

7 The use of legal action and regional and international human rights mechanisms

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In countries where governments are refusing to introduce law reform or are actively opposing it, both international human rights law and national law can be used to ‘force’ them to accept their obligations to realise children’s rights. The idea of using the law frightens some people, but it should not. *The law should not be a mystique, however much lawyers want to make it so.*

When states are examined on their implementation of the UNCRC by the Committee on the Rights of the Child, the Committee, where necessary, recommends explicit prohibition of all corporal punishment. If states do not comply, the recommendation is repeated at the next examination. While no court can make states obey the Committee, there is pressure and international embarrassment if they do not do so.

Organisations can add to this pressure, e.g. by producing an annual report to show what action the government has taken or failed to take to fulfil the recommendations of the Committee on the Rights of the Child and other relevant treaty monitoring bodies. But the most effective pressure comes from making full use of the UNCRC as a legal instrument.

Using national legal systems

Incorporation of the UNCRC

International human rights law is made up of various international human rights instruments: the Convention on the Rights of the

Child is a legal instrument. When states ratify the UNCRC, they take on legal obligations to implement it fully. This means, among other things, that they must prohibit all corporal punishment of children, by law.

States have different ways of treating international instruments when they ratify them. In some states, on ratification the instrument automatically becomes part of (is incorporated into) national domestic law, and takes precedence over domestic law. It can therefore be used in courts to claim rights guaranteed by the instrument. In other states, incorporation is not automatic and requires some action of parliament. In some states, the question of the status of the UNCRC has never been answered; it will be answered only when someone takes a case to court.

In states where instruments do not become part of domestic law on ratification, the domestic law should be reviewed and reformed to bring it into line with the instrument.

In all cases, governments need to be reminded that the UNCRC imposes legal obligations, under international law. There is an overarching instrument, the Vienna Convention on the Law on Treaties,³⁵ which emphasises that accepting human rights instruments means taking on legal obligations. It states that the existence of domestic law which is in conflict with the obligations, cannot be used as an excuse for not complying fully.

Constitutional and other domestic laws

Most states have some provisions in constitutions or other basic laws that conflict with laws authorising or justifying corporal punishment. Most constitutions include rights to protection of ‘everyone’s’ human dignity and physical integrity, to protection from cruel or degrading punishment or treatment, and to equal protection under the law. These provisions may also be reflected in child protection or child rights laws.

These national legal provisions can be used to challenge corporal punishment in all or some settings, in addition to using the international instruments which the state has accepted.

In taking legal action to challenge the legality of corporal punishment, the complaint is against the state. The final authority in the case depends on the national legal system. In some states, cases start at low-level courts and work upwards. For example, in the UK system of judicial review, a case is first heard at the high court, then the appeals court and then the Supreme Court.

Getting a legal opinion

An expert legal opinion is an extremely useful tool in cases where progress towards prohibition is not happening, or is being resisted. It is essential in challenging the legality of corporal punishment in the courts. Should this fail, it provides a firm foundation for using international and/or regional human rights mechanisms (see below). It is also useful, in any state, to support the campaign for prohibition.

A lawyer who believes in children’s rights, and is fully supportive of the human rights imperative to prohibit all corporal punishment of children in law, should be commissioned to write the opinion. Experiences has shown that these shared values are important if the collaboration is to be successful.

The legal opinion should address, in detail:

- whether the law which allows corporal punishment in one or more settings is in conflict with: (i) the international human rights instruments which the state has ratified, including the UNCRC, and (ii) provisions in the Constitution and other domestic law
- how this conflict can be challenged in the national legal system and, if necessary, by using regional or international human rights mechanisms (see below). In some states, the incompatibility of domestic law with the Constitution, or with ratified international instruments, can be challenged in the abstract, without the need to identify a particular victim or victims of corporal punishment. In other states, it is necessary to bring the challenge on behalf of an individual or group whose rights have been breached as a result of provisions in domestic law which conflict with the Constitution and/or international law.

The opinion can usefully cite the many important and clear judgments made in high-level national courts in other states, which support the case for full prohibition. Most of these refer only to penal or school corporal punishment, but some also refer to the family home. Relevant judgments have been made in Italy, Fiji, Nepal, Costa Rica, Kenya, South Africa and other states.

Using the legal opinion

The primary purpose of a legal opinion is to enable legislation allowing corporal punishment to be challenged in the courts. However, in some cases, merely *threatening* to take legal action may be enough – and much less costly in terms of money and time than actually going to court.

The decision to take the challenge all the way to the courts should follow a careful assess-

ment of the risks of such action. In particular, what is the chance of losing the case and creating a bad precedent? Judges are usually quite old, and often very conservative in their views. Some are adept at using tortuous logic to try and justify corporal punishment, for the usual personal reasons. Bad judgments can be challenged, but it is critical to ensure that the advocates are very good and are using all the right arguments.

Legal action, or threatening it, should never be seen as an isolated strategy. It should be linked to other strategies, such as community involvement and children's participation. This may include the development of a child-friendly version of the legal opinion, use of the media, etc.

Using international and regional human rights mechanisms

International and regional mechanisms (complaints/communications mechanisms) provide a means to appeal to, and bring pressure on, national governments.³⁷ Generally, these mechanisms require that any possible use of national legal systems has been tried and has failed – the process known as 'exhausting domestic remedies'. They nearly always require an actual victim(s) to make a case.³⁸

International complaints/communications mechanisms

There are complaints/communications mechanisms linked to the following international human rights instruments:

- International Covenant on Civil and Political Rights (Human Rights Committee)
- UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Committee Against Torture)

- UN Convention on the Elimination of All Forms of Racial Discrimination (Committee on the Elimination of Racial Discrimination)
- UN Convention on the Elimination of All Forms of Discrimination against Women (Committee to End Discrimination against Women)

There is now a campaign to have a complaints system under the UNCRC, by drafting a new Optional Protocol.³⁹

Regional complaints/communications mechanisms

Some regional human rights instruments also have associated complaints/communications mechanisms:

- American Convention on Human Rights and the American Declaration of the Rights and Duties of Man (Inter-American Commission on Human Rights and Court, Inter-American Court of Human Rights)
- African Charter on Human and People's Rights (African Commission on Human and People's Rights, African Court on Human and People's Rights)
- African Charter on the Rights and Welfare of the Child (African Committee of Experts on the Rights and Welfare of the Child)
- European Convention on Human Rights (European Court of Human Rights)
- European Social Charter and Revised Social Charter (European Committee of Social Rights).

There has been some success at challenging the legality of corporal punishment through the complaints mechanisms of some regions. The African Commission has issued one decision against the whipping of students in

Sudan, declaring that the law which authorised it was not in compliance with the Charter. The European Court of Human Rights has issued a succession of decisions since 1973, progressively condemning corporal punishment in the UK. Under the 'collective complaints' system, which allows complaints to be submitted without the need to identify an individual victim, the European Committee of Social Rights has found five states to be 'not in conformity' with the Charter because corporal punishment is not prohibited in all settings.

Conclusion

There is general consensus at international and regional level that the Convention on the Rights of the Child sets the standard for assessing whether or not a child's rights have been violated. There is growing recognition of this in national high-level courts. Pursuing the use of the UNCRC as a legal instrument is perhaps the most important focus in the next stage of implementation of the Convention.

35. See www.worldtradelaw.net/misc/viennaconvention.pdf

36. For further details, including the texts of some of the judgments, see www.endcorporalpunishment.org

37. The state must have ratified the relevant optional protocol or made the appropriate declaration on ratifying the main instrument. See Annex 7

38. For details on how to make a complaint using these mechanisms, see

www2.ohchr.org/english/bodies/petitions/individual.htm and www.crin.org/law/index.asp#co

39. Campaign details and petition is available on the Child Rights Information Network website at www.crin.org/petitions/petition.asp?petID=1007