abolition of Force as a Justification for Child Discipline) Bill passed the First Reading on July 27, 2005 by a vote of 65 to 54 and has now been sent to a Select Committee for further consideration. It will not return to the House for a Second Reading until after the general election on September 17, 2005. Further progress of this Bill will be determined by the new political make up of the House of Representatives.

The only likely progress would take place under a Labour-Green coalition. However, the liberal dilemma still presents itself. The Labour-Progressive Coalition Government, which labels itself ‘social democratic’ has introduced a range of controversial measures, such as decriminalizing prostitution, legalizing same-sex ‘civil unions’ and banning smoking in public places. The extension of rights to adults can be seen as a pragmatic political transaction, legislative ‘payback’ for groups whose electoral support helped put Labour in power in 1999 and whose continued support will be necessary to enable Labour to achieve an historic third term victory. With opposition from the majority of the public, however, it is only those parties which oppose the Bill, whether from a conservative or libertarian standpoint, which can safely voice their position.

⁵³ Le Tagaloa, Aiono Dr Fanaafi (2000) “The Rights of the Samoan Child”, in Smith Anne B., Gollop, Megan, Marshall, Kate & Nairn, Karen, Advocating for Children: International Perspectives on Children’s Rights, Dunedin, University of Otago Press, p.100.

⁵⁴ Alston, Philip (1994) “The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights”, in Alston, Philip, ed., The Best Interests of the Child: Reconciling Culture and Human Rights, Clarendon Press, Oxford, p.20.

⁵⁵ Quoted in Tasmania Law Reform Institute (October 2003) Physical Punishment of Children, Final Report No.4, p.29.

Extending rights to children, a group with no voting rights, whose rights are seen as competing with the rights of the adult electorate, has been slow in coming. However, with increasing international pressure and as increasing numbers of countries change to legislation which recognizes the needs and rights of children, those Anglo-American countries which are lagging behind on this issue, will eventually have to decide whether children count as 'human' for the purposes of rights protection and whether, in the context of corporal punishment, children will achieve security of their person.

Bibliography

- Ahdar, Rex & Allan, James (2001) "Taking Smacking Seriously: The Case for Retaining the Legality of Parental Smacking in New Zealand", New Zealand Law Review, Part I
- Alston, Philip (1994) "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights", in Alston, Philip, ed., The Best Interests of the Child: Reconciling Culture and Human Rights, Clarendon Press, Oxford.
- Anthony, Edward (1995) Thy Rod and Staff: New Light on the Flagellatory Impulse, Little Brown & Co., London
- Archard, David (1993) Children: Rights and Childhood, Routledge, London
- Benatar, David (1998) "Corporal Punishment", Social Theory and Practice, Summer 1998, No.1
- Breen, Claire (2002) "The Corporal Punishment of Children in New Zealand", New Zealand Law Review, Part III
- Carswell, Sue (2001) Survey on Public Attitudes Towards the Physical Discipline of Children, Ministry of Justice, Wellington
- Coalition on the Physical Punishment of Children and Youth (April 25, 2003) "Joint Statement on Physical Punishment of Children and Youth", Ontario, Canada
- Daniel, Paul & Ivatts, John (1998) Children and Social Policy, Macmillan, Basingstoke
- Davies, E., Devere, H., Crothers, C., Hassall, I., McCormack, F., Verbitsky, J. (2005) *Report on 2004 Survey on Attitudes to Children in New Zealand*, Unpublished Report, Auckland University of Technology, Auckland.
- Davin, Anna (1999) "What is a child?", Anthony Fletcher & Stephen Hussey (eds.), Childhood in Question, Manchester University Press, Manchester
- Duncan, Grant (2004) Society and Politics: New Zealand Social Policy, Pearson Education, Auckland
- Durrant, Joan E. (1994) "The Abolition of Corporal Punishment in Canada: Parents' Rights Versus Children's Rights", International Journal of Children's Rights, Vol.2
- Durrant, Joan E. (2003) "Legal Reform and Attitudes Toward Physical Punishment in Sweden", International Journal of Children's Rights, Vol.11
- Ekman Ladd, Rosalind (2002) "Rights of the Child: A Philosophical Approach", Alaimo, Kathleen & Klug, Brian (eds.), Children as Equals: Exploring the Rights of the Child, University Press of America, Maryland
- Ellison, Christopher G., Bartkowski, John P., & Segal, Michelle L. (1996) "Conservative Protestantism and the Parental Use of Corporal Punishment", Social Forces, Vol.74, No.3

- Barbara Fawcett, Brid Featherstone & Jim Goddard (2004) Contemporary Child Care Policy and Practice, Palgrave, Hampshire
- Freer, Lyndsay (8 October 2003) "New Zealand Catholic Bishops Support the Rights of Children", Catholic Communications
- Gittins, Diana (1998) The Child in Question, Macmillan Press, Hampshire
- Harris-Short, Sonia (2001) "Listening to 'the other'?: The Convention on the Rights of the Child", Melbourne Journal of International Law, Vol.2, Iss.2
- Heywood, Andrew (2002) Politics, 2nd ed., Palgrave, Hampshire
- Howe, R. Brian (2001) "Do Parents have Fundamental Rights?", Journal of Canadian Studies, Vol.36, Iss. 3
- http://www.endcorporalpunishment.org/pages/progress/prohib_states.html
- <http://www.nzherald.co.nz>
- Hutchison, Elizabeth D. & Charlesworth, Leanne W. (2000) "Securing the Welfare of Children: Policies Past, Present and Future", Families in Society: The Journal of Contemporary Human Services, Vol.81, Iss.6
- Le Tagaloa, Aiono Dr Fanaafi (2000) "The Rights of the Samoan Child", in Smith Anne B., Gollop, Megan, Marshall, Kate & Nairn, Karen, (eds.), Advocating for Children: International Perspectives on Children's Rights, Dunedin, University of Otago Press
- Ludbrook, Robert (1991) A New Zealand Guide to Children and the Law, Inprint New Zealand Limited, Wellington
- Physical Punishment of Children: Final Report No.4, Tasmania Law Reform Institute, October 2003
- Ritchie, Jane & James (1981) Spare the Rod, George Allen & Unwin, Sydney
- Robertson, Geoffrey (1999) Crimes Against Humanity: The Struggle for Global Justice, Allen Lane The Penguin Press, London
- Smith, Anne B., Gollop, Megan M., Taylor, Nicola J. & Marshall, Kate A. (2004) The Discipline and Guidance of Children: A Summary Report, Children's Issues Centre, University of Otago & the Office of the Children's Commission
- Tapp, Pauline & Henaghan, Mark (2000) "Family Law: Conceptions of Childhood and Children's voices – the implications of Article 12 of the United Nations Convention on the Rights of the Child", Anne B. Smith, Nicola J. Taylor & Megan M. Gollop, (eds.), Children's Voices: Research, Policy and Practice, Pearson Education, Auckland
- UNICEF (2003) A League Table of Child Maltreatment Deaths in Rich Nations: Innocenti Report Card No.5, UNICEF, Innocenti Research Centre, Florence.
- Urlich, Rochelle (1992-95) "Physical Discipline in the Home", Auckland University Law Review, Vol.7