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The Genesis of the Prohibition of Corporal Punishment against Minors and the Consequences of Its Application*

Przyczyny wprowadzenia zakazu stosowania kar cielesnych wobec małoletnich oraz skutki jego stosowania

ABSTRACT

To present the purpose and the actual role of the prohibition of corporal punishment against minors in society, the sources, causes and effects of introducing this normative prohibition are analysed, based on the example of the Polish legal system. The sources that sought to adopt the amendment in question are indicated, as well as the entities influencing the enactment of the prohibition in its final version. The situation of entities that will reap benefits from the ban in question and those to suffer losses is also described. The analysis of formal and informal rules relating to the upbringing methods used in the society is aimed at answering the question of whether the prohibition of corporal punishment against minors achieved the goal intended by the legislator or even caused the opposite effect.

Keywords: corporal punishment; minors; prohibition; the Polish legal system; upbringing methods; legislator

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INTRODUCTION

Until 2009, the prohibition of corporal punishment against minors was in force in 24 countries around the world.[1] In Poland this ban was introduced[2] in the Family and Guardianship Code[3] on 10 June 2010, in the form of Article 961, reading as follows: "Persons exercising parental responsibility and exercising the care or custody of minors shall be prohibited from using corporal punishment". This article uses the example of the Polish legal system to analyze how the *expressis verbis* prohibition of corporal punishment affects family relationships, and especially the upbringing process. To determine this, an analysis of the motives of the Polish legislator at the time of introducing this provision was made, and the real effects of the amendment were presented.

In this study, the author used his own research method, largely based on the method developed by P. Chmielnicki.[4] It differs from the method of formal and dogmatic legal analysis commonly used in legal sciences and allows to better understand the place and role of formalized rules in society. Moreover, it enables the use of the achievements of many scientific disciplines in order to discover the mutual interaction between formal and informal rules organising a given community.

To discover the true purpose and role of a norm introduced into the legal system, one must first distinguish the subjects of the action scheme. These are the parties that strive to introduce the norm (sources of law) and the parties that participate in the legislative process and have an impact on the final wording of a given legal norm (disposers). It is also necessary to determine the interests that guide those parties. Then, taking into account the fact that law does not exist in a vacuum but, by influencing society – by designing a possible world[5] – makes a system of connected vessels, it is necessary to consider how the introduced legal norm affects

[1] A. Zolotor, M. Puzia, *Bans against Corporal Punishment: A Systematic Review of the Laws, Changes in Attitudes and Behaviours*, "Child Abuse Review" 2010, vol. 19(4), p. 229.

[2] Act of 10 June 2010 amending the Act on counteracting domestic violence and some other acts (Journal of Laws 2010, no. 125, item 842).

[3] Act of 25 February 1964 – Family and Guardianship Code (consolidated text, Journal of Laws 2020, item 1359, as amended), hereinafter: FGC.

[4] P. Chmielnicki, *Metodyka badań nad źródłami powstawania prawa. Część 1. Podstawy*, "Przegląd Prawa Publicznego" 2012, no. 3, p. 90 ff.; idem, *Metodyka badań nad źródłami powstawania prawa. Część 2. Uzasadnienie i objaśnianie poszczególnych faz badań*, "Przegląd Prawa Publicznego" 2012, no. 4, p. 72 ff.; idem, *Konspekt badań nad źródłami pochodzenia prawa*, "Przegląd Prawa Publicznego" 2012, no. 11, p. 84 ff.; idem, *Uniwersalna metoda oceny regulacji skutków prawnych*, "Przegląd Prawa Publicznego" 2013, no. 7–8, p. 160 ff.; idem, *Identyfikacja celów i funkcji w ramach wykładni prawa*, "Przegląd Prawa Publicznego" 2015, no. 3, p. 9 ff.; M. Gurdek, *Wstęp*, [in:] *Badania nad źródłami prawa i efektami jego stosowania*, ed. M. Gurdek, vol. 1, Warszawa 2020, p. 9 ff.

[5] M. Matczak, *Imperium tekstu. Prawo jako postulowanie i urzeczywistnianie świata możliwego*, Warszawa 2019.

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individual members of society, especially those to whom it is addressed. To do so, it is needful to reconstruct the links between the formal and informal solutions guiding human behaviour. In that way, it is possible to finally determine the gains and losses brought as a result of adopting the legal norm, as well as to indicate the beneficiaries and the maleficiaries of the discussed reform.

SUBJECTS OF THE ACTION SCHEME – SOURCES OF LAW

The constitutive source of introducing the provision of Article 961 in the Family and Guardianship Code was principally the Polish government. During the first reading of the draft act amending the Family and Guardianship Code, the representative of the authors pointed out that the introduction of the ban on corporal punishment was a result of many years of battles fought in the legislative works to adopt this type of norm.[6]

Undoubtedly, a constitutive source may also be the Ombudsman for Children[7] and representatives of social organisations dealing with the protection of children's rights (Committee for the Protection of Children's Rights, National Competence Centre, "Whole Poland Reads to Children" Foundation, Polish ADHD Society), which acted effectively to prohibit physical punishment of minors both during the legislative process and in different previous social campaigns regarding the harmfulness of beating children.[8] Corporal punishment – even delicate smacking or slapping – according to the supporters of its total ban, offends the child's dignity, weakens the sense of security and is not a good parenting technique.

The government, as the initiator of the discussed amendment, in the explanatory memorandum indicated that the purpose of the regulation was to change "attitudes of the society and indicate other parenting methods. At present, there is no provision in the applicable legal regime that would directly involve a prohibition of harming children".[9]

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[6] *133. posiedzenie Komisji Polityki Społecznej oraz Rodziny z 5 marca 2009 r.*, http://orka.sejm.gov.pl/Biuletyn.nsf/wgskrnr6/PSR-133 [access: 11.02.2021].

[7] *Stenogram z 62. posiedzenia Sejmu VI kadencji z 4 marca 2010 r.*, http://orka2.sejm.gov.pl/StenoInter6.nsf/0/484DDBBB3FB4A10EC12576DD000EA21F/$file/62_b_ksiazka.pdf [access: 11.02.2021].

[8] *133. posiedzenie Komisji Polityki Społecznej…*; *139. posiedzenie Komisji Polityki Społecznej oraz Rodziny z 31 marca 2009 r.*, http://orka.sejm.gov.pl/Biuletyn.nsf/wgskrnr6/PSR-139 [access: 11.02.2021].

[9] *Uzasadnienie projektu ustawy z 10 czerwca 2010 r. o zmianie ustawy o przeciwdziałaniu przemocy w rodzinie*, Druk sejmowy nr 1698 Sejmu VI kadencji, http://orka.sejm.gov.pl/Druki6ka.nsf/0/E7D206E9D4B5292AC125756100371248/$file/1698.pdf [access: 11.02.2021].

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A secondary source of the discussed amendment are numerous representatives of science, mainly physicians and pedagogues, as well as lawyers who, for years, opposed the use of corporal punishment against minors and called for its total prohibition. They point out that such punishments only result in causing physical pain to the disciplined child, the child's humiliation, they cause fear in the relationship with the caretaker, lower self-esteem, lead to fearfulness or even depression, and thus definitely have a negative impact on the mental and emotional development of the minor, as well as the minor's ability to learn.[10] In their opinion, even low-intensity violence may have negative effects on the child's physical, mental and social development.[11]

The status of the secondary source should also be accorded to that part of the society which, before the introduction of the discussed prohibition, was against physical punishment. For example, in 2008, 22% of respondents were against the possibility of spanking in all upbringing situations.[12]

Provisions of the Polish Constitution[13] (Article 72 (1)) and acts of international legislation (Article 19 (1) and Article 37 of the Convention on the Rights of the Child,[14] Article 17 of the European Social Charter[15]) oblige public authorities to ensure adequate protection of children against all manifestations of physical and psychological violence – they may be considered secondary sources, but in the objective context. Also, the non-binding Recommendation 1666 (2004) of the Parliamentary Assembly of the Council of Europe of 22 June 2004 on a pan-European prohibition of corporal punishment against children suggests that Member States enact an explicit prohibition of any physical discipline to children.

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[10] R. Sege, B. Siegel, *Effective Discipline to Raise Healthy Children*, "Pediatrics" 2018, vol. 142(6), p. 4; A. Rowland, G. Felicity, M. Stanton, *Physical Punishment of Children: Time to End the Defence of Reasonable Chastisement in the UK, USA and Australia*, "International Journal of Children Rights" 2017, vol. 25(1), p. 174; K. Makaruk, *Postawy Polaków wobec kar fizycznych a ich stosowanie w praktyce rodzicielskiej*, "Dziecko krzywdzone. Teoria, badania, praktyka" 2012, no. 4, p. 40; I. Andrejew, *Oceny prawne karcenia nieletnich*, Warszawa 1964, p. 22; A. Cisek, *Obowiązek posłuszeństwa wobec rodziców a ochrona dóbr osobistych dziecka*, "Acta Universitatis Wratislaviensis" 1990, no. 1152, p. 22.

[11] S. Hypś, *Prawnokarna ochrona dziecka przed przemocą*, [in:] *Prawo karne w ochronie praw dziecka*, eds. A. Grześkowiak, I. Zgoliński, Bydgoszcz 2018, pp. 103–104; A. Zolotor, M. Puzia, *op. cit.*, p. 213.

[12] E. Jarosz, Jarosz, *Postawy społeczne wobec bicia dzieci. Raport z badań*, www.powiat.swidnica.pl/strony/do_druku/aktualnosci/2012/11/025-01.pdf [access: 11.02.2021], p. 5.

[13] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 483, as amended). English translation of the Constitution at: www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [access: 10.09.2021].

[14] Convention on the Rights of the Child, adopted by the UN General Assembly on 20 November 1989 (Journal of Laws 1991, no. 120, item 526).

[15] European Social Charter signed at Turin on 18 October 1961 (Journal of Laws 1999, no. 8, item 67).

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An accessory source are parliamentarians who opposed the originally proposed and broader wording of the provision in question ("persons exercising parental responsibility and exercising the care or custody of minors shall be prohibited from using corporal punishment, causing mental suffering or other forms of humiliating the child"), imputing its vagueness and thus contributing to the current wording as in the Senate's amendment approved by the Sejm.[16]

SUBJECTS OF THE ACTION SCHEME – DISPOSERS

The constitutive disposer in the legislative process of the analysed amendment was the government submitting the draft act. The Minister of Labour and Social Policy was authorized to represent the position of the Council of Ministers during the parliamentary session. At the same time, it should be noted that an important role in the process of formalizing the solution was also played by the Senate, which, by means of an amendment approved by the Sejm, changed the proposed wording of the provision under discussion into the current wording. Thus, the upper house may in this case be treated as the second constitutive disposer.

Undoubtedly, the deputies and senators who contributed to the above-mentioned modification to the wording of the provision of Article 96[1] FGC may be considered accessory disposers. On the other hand, the Ombudsman for Children, who, as a part of his activities, has long pointed to the necessity of introducing the discussed solutions, seems to be a secondary disposer.

ACTORS OF THE ACTION SCHEME – BENEFICIARIES

The main beneficiaries of the provision of Article 96[1] FGC are undoubtedly children, who can grow up without pain, humiliation and fear of the parent's reprimanding hand. The beneficiaries of this solution are also those who have opted for the proposed changes for years – representatives of organisations dealing with the protection of children's rights, the Ombudsman for Children, as well as parents who have long ago eliminated spanking and other physical punishment from the catalogue of their parenting methods.

Corporal punishment has negative consequences for both children and the entire family. A minor's psychophysical disorders resulting from corporal discipline may cause further upbringing difficulties, which some parents are unable to solve

[16] *Stenogram z 68. posiedzenia Sejmu VI kadencji z 10 czerwca 2010 r.*, http://orka2.sejm.gov.pl/StenoInter6.nsf/0/9D1A300E3DADB03EC125773E00836892/$file/68_b_ksiazka.pdf [access: 11.02.2021], p. 158; *Stenogram z 62. posiedzenia Sejmu VI kadencji…*, pp. 140–180.

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other than by spanking. This creates a vicious circle effect. The ban on corporal punishment, therefore, brings long-term benefits not only to children but also to parents and families. It is also important to bear in mind the benefits for members of the society as a whole, who do not have to associate with individuals suffering from multiple disorders as a result of being corporally punished in their childhood.[17]

ACTORS OF THE ACTION SCHEME – USERS (INCLUDING MALEFICIARIES)

The main cost of introducing the prohibition of corporal punishment is borne by those exercising parental authority as well as guardians and persons taking care of minors who used physical punishment as one of the methods of parental influence and still want to use it. They are undoubtedly the maleficiaries of the described solution.

Interestingly, minors who are protected by the prohibition in question can also become maleficiaries. This could happen where the state begins to interfere with their families because of corporal punishment administered by their caretakers. Any such interference in upbringing relationships, especially by criminal law, is a drastic solution and essentially deepens the family's disintegration, destroying the ties between its members.[18]

Other users include representatives of organisations dealing with protection against violence (e.g., the National Emergency Service for Victims of Domestic Violence "Blue Line"), social workers, probation officers, foster family members, employees of educational institutions, police officers or judicial authorities, who may or must react in the event of breach of the prohibition under Article 961 FGC. One must also recognise as users all members of the society who witness behaviours of persons exercising parental authority or taking care of minors in violation of that prohibition. They have a moral and statutory obligation to react (Article 12 (2) of the Act of 29 July 2005 on counteracting domestic violence).

BENEFITS AND COSTS

Minors will only benefit from the introduced prohibition in cases where parents or guardians respect the rule under Article 961 FGC. It will then also be beneficial to other users. They will not have to react in a situation when, due to the deterrent

[17] *Kary fizyczne a problemy zdrowotne i psychiczne*, www.niebieskalinia.info/files/Artykuly/Kary_fizyczne_a_problemy_zdtowotne_i_psychiczne.pdf [access: 29.06.2021].

[18] R. Krajewski, *Karcenie dzieci. Perspektywa prawna*, Warszawa 2010, p. 105.

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effect of the discussed provision, domestic violence is eliminated. Then, such a reaction will no longer be necessary.

The discussed regulation seems to generate more costs for users than gains for beneficiaries. First of all, severe consequences, including the possibility of incurring criminal liability, will be faced by those parents and guardians who break the prohibition in question. Children who are victims of this type of behaviour also suffer from state interference in their home environment. The costs, including economic ones, of the acts undertaken under the norms encapsulated, i.a., in the Family and Guardianship Code and the Act on counteracting domestic violence, will be borne by other above-mentioned users obliged to react in the event of violation of the prohibition under Article 961 FGC.

RECONSTRUCTION OF LINKS BETWEEN FORMAL AND INFORMAL SOLUTIONS – FAMILY LAW NORMS

In case of violation by those exercising parental responsibility of the prohibition under Article 961 FGC, the following are possible:

a) limitation of parental authority of one or both parents if the child's welfare is threatened by their behaviour involving the application of corporal punishment, including by ordering the minor to be placed in a foster family, family orphanage or in institutional foster care, or by temporarily entrusting the function of a foster family to spouses or a person who does not meet the conditions for foster families in respect of the necessary training, as specified in the provisions on supporting the family and the foster care system (Article 109 FGC),
b) depriving one or both such persons of parental authority if the court finds that the violation of the prohibition in question constitutes an abuse of parental authority or gross negligence of parental duties towards the child (Article 111 FGC),
c) taking the child away from the family by a social worker and placing him/her with another close relative not living together, within the meaning of Article 115 § 11 of the Penal Code,[19] in a foster family or in an educational care facility, when physical punishment poses a direct threat to the minor's health or life (Article 12a (1) of the Act on counteracting domestic violence).[20]

[19] Act of 6 June 1997 – Penal Code (consolidated text, Journal of Laws 2020, item 1444, as amended), hereinafter: PC.

[20] Consolidated text, Journal of Laws 2020, item 218, as amended.

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RECONSTRUCTION OF LINKS BETWEEN FORMAL AND INFORMAL SOLUTIONS – CRIMINAL LAW NORMS

Article 96[1] FGC may constitute a rule of dealing with the legal interest, clarifying the scope of sanctioned norms prohibiting, in particular, violation of bodily inviolability (Article 217 PC) or slight damage to health (Article 157 § 2 PC). In case of a justified suspicion that these offenses have been committed, an order opening an investigation is issued (Article 325b § 1 and Article 303 in conjunction with Article 325a § 2 of the Code of Criminal Procedure[21]). Due to the introduction of the prohibition in question, it is not possible to invoke the permitted discipline defence for the avoidance of criminal liability.

However, attention should be paid to what I. Andrejew[22] already pointed out more than half a century ago, that criminal punishment is a poor means of developing delicacy in a person, which is undoubtedly needed to deal with children, and when imposed on a parent, it may also be a source of trauma for the family, and especially for the child. Therefore, the court, relying on the principles of criminal liability and sentencing directives, may in some cases decide that the parent administering physical punishment did not commit the crime due to the negligible degree of the act's social noxiousness (Article 1 § 2 PC) or, e.g., conditionally discontinue the proceedings against the parent (Article 66 § 1 PC). The Committee on the Rights of the Child also recommends that common law countries remove the reasonable physical chastisement defence, leaving the possibility of invoking the *de minimis* principle so that minor violations of the prohibition of corporal punishment are not prosecuted.[23]

On the other hand, it would be impossible not to agree with R. Krajewski, who points out that "leniency for such isolated cases is not beneficial from the perspective of both individual and general prevention since if such behaviour was left without any consequences, then, on the perpetrator's part, it may give rise to a desire for further similar behaviours, and, in the opinion of other persons, it may lead to the conclusion that since the perpetrator has not been held criminally liable, they would neither face such liability".[24] As the author claims, it is extremely difficult to find an optimal solution in this case.[25] It seems that the solution proposed by R. Krajewski should be accepted according to which in case of slight transgression

[21] Act of 6 June 1997 – Code of Criminal Procedure (consolidated text, Journal of Laws 2020, item 30, as amended), hereinafter: CCP.

[22] I. Andrejew, *op. cit.*, p. 117.

[23] D. Birchall, D. Burke, *Just a Slap on the Wrist? Parental Corporal Punishment of Children and the Defence of Reasonable Chastisement in Hong Kong*, "Hong Kong Law Journal" 2020, vol. 50(1), p. 181.

[24] R. Krajewski, *op. cit.*, p. 105.

[25] *Ibidem*.

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of the limits of legal parental influence, parents should be subjected to the restrictions and control mechanisms provided for under the Family and Guardianship Code, instead of launching litigation based on the sanctioning norm.[26] Rules of social behaviour according to which any violence against children is unacceptable should be promoted, and the provisions of criminal law should be reserved only for the most severe cases, so as to avoid unnecessary disintegration of family.[27]

RECONSTRUCTION OF LINKS BETWEEN FORMAL AND INFORMAL SOLUTIONS – NON-FORMALISED STANDARDS OF CONDUCT

Strong support for the use of corporal punishment of minors persists:

a) in Polish society – in 2018, the use of spanking was supported by 43% of respondents, and 24% were in favour of "heavy spanking", with 85% of the respondents aware that the use of corporal punishment was against the law,[28]
b) in Polish jurisprudence – e.g., the District Court in Gliwice suggests that there are situations in which acts of an offender are difficult to distinguish from non-punishable child discipline,[29]
c) among academic authors – e.g., P. Czarnek believes that there are situations in life in which administration of physical punishment to a child is necessary.[30] According to W. Jedlecka, in Poland, there is a legal tolerance for physical disciplining of children,[31]
d) among participants of the legislative process – e.g., MP R. Telus claims that spanking is a manifestation of parental love for a child[32].

Poland is no exception in the international arena as regards the existing support for the use of corporal punishment of minors. As A. Rowland, G. Felicity and M. Stanton indicate, in 2017, in the USA 65% of parents supported physical discipline of young children, and there are still voices among representatives of the American judiciary supporting this method of disciplining.[33] Also, some representatives of foreign science, as pointed out by A. Rowland, G. Felicity and M. Stanton,

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[26] *Ibidem*.

[27] D. Birchall, D. Burke, *op. cit.*, pp. 169–170, 181, 189.

[28] E. Jarosz, *Postawy wobec przemocy w wychowaniu – czy dobra zmiana? Raport Rzecznika Praw Dziecka 2018*, https://brpd.gov.pl/sites/default/files/raport_2018.pdf [access: 11.02.2021], p. 8, 29.

[29] Judgement of the District Court of Gliwice of 23 March 2017, V Ka 647/16.

[30] P. Czarnek, *Karcenie małoletnich w świetle Konstytucji RP*, [in:] *Prawne aspekty karcenia małoletnich*, ed. F. Ciepły, Warszawa 2011, p. 34.

[31] W. Jedlecka, *Zakaz stosowania kar cielesnych a kontratyp karcenia wychowawczego*, "Przegląd Prawa i Administracji" 2020, no. 2, p. 100.

[32] *Stenogram z 62. posiedzenia Sejmu VI kadencji…*, p. 166.

[33] A. Rowland, G. Felicity, M. Stanton, *op. cit.*, pp. 172–174.

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claim that occasional spanking does not bring harm, and traditional methods of disciplining children should not be prematurely prohibited.[34] In the USA, physical discipline is permitted in all states (the same is the case in Australia), whereas in England and Northern Ireland, only such corporal discipline is prohibited that leaves a mark on the child's body or involves the use of a tool, such as a cane or a belt.[35] In Wales, the reasonable punishment defence will be removed in 2022.[36] In South Africa, already in 2005, the ban on the use of corporal punishment of minors was rejected because parliamentarians turned out to support this method.[37]

In connection with the above, it can be assumed that informal standards have developed under which the use of light spanking of children is still practiced, without appropriate reaction from the authorized bodies and without condemnation from a part of the society. According to those rules, the upbringing of children, including administration of punishments to them, constitutes a right of parents, which should not be interfered with by other persons.[38] It can be said that in Poland, as in Hong Kong, corporal discipline of minors is still rooted in social norms for almost half of parents and guardians.[39]

This informal norm seems to be well reflected in the words of B. Hołyst, spoken after the adoption of the prohibition in question. In the opinion of this victimologist, "the use of physical violence against children – hitting, jerking, kicking, etc. is, in principle, an almost permissible activity in our country, as long as it does not bear the features of systematic abuse prosecuted under Article 207 PC. From the legal point of view, as long as the child is punished dispassionately and moderately and the punishment, executed with an appropriate tool, is not unbearable for the child, administration of corporal punishment to children is permissible in Poland".[40] The informal norm of behaviour may therefore read: "Parent/guardian, you may use such penalties as you consider appropriate to achieve the parenting goals".

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[34] *Ibidem*, p. 172; T. Waterston, S. Janson, *Hitting children is wrong*, "BMJ Paediatrics Open" 2020, vol. 4(1), p. 1.

[35] A. Rowland, G. Felicity, M. Stanton, *op. cit.*, pp. 182–184; T. Waterson, S. Janson, *op. cit.*, p. 1.

[36] D. Birchall, D. Burke, *op. cit.*, p. 186.

[37] J. Sloth-Nielsen, *Sideswipes and Backhanders: Abolition of the Reasonable Chastisement Defence in South Africa*, "International Journal of Law, Policy and the Family" 2020, vol. 34(2), p. 193; T. Waterston, S. Janson, *op. cit.*, p. 2.

[38] M. Wolicki, *Zasadność i dopuszczalne formy karcenia małoletnich według wskazań psychologii wychowawczej*, [in:] *Prawne aspekty karcenia małoletnich*, ed. F. Ciepły, Warszawa 2011, p. 150.

[39] D. Birchall, D. Burke, *op. cit.*, p. 188.

[40] B. Hołyst, *Wiktymologia*, Warszawa 2011, p. 431.

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THE ACTUAL ROLE OF THE PROHIBITION OF CORPORAL PUNISHMENT OF MINORS

Administration of corporal punishment to minors has always been a behaviour violating the inherent and inalienable dignity of human beings, the respect for which is guaranteed by both national (Article 30 of the Polish Constitution) and international law provisions (Preamble to the International Covenant on Civil and Political Rights).[41] The fact that the addressees of this prohibition are also subjects of private law – and this category includes parents or guardians – is not questioned in the doctrine even by those lawyers who are against direct, horizontal application of the provisions on human rights.[42] Hitting a child was therefore unlawful in civilized countries, as was hitting of an adult. The ban on violating human dignity is absolute and applies to everyone.[43] The above thesis is also confirmed by the decision of the Constitutional Court of South Africa, which points out that corporal discipline violates the right to dignity, which is a fundamental constitutional value.[44]

There is no consensus in society and among educators as to whether the use of corporal punishment has any educational value.[45] Moreover, even the best parental motivation behind that punishing method will not reduce its harmful influence on the child. This leads to the conclusion that corporal discipline can by no means (and never could) be considered legal.

Thus, the prohibition of corporal punishment in the Family and Guardianship Code did not expand the scope of criminalization. Behaviour consisting in physical punishment, even prior to the entry into force of Article 96[1] FGC, was not – due to the mandatory prohibition of violating human dignity – a socially acceptable method of parenting, and thus was always unlawful.

It must be admitted that the introduction of the discussed provision is an attempt to employ the regulatory function of law so as to reinforce social attitudes desired by the legislator. As M. Płatek notes, law shapes culture and changes beliefs – its contents are treated as something normal in society.[46] This is also pointed out

[41] R. Smith, *'Hands-off parenting?' – towards a reform of the defence of reasonable chastisement in the UK*, "Child and Family Law Quarterly" 2004, vol. 16(3), p. 267.

[42] L. Bosek, *Prawo podstawowe do godności ludzkiej w Konstytucji RP*, [in:] *Państwo prawa i prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla*, eds. P. Kardas, T. Sroka, W. Wróbel, vol. 1, Warszawa 2012, pp. 94–96; J. Boć, B. Banaszak, M. Jabłoński, *Komentarz do art. 30 Konstytucji RP*, [in:] *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 roku*, ed. J. Boć, Wrocław 1998, p. 68.

[43] Judgement of the Constitutional Tribunal of 4 April 2001, K 11/00, LEX no. 46869.

[44] J. Sloth-Nielsen, *op. cit.*, p. 195.

[45] S. Różycka-Jaroś, *Karcenie dzieci – czyn zabroniony czy okoliczność uchylająca bezprawność*, Warszawa 2012, p. 79; T. Waterston, S. Janson, *op. cit.*, p. 1.

[46] M. Płatek, *W drodze*, "Niebieska Linia" 2005, no. 6, www.niebieskalinia.pl/pismo/wydania/dostepne-artykuly/4463-w-drodze [access: 11.02.2021].

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by E. Zielińska in her legal opinion on the draft act introducing the provision in question. The author writes about reaffirmation of the ban on the use of corporal punishment.[47] Such purpose, as indicated above, was also made express by the authors themselves in the draft's explanatory memorandum. Such was the tone of MP T. Ross during the legislative process: "I want to move back to the subject of corporal punishment, to spanking. These are two questions that must be separated – criminal problem and problem of social sensitivity, question of developing instinctive response in the society. A slap administered by a mother to her child when boarding a bus should be controlled immediately. It is not that a policeman will come, but this is a matter of social disapproval, and for that purpose we need extensive education, and this is the direction we should take".[48] The prohibition of corporal punishment against minors is intended to prevent parents from cruel child discipline through education and support rather than punitive methods.[49]

It is worth noting, as P. Tuleja did, that the right to protection of dignity under Article 30 of the Polish Constitution is subsidiary and "an individual may rely thereon only when other rights or freedoms fail to guarantee such protection".[50] Therefore, the decision of the legislator who resolved to insert in the Family and Guardianship Code a provision directly relating to the unlawful handling of minor's legal goods by physical punishment and guaranteeing the said protection should be assessed very positively.

THE IMPACT OF REAFFIRMING THE PROHIBITION OF CORPORAL PUNISHMENT ON THE CHANGE OF SOCIAL OPINION ON PARENTING METHODS

In 2008, two years before the ban on corporal punishment was introduced, 78% of respondents approved of the use of minor physical punishment, agreeing with the statement that there are situations in which a child should be spanked.[51] Four years later (two years after the introduction of Article 96^1 FGC), social support for

[47] E. Zielińska, *Opinia prawna dotycząca Sprawozdania Komisji Polityki Społecznej i Rodziny (druk 2776) o rządowym projekcie zmiany ustawy o przeciwdziałaniu przemocy w rodzinie oraz niektórych innych ustaw (druk 1698) oraz o poselskim projekcie ustawy o zmianie ustawy o przeciwdziałaniu przemocy w rodzinie oraz o zmianie niektórych innych ustaw (druk nr 1789)*, http://orka.sejm.gov.pl/RexDomk6.nsf/0/937A28F06DB23B7EC12576E30041A579/$file/i412_10.rtf [access: 11.02.2021], p. 17.

[48] *133. posiedzenie Komisji Polityki Społecznej…*

[49] D. Birchall, D. Burke, *op. cit.*, p. 181.

[50] P. Tuleja, *Stosowanie Konstytucji RP w świetle zasady jej nadrzędności (wybrane problemy)*, Kraków 2003, pp. 127–128.

[51] E. Jarosz, *Postawy społeczne…*, p. 5.

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this form of punishing minors fell to 69%.[52] In 2014, this indicator was 61%,[53] and in 2017 – 52%.[54] In 2018, the percentage of people who supported spanking was only 43%.[55] Slightly slower is the decline in the much lower, from the very beginning, social support for disciplining children through so-called "heavy spanking". In 2008, only 41% of the respondents were in favour of "heavy spanking",[56] in 2012 – 38%,[57] in 2014 – 28%,[58] in 2017 –27%,[59] and in 2018 – 24%.[60]

It should be remembered that research on social attitudes reflects views only and does not give a picture of actual attitudes. In fact, actions may deviate from the declarations made. In order to fully assess the effects of the introduced ban, research should be carried out to verify actual behavior, e.g., by analyzing statistics maintained by organizations supporting families and protecting children against violence, or criminal statistics. This way, it can be noted that between 2010 and 2012 there was a two-fold decrease in the number of minor victims of domestic violence (from little more than 40,000 to little less than 20,000).[61] In 2014, there was a slight increase to 21,000, but then a progressive decline was reported to 12,000 in 2019.[62] However, on the basis of the above data, it is impossible to determine what the share of unlawful corporal punishment was in overall violence against children.

As can be seen from the presented data, the support for the use of corporal punishment against minors by Polish society has definitely decreased. The question is whether the introduction of the ban on this type of parental method in 2010 was the reason for that trend. In this context, it is worth looking at one more research – concerning the social awareness of the existence in the Polish legal system of the prohibition of physical child discipline. In 2012, 78% of the respondents realized that hitting a child was against the law.[63] In 2014, this percentage was 76%,[64]

[52] *Ibidem*.

[53] *Bicie dzieci po polsku… czyli postawy społeczne wobec przemocy w wychowaniu. Raport Rzecznika Praw Dziecka 2014*, http://brpd.gov.pl/sites/default/files/prezentacja_wynikow_badan_2014.pdf [access: 11.02.2021], p. 4.

[54] E. Jarosz, *Przemoc w wychowaniu – czas z tym skończyć! Raport Rzecznika Praw Dziecka 2017*, http://brpd.gov.pl/sites/default/files/przemoc_w_wychowaniu_raport_2017_0.pdf [access: 11.02.2021], p. 5.

[55] Eadem, *Postawy wobec przemocy*..., p. 8.

[56] Eadem, *Postawy społeczne*..., p. 7.

[57] *Ibidem*.

[58] *Bicie*..., p. 6.

[59] E. Jarosz, *Przemoc w wychowaniu*..., p. 4.

[60] Eadem, *Postawy wobec przemocy*..., p. 10.

[61] *Przemoc wobec dzieci*, https://dzieciwpolsce.pl/analiza/29/przemoc-wobec-dzieci [access: 29.06.2021].

[62] *Ibidem*.

[63] E. Jarosz, *Postawy społeczne*..., p. 13.

[64] *Bicie*..., p. 13.

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in 2017 – 70%,[65] and in 2018 – 85%.[66] The data indicate that the awareness of unlawfulness of beating children was present in society practically from the very introduction of the ban on corporal punishment, and even slightly decreased until it rose rapidly in 2018. On the other hand, the decline in support for this type of parental method was constant.

Therefore, one can risk saying that the introduction of Article 96[1] FGC contributed to a decline in the social approval of physical discipline of minors, but was not its only and decisive cause. It seems that social and educational campaigns against any forms of violence affecting children, as well as policies aimed at supporting families, could be of equal importance for the creation of positive behaviour patterns. A. Rowland, G. Felicity and M. Stanton are absolutely right to point out that "laws function better to eradicate behaviour when combined with education and supportive measures".[67] In Poland, we need to act like the Welsh Government which "proposes a range of measures to support parents, such as raising awareness and the inculcation of positive parenting skills that align with human rights law".[68]

CONCLUSIONS

The provision of Article 96[1] FGC has not changed anything with regard to the scope of permitted disciplining of minors. Before the provision was introduced in the Code, parents could not use corporal punishment as a part of parental impact. Contrary to the highest acts in the Polish legal system, such as the Polish Constitution or the International Covenant on Civil and Political Rights, the right cannot be derived from the parental authority regime. This provision is only an attempt to reinforce the desired social attitudes and parenting culture in order to ultimately eliminate the unlawful use of corporal punishment, and such is its role in any legal order.[69] The ban on corporal punishment of children, just as the postulated removal of the reasonable chastisement defence in Hong Kong, was not enacted to increase the prosecution rate of parents.[70]

On the other hand, the fact that some parents and guardians have until now used such penalties, and the social support for them persisting at a certain level, indicates that informal standards of conduct will nevertheless prevail over legal

[65] E. Jarosz, *Przemoc w wychowaniu…*, p. 12.

[66] Eadem, *Postawy wobec przemocy…*, p. 29.

[67] A. Rowland, G. Felicity, M. Stanton, *op. cit.*, p. 185; R. Smith, *op. cit.*, p. 267, 269; T. Waterston, S. Janson, *op. cit.*, p. 2.

[68] D. Birchall, D. Burke, *op. cit.*, p. 187.

[69] A. Rowland, G. Felicity, M. Stanton, *op. cit.*, pp. 188–189; D. Birchall, D. Burke, *op. cit.*, p. 169, 188.

[70] D. Birchall, D. Burke, *op. cit.*, p. 193.

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norms, including the discussed provision aimed at reinforcing the correct social attitudes towards children during the upbringing process. Physical disciplining of children is still normal for some parents or guardians, and the prohibition in question constitutes a "significant intrusion into the private sphere".[71] It may take more time to convince the rest of society of the harmfulness of physical disciplining of minors.

Although the society is not ready to change its behaviour as far as upbringing of children is concerned, the need to provide them, as the weakest parties, with the greatest protection fully justifies an express prohibition of corporal punishment.[72] It is unacceptable that the right to corporal discipline, which was enjoyed in the past by slave masters and husbands in relation to their wives, should continue to apply to the most fragile and weakest ones.[73]

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[71] *Ibidem*, p. 169.

[72] A. Rowland, G. Felicity, M. Stanton, *op. cit.*, p. 189.

[73] See R. Smith, *op. cit.*, p. 261.

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ABSTRAKT

Aby przedstawić cel i rzeczywistą funkcję, którą w społeczeństwie pełni zakaz stosowania kar cielesnych wobec małoletnich, na przykładzie polskiego systemu prawnego przeprowadzono analizę źródeł, przyczyn i skutków wprowadzenia tego zakazu w drodze normatywnej. Wskazano też, kto dążył do uchwalenia omawianej zmiany oraz podmioty mające wpływ na ukształtowanie zakazu w ostatecznej wersji. Ponadto opisano sytuację zarówno tych podmiotów, które w wyniku wprowa-

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dzenia przedmiotowego zakazu osiągną zyski, jak i tych, które poniosą straty. Analiza formalnych i nieformalnych reguł dotyczących metod wychowawczych, które obowiązują w społeczeństwie, ma na celu udzielenie odpowiedzi na pytanie, czy zakaz stosowania kar cielesnych wobec małoletnich pozwolił zrealizować cel założony przez ustawodawcę czy też wywołał odwrotny skutek.

Słowa kluczowe: kary cielesne; małoletni; zakaz; polski system prawny; metody wychowawcze; ustawodawca

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