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Corporal Punishments as a Mean of Upbringing vs. Children's Rights in the Czech Republic

Abstract: This article focuses on one of the means of upbringing - corporal punishments. It sets down a question if they can be seen as an admissible mean of upbringing under the Czech law. Even though the answer seems obvious on the first sight, it is actually far more complicated. The article also deals with the question if the current *status quo* should be changed and the Czech Republic should introduce an explicit ban of all corporal punishments like many other countries. Rather than giving a strict answer, different opinions are offered and an open space is left for much needed further discussion.

Keywords: Corporal Punishment; Child; Parental Responsibility; Means of Upbringing; Czech Family Law; Parents

Abstract: Jelen cikk a nevelés egyik eszközére – a testi fenytítésre – összpontosít. Felteszi a kérdést, hogy a cseh jog szerint elfogadható nevelési eszköznek tekinthető-e a testi fenytítés. Bár a válasz első pillantásra nyilvánvalónak tűnik, valójában nagyon bonyolult. A cikk foglalkozik azzal a kérdéssel is, hogy meg kell-e változtatni a jelenlegi status quo-t, és a Cseh Köztársaságnak – sok más országhoz hasonlóan – egyértelműen be kellene-e vezetnie azt, hogy minden testi fenytítés tilos. Ahelyett, hogy szigorú választ adnánk a fenti kérdésekre, a tanulmányban bemutatjuk a különböző véleményeket, ezáltal szabad teret hagyva az igencsak szükséges továbbgondolásnak.

Keywords: testi fenytítés; gyermek; szülői felügyelet; nevelési eszközök; cseh családjog; szülők

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Introduction

The relationship between parents and children is one of the most important and fundamental parts of Family Law in general. Legal regulation of every country provides for this area at least to a certain degree. Czech Family Law and especially its Civil Code¹ is no exception. And even though each legal regulation of child-parent relationships may differ in details, all of them deal with their mutual rights and duties which are (viewed from the perspective of parents) also known as

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¹ Act no. 89/2012 Coll., Civil Code, as last amended (hereinafter „CC“ or „Civil Code“).

parental responsibility. Some areas, or better said rights and duties that create parental responsibility, are more or less the same (or at least very similar) in many countries – others, on the contrary, are rather diverse. One of the rights and duties belonging to the latter group is the right to bring up one's children using various means of upbringing. This right on its own would not be anything unusual – I believe we can all agree that any parent has naturally the right to guide his/her children through its early years of life and to oversee it will grow into a responsible, well-mannered young man or woman. However, the tools parents may use to achieve such goals (means of upbringing), can be quite unusual.

The abovementioned means of upbringing and their legal and admissible extent of usage in the Czech Republic are the main topic of this article. Even though this question may seem obvious to a stranger, the reality is much more complicated. This article aims to explain the philosophy of Czech law regarding corporal punishments. I will not only explain the current Czech legislation and the issues the Czech Republic has in this particular area, but I will also try to analyse a closely connected question of whether or not should Czech legislation change and move more towards the “Western legislations”. The goal here is not to give a strict answer, but rather offer different points of view on this topic (including the view of the child itself) and possibly contribute to a wider discussion that should always precede any important decisions in private areas such as family life of an individual.

Before heading to the Czech legislation on means of upbringing, it is necessary to define the term ‘corporal punishment’. I believe everyone has a more or less precise idea of what corporal punishments may look like – some will give such names only to physical punishments such as slapping, beating, or spanking, others will rank psychological measures under it as well. To keep this article consistent, I will use the definition created by the United Nation's Committee on the Rights of the Child in 2006, which defined ‘corporal punishment’ as *“any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting (“smacking”, “slapping”, “spanking”) children, with the hand or with an implement – whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment which are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child.”*²

² COUNCIL OF EUROPE. COMMISSIONER FOR HUMAN RIGHTS: *Children and corporal punishment: „The right not to be hit, also a children's right“* [online]. 2006 (updated 2008), p. 4. Available at: <https://rm.coe.int/children-and-corporal-punishment-the-right-not-to-be-hit-also-a-childr/16806da87b> (date of download: 13/12/2021).

It is obvious that the above-cited definition is very wide and covers not only “classical” physical violence or measures aimed against children, but any other situations of discomfort including psychological measures which can be as grievous as causing actual physical pain to the child (if not more). I chose this definition as a reference framework especially for its broad scope which suits the philosophy of children protection in international conventions, and also because it is the definition more or less used in many European countries.

Means of Upbringing as a Part of Parental Responsibility Under the Czech Law

Before heading into answering the question of whether or not corporal (or physical) punishments are allowed in the Czech Republic, it is necessary to explain the position of all means of upbringing within parental responsibility. Doing so will help understand its function and perhaps even the current attitude of the Czech legal regulation. Parental responsibility, under Czech law, presents a vast set of mutual rights and duties existing in the relationship of parents and children. Every right parent has is his duty at the same time. That is why these rights are often called “obligatory exercised rights”. For example, parents have the right as well as the duty to protect their child, to educate it, to care for it and its health, to maintain personal contact with the child, or to bring it up. These rights and duties are listed in detail in Section 858 of the Civil Code. Parents must always exercise them in the best interests of the child. Apart from that, parents should also play a crucial role in child care and should be their child’s all-round role models, especially concerning the way of life and behaviour in the family [§ 884(1) CC]. The goal parents want to seek in terms of child-rearing should be raising their child well, so it becomes a good citizen that lives a good life according to the law. As a mirror to this parental duty, the child is obliged to heed its parents, to respect them, to help them if they need it, or to care for them when they are old, etc [§ 857 (1) CC].

To be able to exercise these rights and duties correctly and to fulfil the child-rearing objective, parents are entitled to the right to direct their child’s behaviour using upbringing measures as appropriate to the child’s developing abilities, including limitations to protect the morals, health, and rights of the child as well as the rights of other persons and public order. They may do so until the child reaches full legal capacity and the child is obliged to conform to those measures [§ 857(2) CC]. The right (and the duty) to bring up one’s own children has its model even on the constitutional level, in article 32(4) of the Charter of Fundamental Rights and Freedoms of the Czech Republic. This provision does not only states that child care and upbringing is the right of its parents, but it also adds the child itself has the right

to demand and expect care and upbringing from its parents.³ This goes to show that child-rearing is a crucial part of parental responsibility not only for the parent but for the child as well.

There is no given list of “legal” upbringing measures in the Civil Code. We can only read from its provisions there are ‘upbringing *measures*’ and ‘*means or methods of upbringing*’. Is there any difference between these two? Well, in fact, there is not. The meanings of these terms are so close they will usually overlap. We may argue whether ‘measures’ are more of a precautionary character, whereas ‘means’ refer to particular tools parents may use to direct their children, but at the end of the day, such disputes are unimportant for their meaning in the light of the Civil Code. That is why I won’t be distinguishing between them in this article and use them as synonyms.⁴

It is therefore obvious that means of upbringing are a set of tools parents may use to help them with raising their children in the first place. But that is not their sole purpose. The others are more general: protecting the morals, health, and rights of the child, rights of other persons, and public order. We can see that in a certain way means of upbringing serve to the society as a whole, not only to particular persons – the parents. However, no matter for what reason these methods are being used, parents should *always* use them wisely and only *within* certain legal boundaries strictly set down not only in the Civil Code but in other legal acts as well (for further details see the following chapter). Since there is no given list of available methods, parents can be quite inventive – as long as they do not use a method that would step outside of the limits defined in the Civil Code. Means of upbringing can be divided into several categories, the two most common ones being positive and negative means of upbringing.

Positive means should be always the preferred option. The same is also explicitly stated in the explanatory report to the Civil Code.⁵ Positive means include e.g. praises, rewards, motivation. Negative means, on the other hand, should be only a standby solution to child-rearing issues. Parents should always, even if the child misbehaves, opt for positive measures rather than negative ones. However, even the negative means can be further internally divided into two subcategories: corporal or

³ Art. 32(4) of the Resolution of the Presidium of the Czech National Council of the 16th of December 1992 on the declaration of the Charter of Fundamental Rights and Freedoms as a part of the constitutional order of the Czech Republic, no. 2/1993 Coll.: “*It is the parents’ right to care for and bring up their children; children have the right to parental upbringing and care. Parental rights may be limited and minor children may be removed from their parents’ custody against the latters’ will only by the decision of a court on the basis of the law.*”

⁴ Similarly, see HRUŠÁKOVÁ, M. – WESTPHALOVÁ, L.: § 857 [Povinnost dítěte dbát svých rodičů a právo rodičů usměrňovat dítě]. KRÁLÍČKOVÁ, Z. – HRUŠÁKOVÁ, M. – WESTPHALOVÁ, L. - et al.: *Občanský zákoník II. Rodinné právo (§ 655-975). Komentář*. 2nd ed. Praha: C. H. Beck, 2020, p. 730.

⁵ VLÁDA. Důvodová zpráva k zákonu č. 89/2012 Sb., občanský zákoník. In: *Beck-online* [online]. 18/05/2011. Available at: <https://www.beck-online.cz/bo/chapterview-document.seam?documentId=oz5f6mrqgezlf6obzl5shultdmeza&rowIndex=0#> (date of download: 15/12/2021).

physical punishments (e.g. slapping with hand or with an object, spanking, smacking, pulling hair) and non-corporal or psychological punishments (e.g. telling off, reprimand, ban of a certain activity or using a certain object such as computer, ban of meeting certain people for a certain period of time).⁶ And even amongst the negative measures, the corporal ones should be used very rarely, on occasions where nothing else works. No matter how supporting the role of negative means is, their importance should not be reduced down only to *ex-post* measures. They also play an important part in *ex-ante* prevention: a child will remember that certain undesirable behaviour was followed by a negative measure and therefore will not repeat the same undesirable action.

This article focuses primarily on physical punishments and their legality. They are probably the most controversial ones when it comes to means of upbringing. Some people are still countenancing them while others, on the other hand, are condemning and strictly avoiding them. However, that should not by any means awaken a feeling that corporal punishments are the most severe ones and others are minor and insignificant. Such a view would be very dangerous. It shall not be forgotten that non-physical and especially long-lasting, continuous psychological punishments can cause much more damage than one or two occasional slaps or hair pulls.

Legal and Judicial Limits of Physical Punishments

Civil Code Limitations

As already mentioned, parents cannot use *any* type of method of upbringing and have to mind certain legal boundaries while using them. These limits are primarily set down in the Civil Code. Section 857(2) CC, which establishes the right to direct one's children, also contains a significant limitation. This right can be exercised through methods of upbringing only if they are appropriate to the child's developing abilities. There would be different means appropriate to different age groups. What would be seen as utterly inadmissible in little children, can be tolerated in teenagers. The same goes for other conditions means of upbringing have to meet. According to S 884(2) CC, means of upbringing "*may only be used in the form and to the extent which are appropriate to the circumstances, do not endanger the child's health or development and do not affect the dignity of the child*". Parents should never overreact and should not use measures that are disproportionate to the particular situation. What is and what is not an adequate measure may be a tough question to answer and will take a bit of

⁶ HRUŠÁKOVÁ, M. – WESTPHALOVÁ, L.: § 857 [Povinnost dítěte dbát svých rodičů a právo rodičů usměrňovat dítě]. KRÁLÍČKOVÁ, Z. – HRUŠÁKOVÁ, M. – WESTPHALOVÁ, L. - et al.: *Občanský zákoník II. Rodinné právo (§ 655-975). Komentář*, p. 730.

thinking as well as experience from the parent. This condition also cannot be judged on its own, but only in conjunction with all the others. Therefore, even if some measures seem appropriate to parents for the particular situation, they should not use them if these measures would endanger the child's health (both physical and mental) or affect its dignity.

All of the abovementioned limits and guidelines for means of upbringing are also important for the child's duty to conform to upbringing methods. It is not obliged to conform to *any* methods but only to those that fulfilled the legal requirements.⁷

What Will Happen if Inappropriate Measures are Taken?

On the other hand, it is necessary to pay attention to the consequences of the situation where parents stepped out of the Civil Code boundaries. There are three possible consequences, each one in a different area of law and each one of a different level of seriousness – Civil Law ones, Administrative Law ones, and Criminal Law ones.

The first group of consequences arises from the Civil Code itself. If parents use inappropriate measures, their parental responsibility might be directly affected by the court's decision as a result of that. The court can either limit their parental responsibility or relieve (deprive) them of it. *Limitation* of parental responsibility or its exercise takes place if a parent doesn't exercise his parental responsibility properly and it is required by the interests of the child [S 870 CC]. *Deprivation* of parental responsibility takes place if a parent seriously neglects or abuses his parental responsibility or its exercise [S 871(1) CC].⁸ In both situations, such judicial intervention presents a punishment for the parent. In reality, the child is usually taken away from the 'abusive' parent and placed either in foster care or in an institution aimed to help children. However, it is also important to mention that even these 'mildest' interventions take place only in cases of inappropriate child-rearing methods that reached a certain level of seriousness. Not every margin and rare excess would be enough to convince the court to limit or deprive a parent of his parental responsibility.

The second group of consequences is the Administrative Law one. These consequences are more serious than the Civil Law ones. According to S 59(1h) of

⁷ PTÁČEK, L.: § 857. MELZER, F. – TĚGL, P. – et al.: *Občanský zákoník – velký komentář. Svazek IV.* § 655-975. Praha: Leges, 2016, p. 1314.

⁸ The court shall also separately consider if there are reasons for relieving a parent from his parental responsibility if he has committed an intentional criminal offence against his child, or has used his child who is not criminally liable for committing a criminal offence, or if the parent has committed a crime as an accomplice/instigator/aider/abettor/organiser of a criminal offence committed by his child [S 871(2) CC].

the Act on Social and Legal Protection of Children:⁹ “*Natural person, legal person, or natural person that is running business commits a misdemeanour, if he uses inappropriate measure or restriction during child upbringing.*” In case of committing this misdemeanour, the parent can be sued with a fine of up to 50. 000 CZK (approx. 1982 EUR). Similar to the regulation contained in the Civil Code, ASLPCh does not enumerate forbidden child-rearing measures. Every case would be then up to the authority responsible for the social and legal protection of children to carefully examine and decide whether or not the parent has committed a misdemeanour against his child.

Finally, the last, as well as the most serious group of consequences, can be found within the Criminal Code. However, these consequences can take place only if nothing else works. Criminal law in general plays the role of an *ultima ratio* measure. Whether certain action resembles theft, larceny, bodily harm, extortion, abuse, or any other anti-social or ‘criminal-offence-like’ behaviour, criminal law measures can be taken only if measures from other branches of law are not sufficient to stop and/or right it. The same goes for inappropriate means of upbringing. If the parent abuses or neglects his parental responsibility (including the right to direct his child) in such a severe manner it cannot be corrected in another way, he can be found guilty of several criminal offences, most likely of child abuse [S 198(1) of the Criminal Code],¹⁰ endangering of child’s upbringing [S 201(1) CrimC], actual/grievous bodily harm [S 146(1, 2) and S 145(1, 2) CrimC], or murder [S 140(1) CrimC]. Committing any of these criminal offences can result in years of imprisonment (varying according to the particular type of criminal offence and specific circumstances of each case).

Apart from analysing what will happen if inappropriate measures are taken, it is of the same importance to briefly touch on the opposite – what will happen if parents *resign from* raising or directing their child or do not manage it properly. Even this situation is in fact in contrary to the child’s best interests. The child has the *right* to be raised by its parents. In case parents fail or refuse to fulfil their duty to meet this right of the child, there comes the state (through its authorized bodies) to stand in for them and direct the child. The same can follow if the child itself makes it difficult for its parents to fulfil their duty of proper upbringing and causes them serious struggles. Such measures are usually preventive and don’t serve as punishments. They come before any intervention with parental responsibility (in other words, before the mildest “consequence” as mentioned above) and aim to restore the balance within the family.¹¹ These measures can be taken either by

⁹ Act no. 359/1999 Coll., on Social and Legal Protection of Children, as last amended (hereinafter “ASLPCh”).

¹⁰ Act no. 40/2009 Coll., Criminal Code, as last amended (hereinafter “CrimC”).

¹¹ WESTPHALOVÁ, L.: § 925 [Výchovní opatření]. KRÁLÍČKOVÁ, Z. – HRUŠÁKOVÁ, M. – WESTPHALOVÁ, L. - et al.: *Občanský zákoník II. Rodinné právo* (§ 655-975). *Komentář*, p. 1055.

administrative bodies for social and legal protection of children or,¹² in case these bodies do not take any action, by a court.¹³ In both cases, any action or intervention within a non-functional family has to be necessary concerning the interest in the proper upbringing of the child. Measures that can be taken include e.g. appropriate cautioning or establishment of supervision. They can be taken both towards the child and its parents or a person who disrupts the proper upbringing of the child (some logically only towards some subjects – e.g. establishment of supervision takes place only over the child).

Are Corporal Punishments Really Legal Under the Czech Law?

Based on the previous chapter, we could conclude that the Czech law in fact allows using corporal punishments of children if they stay within certain legal boundaries and do not constitute criminal offence nor misdemeanour nor any other abuse or neglect of parental responsibility. However, such a view would not be quite right and rather simplified.

All of the abovementioned provisions of the Civil Code on parental right to direct their children as well as on means of upbringing cannot be read separately. On the contrary, they should and have to be read in conjunction with other provisions of the Civil Code, especially those on personality rights of an individual and general provisions from the very beginning of the Civil Code. According to S 2(3) CC the interpretation and application of a legal regulation must not be contrary to good morals and must not lead to cruelty or inconsiderate behaviour offensive to ordinary human feelings. According to S 81(1) CC personality of an individual including all his individual rights are protected. Subsection 2 of this provision adds that the life and dignity of an individual, his health and the right to live in a favourable environment, his respect, honour, privacy, and expressions of personal nature enjoy particular protection. And most importantly, according to S 91 CC an individual is *inviolable*. In addition to that, according to S 93(1) CC no one shall, unless there is an exception provided by law, interfere with the integrity of others without them giving their informed consent to it.

¹² S 13 and S 13a ASLPCh.

¹³ S 925(1) CC: “If required by the interest in the proper upbringing of a child, and unless done so by the body for social and legal protection of children, a court may:

a) appropriately caution the child, the parents, the person having the care of the child or the person who disrupts the due care of the child,
b) establish supervision over the child and carry it out in cooperation with the school, body for social and legal protection of children, and other institutions and individuals pursuing activities, in particular, in the place of residence or workplace of the child, or
c) impose restrictions upon the child or parents which prevent harmful effects on the child's upbringing, especially the prohibition of certain activities.”.

What do those provisions tell us about the legality and admissibility of corporal punishments of children? Both adults and children are individuals. If we legally protect adults from being arbitrarily violated and grant them no one shall interfere with their bodily integrity without their informed consent (generally speaking), protect their life, health, and dignity – in other words, we ban corporal punishments of adults - *the more so* we shall keep the same attitude when it comes to children. Children are usually deemed the weaker party that deserves far more protection than adults. Thus, it would be unreasonable to allow physical punishments of them.¹⁴ Interpretation any other than that would be contrary to S 2(3) CC.

So, we shall make a partial conclusion that even if corporal punishments of children are not explicitly forbidden by the law in the Czech Republic, they are inadmissible and shall not occur nor be tolerated.

Corporal Punishments in the European Overview

Initial Thoughts

Even though it has been shown above that the Czech Republic is not in fact in favour of using corporal punishments of children and has functional legal tools to combat excesses in child-rearing, one can ask a legitimate question if such legal regulation is truly enough to ensure sufficient protection of children rights as they are stipulated in many international conventions, most importantly in the Convention on the Right's of the Child (hereinafter "CRC"). It is true that the Czech approach to corporal punishments is unique indeed, especially if compared to other European countries. General consensus actually lies on an explicit ban of any forms of corporal punishments, no matter how light and margin they may be – exactly in the spirit of the UN Committee's definition of 'corporal punishment'. It is therefore right to at least ponder whether the Czech approach is actually correct or if it deserves to be shifted.

European Countries and Physical Punishments – Overview

In terms of approach to corporal punishments, European countries can be divided into 3 groups. The first and biggest one consists of countries that ban corporal punishments of children in all settings (home, school, alternative care, penal institutions) explicitly in their legislations. Countries belonging to this group are e.g. Austria, France, Sweden, Germany, Finland, Hungary, Spain, Poland, and Portugal. The second group consists of countries that do not have an explicit ban and prohibit

¹⁴ Similarly, see WESTPHALOVÁ, L. § 884 [Výchovné prostředky]. KRÁLÍČKOVÁ, Z. – HRUŠÁKOVÁ, M. – WESTPHALOVÁ, L. et al.: *Občanský zákoník II. Rodinné právo (§ 655-975). Komentář*, p. 841–842.

corporal punishments only in some settings. There is usually no explicit prohibition of corporal punishments at home. The Czech Republic is one of the countries belonging to this group; others are e.g. Italy, Slovakia, or Belgium. The last group consists of countries that don't have an explicit ban of physical punishments in all settings as well but their governments have committed to introduce one in the near future (e.g. Serbia).¹⁵

An explicit ban of all corporal punishments was not the "starting line" for all of the European countries that have such bans nowadays. Some of them has introduced it quite a long time ago, whereas others only recently. Countries with the longest tradition of strict all-settings ban of corporal punishments are typically Scandinavian countries, such as Finland or Denmark. In Finland, there is an explicit ban from 1984.¹⁶ Denmark did explicitly forbid *revselsesretten* (the right to reprimand one's own children) in 1997. It was believed that any physical violence, no matter how mild one, may breach the mutual trust between the parent and the child and might eventually lead to much more serious cases of actual domestic violence on children. If parents breach this ban, they can be punished with a fine or even imprisonment, depending on the seriousness of the attack.¹⁷ Other countries, on the contrary, introduced the explicit ban of physical punishments in recent years or are even just about to do so. A very recent change in legislation happened in France in 2019.¹⁸ Article 371-1 of the *Code Civil* was re-formulated and nowadays says, inter alia, that *Parental responsibilities are exercised without physical or psychological violence*.¹⁹ The very newest member of the so-called "explicit ban family" is going to be Wales. In 2020, Welsh Assembly passed the Children (Abolition of Defence of Reasonable Punishment) Act which contained an explicit ban of corporal punishments and made all corporal punishments illegal. The Children Act is going to come into force on the 21st of March, 2022.²⁰

¹⁵ *End Violence Against Children. End Corporal Punishment* [online]. Available at: <https://endcorporalpunishment.org/> (date of download: 20/12/2021).

¹⁶ *Corporal punishment of children in Finland* [online]. Last updated July 2020, p. 1. Available at: <http://www.endcorporalpunishment.org/wp-content/uploads/country-reports/Finland.pdf> (date of download: 20/12/2021).

¹⁷ *Revselsesretten*. In: *LEGAL DESK* [online]. 20/04/2021. Available at: <https://www.legaldesk.dk/artikler/revselsesretten> (date of download: 21/12/2021).

¹⁸ *Corporal punishment of children in France* [online]. Last updated June 2020, p. 1. Available at: <http://www.endcorporalpunishment.org/wp-content/uploads/country-reports/France.pdf> (date of download: 22/12/2021).

¹⁹ English translation. In original, the respective part of Art 371-1 of the *Code Civil* says: „L'autorité parentale s'exerce sans violences physiques ou psychologiques.”

²⁰ THE GOVERNMENT OF WALES TAKES FURTHER STEPS TO IMPLEMENT PROHIBITION OF CORPORAL PUNISHMENT. In: *End Violence Against Children* [online]. 21/09/2021. Available at: <https://www.end-violence.org/articles/government-wales-takes-further-steps-implement-prohibition-corporal-punishment> (date of download: 22/12/2021).

At the same time, it is necessary to mention that implementing an explicit ban of all corporal punishments usually does not happen overnight. It is rather a long process that often takes years, sometimes filled with various lawsuits. Let's take Portugal, for example. All corporal punishments are banned in Portugal since 2007 when the Portuguese Penal Code was amended. However, before this change, there was a dispute between the European Committee of Social Rights and the Portuguese Supreme Court. At first, based on a complaint lodged by an organization called OMCT, the Committee stated that Portugal had violated Art 17 of the European Social Charter (hereinafter "ESCh") because their law was insufficient due to allowing corporal punishments. The Portuguese Supreme Court opposed the Committee's decision and in 2006 ruled in one of its judgments that "*slaps and spankings are "legal" and "acceptable", and that failure to use these methods of punishment could even amount to "educational neglect"*".²¹ Soon after that, the same organization lodged another complaint against Portugal with the same result – the Committee's decision that Portugal had violated ESCh, which finally broke Portuguese resistance and led to the amendment to the Penal Code in 2007.

APPROACH vs. the Czech Republic Case (2015)

The case of Portugal is almost identical to the one that happened to the Czech Republic. The Czech Republic has been confronted with the European Committee of Social Rights as well. In 2013, an organization called the Association for the Protection of All Children (hereinafter "APPROACH") lodged a complaint and claimed the Czech Republic allegedly violated Article 17 of the European Social Charter. APPROACH claimed in its complaint that there was a violation of that article due to the lack of the explicit ban of all forms of corporal punishments especially at home, in alternative care, and in schools. The contemporary legislation was therefore deemed insufficient.²²

However, the Czech government didn't agree with APPROACH's point of view and made a statement trying to explain to the Committee how the Czech system worked. The fact the Czech Republic did not have an explicit ban of all corporal punishments did not on no account mean corporal punishments were allowed or tolerated here. The Czech Government also stated there were functional tools to combat and prevent serious cases of inappropriate actions towards children (especially within Criminal Law and the possibility to take children away from the

²¹ *Corporal punishment of children in Portugal* [online]. Last updated June 2020, p. 1. Available at: <http://www.endcorporalpunishment.org/wp-content/uploads/country-reports/Portugal.pdf> (date of download: 22/12/2021).

²² Decision of the Committee of Social Rights from the 20th of January 2015, no. 96/2013 APPROACH v. Czech Republic.

abusive parent and place them into foster care). Not only there were functional measures to combat violence on children, but there was also launched a campaign called 'Stop violence on children' in 2009. This campaign aimed to raise public awareness of violence on children, its forms, causes, and consequences, as well as to raise public perceptivity to all forms of violence on children and thus reduce its occurrence.²³

The Government also pointed out the Czech Republic couldn't have violated Art 17 ESCh. Although the Czech Republic was at that time (and still is nowadays) a party to ESCh, it was a party only to the "original" unrevised version from 1961, not to the revised one. And Article 17 of the unrevised ESCh stated that: "With a view to ensuring the effective exercise of the right of mothers and children to social and economic protection, the Contracting Parties will take all appropriate and necessary measures to that end, including the establishment or maintenance of appropriate institutions or services." On the other hand, Art 17 in its revised version from 1996 stated that: "With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake [...] to take all appropriate and necessary measures designed [...] to protect children and young persons against negligence, violence or exploitation; [...]". In other words, in the version the Czech Republic had ratified, there was nothing about violence on children nor protection from it. And since the Czech Republic did not ratify the 1996 version of ESCh, it could not be legally binding for it and all the more so could not violate its provisions. The Committee could not apply provision from the revised ESCh (nor interpreted the unrevised provision in light of the "newer" document) on a state party that originally had not ratified the revised document and therefore had not anticipated being found guilty of violating some document it had not agreed to follow. Any approach and interpretation different than that would set up a great legal uncertainty. Moreover, both ESCh from 1961 and ESCh from 1996 were still separately opened for ratification, so the potential future state parties could choose which one of them suited them the best.²⁴

However, the Committee didn't share Czech Government's opinion and decided in January 2015 that the Czech Republic had violated Article 17 of the European Social Charter.²⁵ Even though there exists such a decision, not much has changed until now. The Czech legislation remained more or less about the same. There was no explicit ban introduced and the inadmissibility of corporal

²³ GOVERNMENT OF THE CZECH REPUBLIC. *Submission of the Government of the Czech Republic on the Collective Complaint against the Czech Republic for violation of the European Social Charter due to the lack of explicit and effective prohibition of all corporal punishment of children in the family, at school and in other institutions and settings* [online]. 05/11/2013, p. 1–3. Available at: <https://rm.coe.int/no-96-2013-association-for-the-protection-of-all-children-approach-ltd/1680748c91> (date of download: 24/12/2021).

²⁴ *Ibid.*, p. 4–5 (date of download: 24/12/2021).

²⁵ Decision of the Committee of Social Rights from the 20th of January 2015, no. 96/2013 APPROACH v. Czech Republic.

punishments is still being inferred from a conjunction of various provisions of the Civil Code.

Abandoning the Czech *Status Quo*?

Reasons For Amending Legislation

We can see that there definitely exists a certain trend amongst European countries in introducing the explicit ban of all forms and types of corporal punishments within their legal regulations. The number of countries that lack such a ban is small and getting even smaller each year. The Czech Republic is rather alone with its opposite and non-conform attitude. Therefore, it is good to ask ourselves a question, if it is good to uphold such a unique attitude and if it would not be better – not only for the Czech Republic from the international point of view but primarily for the protection of Czech children – to follow that trend. One of the reasons for amending Czech legislation has been already described above. Although the Committee’s decision is not enforceable, it certainly should not be taken flippantly. As it was shown in the example of Portugal, other countries were encountered with the same decision of the Committee like the Czech Republic, which eventually forced them to change their legislations.

Apart from this so-called “subjective” reason for amending legislation, there are also “objective” ones. We shall not forget the Czech Republic is a party to many important international conventions as well as a member of many international organizations. The most important convention is when it comes to children, the Convention on the Rights of the Child. CRC contains many provisions related to children and physical violence or physical punishment of children – e.g. Art. 3 (best interest of the child as a primary consideration), Art. 6 (right to life), Art. 14 (right of a parent to provide direction to their child in the exercise of his/her rights), Art. 18 (a principle that both parents have common responsibilities for upbringing and development of the child), Art. 29 (education of the child shall be directed to the development of child’s personality, talents, abilities, respect for human rights and fundamental freedoms as well as respect for their parents or preparation for responsible life in a free society) and Art. 37 (state parties shall ensure that no child would be subject to torture, cruel or inhuman or degrading treatment or punishment).

However, the most important one is Art. 19(1) CRC. According to this provision states parties to CRC “*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.*”

'Violence' is being understood in the broadest meaning possible within this provision – it covers not only physical violence directed intentionally against children but unintentional and non-corporal violence (such as child neglect or psychological terror) as well. It is also irrelevant whether or not the child itself perceives that particular treatment as harmful.²⁶ At the same time, it is necessary to realize that even an action carried out by the parent with the sole intention to protect the child (from outer danger as well as from itself) – in other words, an action that is deemed by the parent to be in the child's best interest – can easily fall into the definition of 'violence'. The adult's idea of what is in the best interest of the child may often diametrically differ from reality as well as from the content of the child's rights and freedoms.²⁷ Therefore, it is obvious that the term 'all forms of physical or mental violence [...] while in the care of parents' alongside the abovementioned explanation of this provision refers undoubtedly to corporal punishments and their usage in upbringing and those means of upbringing are not approved by CRC.

Apart from legally binding conventions, important soft-law documents should be mentioned. Since the Czech Republic is a member of the European Union (hereinafter "EU"), it shall take into consideration conclusions and principles created by the Commission on European Family Law (hereinafter "CEFL"). CEFL was established in 2001. It consists of experts in the fields of Family Law and Comparative Law from all EU member states as well as some other European countries. The main objective of CEFL was to "*launch a pioneering theoretical and practical exercise in relation to the harmonization of family law in Europe.*"²⁸ To do so, CEFL compares legislation of all member states and tries to create legally non-binding principles for different areas of Family Law (e.g. Principles of Property Relations between Spouses; or Principles on Parental Responsibilities) that would present some sort of "common" legal framework of all partaking countries. In one of its Principles – the Principles on Parental Responsibilities, CEFL deals with using corporal punishments as a method of child-rearing. The Principle 3:19(2) states that: "*The child should not be subjected to corporal punishment or any other humiliating treatment.*"²⁹ This soft-law recommendation arises from the prevailing approach amongst European countries and supports the indisputable trend of explicit bans of all forms of physical punishments of children.

²⁶ HOFSCHEIDEROVÁ, A.: Článek 19 (Právo dítěte na svobodu od všech forem násilí). DUŠKOVÁ, Š. – HOFSCHEIDEROVÁ, A. – KOURILOVÁ, K.: *Úmluva o právech dítěte. Komentář*. Praha: Wolters Kluwer ČR, 2021, p. 295-296.

²⁷ *Ibid.*, p. 296–297.

²⁸ For further details see History. In: *CEFL. Commission on European Family Law* [online]. Available at: <http://ceflonline.net/history/> (date of download: 23/12/2021).

²⁹ *PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING PARENTAL RESPONSIBILITIES* [online]. p. 284. Available at: <http://ceflonline.net/wp-content/uploads/Principles-PR-English.pdf> (date of download: 23/12/2021).

Reasons Against Amending Legislation

On the other hand, it is at least fair to present reasons against amending current legislation as well. Looking at the way Czech legislation and its child-protective measures work, it has to be admitted that if violence or inappropriate means of upbringing appears and are detected by respective authorities, the person who went beyond legal limits will be more than likely punished depending on the seriousness of their actions and child's harm. Plus, if we view provisions on parental responsibility from the Civil Code in the light of general protection of individuals who are inviolable, we cannot say the Czech legal order favours using corporal punishments in any way.

In addition to that, one last mention shall be dedicated to Criminal Law. This branch of law plays an important role not only due to its list of criminal offences the "abusive" parent can be held liable for but for its quite copious judicial practice regarding boundaries of admissible and inadmissible means of upbringing as well. It is especially the judicial practice of the Criminal Law Division of the Supreme Court of the Czech Republic, that often determines and decides on disputable cases of upbringing measures. There have been many cases, some of them being relevant to only very specific situations, others being applicable more or less generally. The latter is for example specification of the term 'abuse' and what conditions certain action has to meet to be classified as 'abuse'. According to the Supreme Court, 'abuse' is "*such bad treatment of person committed to the perpetrator's care, which is characterized with a higher degree of rudeness, heartlessness, and callousness and also with certain permanency, and which that person experiences as a grievous injustice*".³⁰ Such treatment doesn't have to be permanent to constitute 'abuse'. It is also not necessary "*for the abused person to suffer visible health consequences in the form of an injury. Therefore, abuse does not need to be only physical, but psychological as well.*"³¹ While judging whether certain treatment constituted child abuse or not, it is important to "*always assess particular nature and vehemence of used measures and means of upbringing, the intensity which affected physical or mental integrity of the child. If used measured and means of upbringing exceeds the limit bearable for the child and signifies child's physical or mental suffering, and are connected with the humiliation of the child and thus threaten its wellbeing and physical or mental health, it is irrelevant that the perpetrator punishes the child out of educational (upbringing) reasons.*"³²

³⁰ Statement of the Supreme Court of the Czech Republic from the 18th of November 1983, no. Tlpij 169/82 (R 11/1984).

³¹ Judgement of the Supreme Court of the Czech Republic from the 18th of March 2015, no. 4 Tdo 230/2015-22.

³² Judgement of the Supreme Court of the Czech Republic from the 17th of July 2019, no. 8 Tdo 679/2019.

Individual approach to each case is very important because what may constitute an inappropriate treatment or even child abuse in one situation, can be judged as still within tolerated legal boundaries. It will always depend on many specific factors. The Supreme Court has expressed it very clearly in the latter cited decision: “[...] *not every strict method of upbringing used to direct a child has to be necessarily considered to be an abuse. It is necessary to judge what methods and measures were used, their nature, vehemence, and circumstances under which those methods and measures were used, as well as their intensity. Methods of upbringing cannot, therefore, exceed the line beyond which the child suffers, feels pain, or gets injured, or suffers any other deformities. Upbringing cannot become child abuse [...]*”³³

If we look at some of the specific cases that were judged by the Supreme Court, we can, for example, find a decision relating to a case of a mother, who was continuously mentally terrorizing her daughter and sometimes hitting her and pulling her hair, to make her achieve good school results or lose weight (not be “fat”). The mother thought she was only directing her daughter and using means of upbringing that were not deviating from standards at all. But the Supreme Court didn't agree with her and ruled that the treatment of her daughter had definitely fulfilled the conditions of child abuse, for her daughter had suffered from serious, long-lasting PTSD (Posttraumatic Stress Disorder).³⁴ On the other hand, a different conclusion has been taken by the Supreme Court in the case of another woman – a mother of a hyperactive son. She used a stirring spoon and beat up her son with it twice. Even though her actions may be seen as an excessive and inadequate reaction, the Supreme Court stated, after a thorough examination of her case, that her actions were still within the acceptable legal framework. It was necessary to take into consideration *why* she had beaten up her son. Her son was very difficult to handle, hyperactive and she was a single mother. Even though she had asked several institutions for help with the upbringing of her son, none of them had helped her, nor answered her requests. It was therefore understandable that when being again in a desperate situation where no “soft” measures were working for directing her son's behaviour, the woman proceeded out of the ordinary (being in a lot of mental strain) to hitting him with a stirring spoon to make him behave.³⁵

If we look at the two abovementioned cases which were assessed in an utterly different manner, we can see how the Czech mechanism of preventing and prosecuting violence on children works. The fact there is no explicit ban of corporal punishments gives a huge space for judicial practice to distinguish between every case and judge, what actions carried out by the parents were actually harmful to their child and which were not. If there was the explicit ban, it is very likely both of the

³³ Ibid.

³⁴ Judgement of the Supreme Court of the Czech Republic from the 9th of December 2020, no. 8 Tdo 1206/2020.

³⁵ Judgement of the Supreme Court of the Czech Republic from the 17th of October 2012, no. 8 Tdo 1168/2012.

abovementioned cases had been judged the same with sentencing both adults – perpetrators to imprisonment (either as suspended sentence or “regular” sentence), and/or to a fine, and limiting or depriving them of parental responsibility. The Czech way thus seems a little bit more flexible – especially if compared to similar-looking cases from abroad which resulted in sentencing the “abusive” parent. For example, there was a case of a cohabitating partner of a mother of a child in 1993 in Finland. Finland had banned corporal punishments explicitly in 1984. The man flipped the 6-year-old child and pulled its hair and caused pain to the child but no injury. Even though he tried to defend himself saying he had done it purely for upbringing purposes, the Supreme Court of Finland (as the last instance) didn’t accept his defence and said he had repeatedly committed minor assault.³⁶

Another thing that is necessary to take into consideration when pondering on whether or not to amend the Czech legislation is the societal and cultural attitude to corporal punishments in general. The difference between the Czech and, for example, the Norwegian, Finnish, or Spanish attitude is huge. By saying that, I do not, by any means, intend to say Czech people are violent or brute against their children. All I am trying to do is to point out societal and cultural background is also an important part when speaking about corporal punishments as one of the means of upbringing. If we examine a few polls and surveys on public attitude to using corporal punishments in child-rearing, we can find quite interesting results. The Czech society is clearly against violence on children (meaning severe and systematic hitting and beating of children, child abuse, etc.); however, there still exists quite a big tolerance towards the lightest forms of physical punishments of children. In 2018, a non-governmental organization called ‘The League of Open Men’ carried out a survey focused on the usage of corporal punishments as a means of upbringing within the Czech society. One of the questions respondents were asked was if they “*use, or have used (in case their children were grown up), or would use (in case they didn’t have any children yet) corporal punishments as a mean of upbringing*”. In total, 63 % of respondents used/had used/would use corporal punishments at least on rare occasions (2 % answered ‘yes, regularly’; 19 % answered ‘yes, sometimes’ and 42 % answered ‘yes, on rare occasions’).³⁷ Even though that number had decreased since 2013’s survey (66 % in 2013), it was still quite high. On the other hand, if respondents answered they used/had used/would use on some occasions physical punishments, they would do so only in quite serious cases of misbehaviour, such as lying, disobedience of parents/grandparents, destruction or damage of things,

³⁶ Judgement of the Supreme Court of Finland from the 26th of November 1993, no. R92/661 (KKO:1993:151). For further details see KKO:1993:151. *FINLEX* [online]. Available at: <https://finlex.fi/fi/oikeus/kko/kko/1993/19930151> (date of download: 26/12/2021).

³⁷ LIGA OTEVŘENÝCH MUŽŮ. *Liga otevřených mužů. Fyzické tresty* [online]. 2018, p. 10. Available at: https://ilom.cz/wp-content/uploads/2018/10/2018_10_LOM_Fyzicke_tresty.pdf (date of download: 26/12/2021).

physical assaults of parents or other children, or thefts.³⁸ Also if asked about the most frequently used methods of upbringing, respondents usually answered: admonition/explanation (68 %), raising one's voice/telling-off (58 %), reprimand (53 %), ban of favourite activity (46 %), spanking (46 %), household chores (29 %), slap in the face or on the head (27 %), or compulsory meditation of the child on its transgression (18 %). Only 3 % of respondents answered they use the most beating.³⁹ Respondents were also asked if they agreed with introducing an explicit ban of corporal punishments into the Czech legislation. 47 % strongly disagreed, 28 % answered they 'rather disagree', 18 % were indifferent and only 8 % supported the explicit ban (4 % strongly agreed and 4 % rather agreed). On the other hand, 57 % thought parents should *have* the right to use corporal punishments as a method of upbringing. The majority of the respondents (66 %) viewed corporal punishments to be better than non-corporal ones (such as mental torment). Most of them also agreed on corporal punishments are not the ideal mean of upbringing, yet sometimes there were no better options.⁴⁰

As the survey shows, the Czech mindset and attitude towards corporal punishments are unique and different from most other countries. There is certainly a slight decrease in toleration towards corporal punishments that is very likely to continue over the course of next years, however, it is very slow and it will take a long time before Czech societal attitude gets to the position of the Scandinavian one (if at all). One last thing that needs to be added to this picture and that supports what has been written above is the attitude of Czech political parties towards corporal punishments. This fall (2021), there were elections for the Chamber of Deputies. Before the elections, all parties underwent a questionnaire with various questions on different social, political, and cultural issues – one of them being corporal punishments. Only one minor political party had introduced the explicit ban in their election program (the Green Party).⁴¹ Most of the political parties and coalitions (14) considered the explicit ban to be redundant and needless, for the current Czech legislation was sufficient and functional. They were also worried about an overuse of such a ban if enshrined in Czech legislation. In other words, none of the political parties (coalitions) that managed to form the new government was for introducing the explicit ban. All of the abovementioned facts show that there is and most probably will not be any societal or political will to drastically change the legislation soon.

³⁸ Ibid., p. 11–13 (date of download: 27/12/2021).

³⁹ Ibid., p. 14 (date of download: 27/12/2021).

⁴⁰ Ibid., p. 15 (date of download: 27/12/2021).

⁴¹ Zelení. Volební program. In: *Programy do voleb* [online]. Available at: <https://2021.programydovoleb.cz/strana/strana-zelenych/volebni-program> (date of download: 27/12/2021).

Conclusion and Discussion

To conclude this article, it is necessary to say that nothing is only black and white. There are definitely pros and cons of both having and not having the explicit ban of corporal punishments. The Czech Republic is one of the few European countries that does not have such a ban and due to that drew the attention of certain international institutions in the past. Even though it may seem only logical that the Czech Republic joins the undeniable European trend and change its legislation, there are important reasons for not doing so as well.

It is necessary to agree with the Czech Government that it is much more important to have a functional legal mechanism to detect, punish and enforce serious cases of violence on children in *all its forms* (both physical and psychological).⁴² It should not be also forgotten that corporal punishments do not have to be by far the worst type of treatment children can get. The psychological torment of a child is much more inconspicuous and capable of causing much more severe and longer-lasting damages and harm to the child than many types of corporal punishments. Based on all of the abovementioned information, it can be safely said Czech legal regulation is sufficient and in close cooperation with the courts manages to distinguish which cases of inappropriate upbringing measures are important, serious, and punishable and which are not. Even if we view this issue from the perspective of a child, we could not say Czech children would suffer nor that their rights would be protected less than those of children from abroad. Not every exceptional and rare use of minor corporal punishment such as a single mild slap or hit can be (neither should be) automatically viewed as violence against children. Every case should be judged in isolation, after a thorough examination of its particularities. If we look abroad we can see that some of their cases were a bit far-fetched. Systematic beating, as well as intentional violence on children, is highly unacceptable in all civilized European countries. On the other hand, criminal prosecution and/or punishment of a parent who rarely punished a child on reasonable grounds with some sort of corporal punishment simply seems to be too much.

Last but not least, it is necessary to take into consideration that changes in child-rearing are highly culturally and societally determined. One may wish the attitude of Czech people towards corporal punishments (as shown above) changes soon, however, it would be much better if it will happen naturally and easily rather than forcefully through state coercion. The state may try to speed up this process via, for example, campaigns, education, and raising public awareness, but in the end, it

⁴² GOVERNMENT OF THE CZECH REPUBLIC. *Submission of the Government of the Czech Republic on the Collective Complaint against the Czech Republic for violation of the European Social Charter due to the lack of explicit and effective prohibition of all corporal punishment of children in the family, at school and in other institutions and settings* [online]. 05/11/2013, p. 3–4 (date of download: 29/12/2021).

would be up to the people to give up using even the lightest forms of corporal punishments. One last food for thought, in addition to all that, has been written above: upbringing of a child is the sovereign right as well as a duty of its parents. They are responsible for doing so correctly and are entitled to various methods and tools to do so. At the same time, child-rearing is a highly private sphere of life. The state power should not interfere with it and should not tell parents how to do it, unless necessary. Such necessity is then reduced down to: a) setting minimal boundaries of means of upbringing; b) prosecuting overstepping of those boundaries; c) intervening in situations where parents resigned from raising their child or didn't manage to do it properly.

This article should not be viewed as an "ode" on corporal punishments. It rather aims to start a discussion on the position of corporal punishments within means of upbringing and perhaps raise awareness that the explicit ban of them is not the "one and only" correct way. Discussing different opinions, sharing experiences from many countries is very important and would be useful not only for the Czech Republic if it one day considers amending its legislation, but for other countries to perhaps review their approaches to corporal punishments as well.

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