

# PHYSICAL PUNISHMENT OF CHILDREN: PROTECTION UNDER THE MALAYSIAN PENAL CODE

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**ABSTRACT:** *Instilling discipline and nurturing children during early childhood are important as they ensure and augment their proper development in various aspects. Some believe that physical punishment is part of a child's upbringing which helps shape a responsible child and later, adult. However, sometimes the disciplining method administered by parents may exceed acceptable standards and become excessive which may lead to causing physical, psychological and emotional harm. In extreme cases, it may even prove fatal to the child. This article discusses the application of the Malaysia Penal Code with regard to the protection of children who suffer from physical punishment and abuse. The paper analyses the current law with regard to physical punishment and abuse by parents and includes relevant case studies to elaborate the significance of the law and examine to what extent physical punishment is allowed to be administered onto a child in the Malaysian context. The International Convention on the Rights of the Child (CRC) is examined with special reference made to the provisions dealing with physical punishment. This part of the analysis seeks to establish and determine to what extent the provision of the Penal Code sufficiently protect children.*

**Keywords:** physical punishment, abuse, children, protection

## 1. INTRODUCTION

In today's competitive and demanding society, caring for infants, toddlers and children can be challenging for even the most seasoned parents and caregivers. Children need proper upbringing and care to ensure that they can develop a mutually respectful communication system that can empower them to maximize their independence and acceptance into society. The subject of discipline is one which raises heated debate, particularly where physical discipline is concerned as some people fall into the 'anti-smacking' category, with others in the 'pro-smacking' category [1]. A major difficulty for parents, however, is knowing what is acceptable by way of discipline [1]. The ability to chastise is subject to a test of 'reasonableness'- at least in the context of criminal law proceedings, which are brought where discipline has exceeded what was reasonable and hence caused physical harm to children. [1] This article will discuss the application of the Penal Code (Act 574) with regards to the protection of children who suffer from unreasonable physical punishment and abuse and examine to what extent physical punishment is allowed to be administered upon a child.

## 2. MEANING OF PHYSICAL PUNISHMENT

Physical punishment of children relates to the use of force to discipline them. The most common type of physical punishment is 'smacking' although the term can include slapping, pinching and using implements such as a belt, slipper or cane to hit a child. [2] Any use of force can be charged as a criminal offence. However, in cases where the punishment is mild and where the person administering it is the parent or acting in place of the parent (in loco parentis) they are able to argue that they administered a "reasonable punishment". This is the reasonable punishment defence. [2]

Strictly defined 'corporal punishment' is the infliction of pain intended to change a person's behaviour or to punish them. [3] Though it mainly refers to physical pain either through hitting or forcing the child to sit /stand in uncomfortable positions; an evolving definition also includes within its ambit wrongful confinement, verbal insults, threats and humiliation, which are used with impunity and in utter disregard to the law and principles of learning. [3]

According to Diduck & Kaganas [4] in many families mutual respect, affection and nurture prevail. The law no longer permits physical chastisement of a wife by her husband, rape in marriage has been recognized as a crime, and, broadly speaking, the beating of children has come to be called child abuse.

## 3. DEFINITION OF A CHILD

In Malaysia, various forms of definitions are given of a child in accordance with their respective purposes by several legislations. Section 2 of the Child Act 2001 (Act 611) define a 'child' as a person under the age of eighteen years. In relation to criminal proceedings, a "child" means a person who has attained the age of criminal responsibility as prescribed under the Penal Code. Section 82 of the Penal Code (Act 574) explains that nothing is an offence which is done by a child under ten years of age. Under section 17(1)(a) of the Child Act 2001, a child is in need of care and protection if the child has been or there is substantial risk that the child will be physically injured or emotionally injured or sexually abused by his parent or guardian or a member of his extended family.

Under Article 1 of the Convention on the Rights of the Child 1989 (hereinafter referred as CRC) defines child as a person under the age of eighteen years unless under the law applicable to the child, majority is attained earlier. Under the Law Reform (Marriage and Divorce) Act 1976 the minimum age for marriage is eighteen years. However, the Chief Minister of a particular state may in his discretion grant a license authorizing the solemnization of a marriage of the girl child who is under the age of eighteen years and has completed her sixteenth year. Thus, it is clear that there are different legislations which provide different definition of a child. It is important that these legislation's should be consolidated into a single standard definition to be in line with the definition as provided under the Article 1 CRC.

## 4. CONVENTION ON THE RIGHTS OF CHILDREN (CRC)

The CRC is an international treaty that recognizes the human rights of children. [5] Under international law, the Convention establishes that States Parties must ensure that all children, without discrimination in any form, benefit from

special protection measures and assistance; have access to services such as education and health care; can develop their personalities, abilities and talents to the fullest potential; grow up in an environment of happiness, love and understanding; and are informed about and participate in, achieving their rights in an accessible and active manner. [5]

The Convention consists of a total 54 Articles. Malaysia ratified the CRC in 1995 to uphold its commitment to the protection and welfare of children. [6] This was a major step for the country. Reservations to CRC Articles 1, 2, 7, 13, 14, 15, 28(1)(a) and 37 were put in place since these Articles were said to "not conform with the Constitution, national laws and national policies of the Government of Malaysia, including the Syariah law."

While the Government has lifted some of these reservations, others namely, Article 2 on non-discrimination, Article 7 on name and nationality, Article 14 on freedom of thought, conscience and religion, Article 28(1)(a) on free and compulsory education at primary level and Article 37 on torture and deprivation of liberty.

Ratification of the CRC shows the willingness of the Malaysian government to commit and to be bound by an international treaty in safeguarding the interest of children. [7] The ratification also brings the child law in Malaysia to a new dimension and emphasis is now on the duty of the State and the family working together in the upbringing and protection of children. [7]

#### **4.1 CRC Provisions on Physical Punishment**

The Convention views the physical punishment of children as violence against children. Corporal punishment, is a violation of the rights of the child which conflicts with the child's human dignity and the right of the child to physical integrity. It also prevents children from reaching their full potential, by putting at risk their right to health, survival and development. [8].

With regard to the protection of children from abuse, under Article 19(1) of the CRC 1989 which provides that the States Parties shall 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 the care of the child. The provisions also requires the State under Article 19(2) of the CRC 1989 to take various measures, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Children have the right to be protected from being hurt and mistreated, physically or mentally. Governments should ensure that children are properly cared for and protect them from violence, abuse and neglect by their parents, or anyone else who looks after them. In terms of discipline, the Convention does not specify what forms of punishment parents should use. However, any form of discipline involving violence is unacceptable. There are ways to

discipline children that are effective in helping children learn about family and social expectations for their behaviour- ones that are non-violent, are appropriate to the child's level of development and take the best interests of the child into consideration. In most countries, laws already define what sorts of punishments are considered excessive or abusive. It is up to each government to review these laws in light of the Convention. (Article 19, Summary of the Rights under CRC 1989)

The CRC 1989 under Article 37(a) spells out that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment The CRC clearly provides that no one is allowed to punish children in a cruel or harmful way. Children who break the law should not be treated cruelly. They should not be put in prison with adults, should be able to keep in contact with their families and should not be sentenced to death or life imprisonment without possibility of release. (Article 37, Summary of the Rights under CRC 1989) In principle, it is very important for every human to maintain the desire for respect and dignity regardless of whether a child or an adult are involved. Respect for the young and old goes in line with the basic needs of human rights.

#### **5. COMPARATIVE PROVISION**

In most countries, light corporal punishment is permitted as a way of disciplining and correcting a child. In many ways, mild corporal punishments is a good test case for the issue of legal intervention in intrafamilial relations in the privacy of the family and in its autonomy and affairs. [9] Shukla Jyoti and Singh Neetu (2013) believe that the use of corporal punishment in schools interferes with students' right to be treated with dignity and as a result, affects their right to a quality education. [10] As such, they argue that teachers should be educated in the use of alternative methods of discipline, with an emphasis on employing evidence-based behaviour modification and other techniques to maintain control of the classroom without resorting to violence. [10]

For example, section 43 of the Canada Criminal Code 1985 (R.S.C., 1985, c. C-46) is controversial in that it expressly offers parents and teachers a defence when they use reasonable force to discipline a child. The section provides:

Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable in the circumstances. [26]

This section seems to allow not only the parent but also the school teacher to administer beating for the purpose of correcting a child. Section 43 thus, provides some form of defence to the parent and the educator, as long as the force used is not excessive and is with the intention correcting the pupil or the child. This provision clearly states that the punishment must be for the purpose of correcting the child.

Robert E. Larzelere and Brett R. Kuhn, (2005) believes that every child is different, so not all disciplinary tactics will work as well as with every child or for every situation with the same child. [11] Parents need to skillfully use a range of disciplinary options to help their children achieve their full potential, rather than to have effective options restricted unnecessarily. [11]

To consider whether such punishment meted out was reasonable, the case of *R. v T.J.R.*, (2006) ABPC 192 discussed the issue as to whether the corrective force used by the father was reasonable in the circumstances. The accused is charged with assault in pursuant to section 266 of the Canada Criminal Code due to spanking administered to his daughter, who was slightly older than two years during the time of incident. Both parents were worried of their daughter behaviour in which she soiled her diaper, removed it and creating mess. They agreed that corrective discipline through spanking would be appropriate if the daughter repeating her action. One day, the father discovered that the daughter soiled and removed the diaper again, causing the faeces to be all over the room and herself. The father immediately took his naked daughter and gave “two, no more than 3 whacks” on her daughter’s buttock. He said that she was in good condition the rest of the day but during bath time, he was surprised to see marks and redness on his daughter’s back. The next day, buttock bruising and discolouration had set in. Her injuries cleared up in about a week.

The judge took into account that as the daughter was barely past the two years, threshold below which the experts identify the physical punishment as useless and damaging. Although the father did not intend to inflict injuries but to correct the daughter’s behaviour, the injuries are more consistent with a parent who administered the spanking while upset and angry. The father is guilty of common assault and can’t raise the defence of “reasonable force” under the provision of section 43 of the Criminal Code.

It can be concluded that even though the father’s intention was purely to correct his daughter bad behaviour and not to abuse her, but the fact that the daughter is just only slightly older than two years old, the degree of force administered upon her is too much causing her buttocks to bruise up for almost a week. She is still an infant that can’t tolerate and even understand why she was given such punishment. By taking into consideration the age of the child, both the parents should have taken a soft approach to address their daughter’s misbehave rather than to inflict physical punishment on her.

## 6. MALAYSIA - THE PENAL CODE

The Penal Code was first enacted in 1936 as Penal Code for the Federated Malay State cap. 45. The Code was then revised and published in the Gazette on 31 July 1997. The revised version entered into force on 7 August 1997. (Act 574) Physical punishment, to an extent, is lawful at home under Section 89 of the Penal Code which reads as follows:

Nothing, which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to that person:

Provided that this exception shall not extend to—

- (a) the intentional causing of death, or to the attempting to cause death;
- (b) the doing of anything which the person doing it knows to be likely

to cause death for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

- (c) the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity;
- (d) the abetment of any offence, to the committing of which offence it would not extend.

Section 89 of the Penal Code has to an extent allowed physical punishment to be administered upon a child provided that such punishment is not excessive and will not cause grievous hurt or death of the child. However, this provision only applies in respect of the home.

For example, in the case of *Public Prosecutor v Tan Peng Hong & Anor*, (2013) 8 CLJ 282 HC, both the accused were jointly charged under section 302 of the Penal Code for the murder of a three years ten months old girl by subjecting her to severe physical and mental abuse and neglect. The victim was the child of the second accused, a single parent who had another child with her live in boyfriend, the first accused. The girl had previously lived with a full time nanny for three years and seven months before the second accused ended that arrangement and brought the victim to live with her and the first accused, apparently to reduce expenses. Medical evidence adduced by the prosecution showed that over the 44 days the victim lived with the accused, she was severely beaten with various objects and sometimes denied of food and water. On one occasion, the victim’s hand and feet were tied to a chair and she was gagged to prevent her from screaming and was left in such a state alone in the house with the lights off whilst the two accused and their other child went outstation for two days. The victim fell sick from the constant abuse, her immunity dropped and she developed an infection in her lungs. Both, the accused had denied the girl medical treatment. When the first accused finally took her to the government clinic after the victim had stopped breathing, the girl was pronounced dead on arrival. Her body was covered with bruises, lacerations and swelling. An autopsy revealed the cause of death to be Pneumonia Lobar ‘Red Hepatisation’. The medical evidence showed that the victim could have been saved from death if timely and adequate medical attention had been given.

Both accused admitted during the trial that they had beaten the victim but claimed it was not severe and was only meant to discipline the child as she was naughty, refused to listen to them and constantly rebelled. They also claimed most of the bruises on the victim was self-inflicted as the child had a habit of climbing onto furniture and falling as a result.

The court in this case after considering all the evidence, found that the physical injuries on the victim could not have been inflicted in the course of reasonable disciplining but rather they represented physical abuse. Both the accused did not deny they had beaten the victim. From their defence and other evidence, the court observed that the beating and

punishment had gotten out of hand and became abusive and caused harm from which the victim eventually died.

The death in this case could not, as was contended by the defence, be attributed to the pneumonia (which was the immediate cause of death) but to the events that caused the victim's immune system to be weakened. The victim had suffered physical injuries at the hands of both accused and her physical health was compromised. The death became a homicide because the continuous beatings, abuse and refusal to give her medical attention set in motion the chain of events that led her to contract pneumonia and die. Considering the victim's age, it was a life-threatening condition. As parents and guardians, both accused deliberately refused and/or failed to provide the victim with the needed medical care. Her death was the result of their failure to act. The degree of beatings was not light. Extreme force was used when the victim was beaten. The court in this case convicted both the accused pursuant to section 302 of the Penal Code and sentenced to hanging till death.

Another 'disciplinary technique' that this court considered bizarre by most community standard is tying a child (victim) on a chair for extended periods of time. This was a case of fatality from abuse and intentional neglect. From the evidence adduced by the prosecution, it seems that the couple cares nothing about the victim. They deliberately inflicted those injuries on the victim and restrained her for several hours without food and water. The immediate physical effects of abuse (abuse lacerations) are relatively temporary; however, the pain and suffering they caused a child should not be discounted.

A home should be a sanctuary for a child. However, in this case, the victim had been abused physically and emotionally. She suffered harm for a period of a month before she met her fate. The degree of beatings could not be said to be light when the second accused admitted that she was so furious when she was caning the victim until the cane snapped into two. This could lead to one explanation that extreme force was imposed when beating the victim.

In this case, the action taken by the mother and her boyfriend was not within the exception of section 89 of the Penal Code as the beating and abuse had caused the death of the child. It is not reasonable to discipline a toddler by hitting her using blunt and hard objects. Instead the mother should take a lenient approach in the process of educating her child. Whether such punishment amounted to educating or to abusing the child can be determined from the degree of force inflicted. In this case, the victim suffered from bruises over all parts of the body and the cause of the bruises were harsh gripping, pinching, kicking and beating by using objects like belts and cloth hangers. The severe bruises indicate that the punishment given by the parents to teach the child was excessive and amounted to abuse. N. Lowe and G. Douglas (1998) believes that whether or not the punishment is reasonable must depend upon all the facts of the case, and in particular the age and strength of the child and the nature and degree of the punishment. [12]

The death of a child at the hands of her parents always engenders strong feelings. [13] When that child is known to be at risk and is supposedly under the care and protection of the state, the child's death attracts great public anger and

concern. [13] Finding answers to what went wrong and, more importantly, how such deaths can be prevented is exceptionally difficult. [13] Deception and manipulation of the child's parents, the naive optimism of social workers, the complacency of health professionals and teachers, the basic incompetence of over-worked, inexperienced, and poorly trained staff, and a serious lack of local authority resources are all too familiar stories. [13]

In another case of *Public Prosecutor v Mohd Romzan bin Ramli*, (2008) MLJU 22, which involves an appeal by the public prosecutor (appellant) against the sentence of six years imprisonment and one stroke of *rotan* (whipping) passed by the learned Sessions Court Judge in respect of an offence of incest under the provision of section 376A of the Penal Code and punishable under section 376B(1) of the same Code.

The victim who was 11 years old was living under the custody of the mother and the stepfather (accused/respondent). The stepfather entered into the victim's room and asked the victim to open her pants in which the stepfather inserted his penis into the victim's vagina. This incident happened several times when the mother was at work. The victim was so afraid because the stepfather hit her and warned her not to tell anyone pertaining to that incident. The stepfather in this case hit the child to inflict fear upon the victim.

The High Court in this case held that the sentence of six years' imprisonment and one stroke of *rotan* (whipping) imposed by the learned Sessions Court Judge on the respondent (accused/stepfather) is not only manifestly inadequate but it is also not in line with the established judicial principles. Accordingly, under section 316(b) of the Criminal Procedure Code, the sentence imposed by the learned Sessions Court Judge is set aside and substituted thereof a sentence to a sentence of eleven years' imprisonment and three strokes of *rotan* (whipping).

This case reveals as a stepfather, one should act like a true father that gives love, care and protection to the child. As a parent, the stepfather should be a person that the stepdaughter could put her trust on and to seek for protection. Sexually abusing the stepdaughter and raping her is a heartless action that should be penalized with greater punishment. Furthermore, it can be seen as the child was only eleven years old, the stepfather had taken advantage against her because the child was vulnerable and helpless.

The Sessions Court judge has been so lenient in sentencing the stepfather for such an offensive offence that disrespect the child's dignity. Although the stepfather in this case had pleaded guilty in this case, that plea of guilty would not enable him to escape the consequences of severe penalty. No "discount" should be given to the accused for having pleaded guilty as the sentence must reflect Malaysian society's abhorrence to crimes of this nature. Hence, the sentence in this case was enhanced instead of reduced.

The stepfather in this case had administered physical punishment upon the stepdaughter to inflict fear. The physical punishment used by the father was not reasonable and not for the purpose of correcting the child. The physical punishment was used for the stepfather's own pleasure. In this case, the action taken by the accused (stepfather) was not within the exception of section 89 of the Penal Code as the

beating and abuse was administered to inflict fear upon the child to avoid the child from complaining to anyone pertaining to the sexual abuse.

Occasionally, the State is forced to intervene between a child and its carers, either to remove the child completely from the home or to provide some form of intermediate protection. [14] Usually the protection is achieved by means of intervention by relevant welfare authorities, but protection can also be given by making a child a ward of the court. [14]

Hence, in line with the provision of the CRC, the Malaysian Penal Code also emphasizes on the need for the protection of the children in particular section 89 as discussed above. Thus, in cases where parents have physically abused their children, the Penal Code ensures that their right to physically discipline their children must be exercised in a reasonable manner.

## 7. CONCLUSION

Physical punishment by parents has to an extent increased the risk of the incidences of abuse and inhuman treatment of children in Malaysia. It is important for the law to remind parents as to what is allowed and acceptable in how children need to be treated and disciplined. Beating children may even make them disgruntled and resentful of their parents, which may lead to a collapse of the parent-child relationship.

Hence, the law is required to give every child sufficient protection from all forms of abuse, danger and harm. The protection need not necessarily punish a parent who administers light and gentle beating for the purpose of correcting their child. It is generally accepted that on occasion it is necessary to use force to restrain a child. It is necessary for society to bring about the change and practice other possible alternative methods to promote children development. Parents may set out certain rules and limits as a start to discipline a child instead of resorting to beating and smacking. Parent must try to use techniques which can empower a child to rationalize their mistakes and wrong actions and not use inappropriate methods which can be destructive towards a child. There must be a limitation put with regards to physical punishment administered by parents.

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