

## 2. HUMAN RIGHTS DISCOURSE ON CORPORAL PUNISHMENT

Since the 1980s, the discourse on corporal punishment in international and European human rights law and policy has increasingly moved to a consensus in favour of the abolition of such punishment, in schools and care institutions, as well as in private homes. This section briefly considers the human rights instruments and policy documents that have played the primary role in the emergence of this consensus.

The outlawing of corporal punishment in international human rights law predates the Convention on the Rights of the Child 1989 ('CRC'). Article 7 of the International Covenant on Civil and Political Rights 1976 ('ICCPR') provides that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. The Human Rights Committee ('HRC') has stated that this provision applies to acts causing physical as well as mental suffering, and that it includes corporal punishment. It has highlighted the fact that the provision 'protects, in particular, children [and] pupils ... in teaching ... institutions' (HRC, 1992, para 5). The Committee on Economic, Social and Cultural Rights ('CESCR') has likewise called for the abolition of corporal punishment in schools, contending that it violates children's right to dignity (CESCR, 1999, para 41; see Freeman, 2010, p. 231).

Although the CRC itself does not regulate corporal punishment expressly, the Committee on the Rights of the Child has contended that several provisions of the CRC require its elimination. For instance, article 19.1 requires states to adopt '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 ... while in the care of parent(s), legal guardian(s) or any other person who has the care of the child'. In addition, article 28.2 imposes a duty on states to make sure that discipline in schools is imposed in a way that is 'consistent with the child's human dignity' as well as the provisions of the CRC itself. Drawing on these provisions, the Committee on the Rights of the Child has stated that corporal punishment not only violates children's right to dignity in article 28.2, but also constitutes 'physical or mental violence' that infringes article 19.1 (Committee on the Rights of the Child, 2006, paras 7, 18). Consequently, states are under a duty to eliminate it (Committee on the Rights of the Child, 2006, para 22).

The Council of Europe has increasingly aligned itself with the international movement against corporal punishment. Article 14 of Recommendation No. R (90) 2 of the Committee of Ministers to Member States on Social Measures concerning Violence within the

Family (1990) condemns corporal punishment within the context of education. Furthermore, the European Parliamentary Assembly, noting that corporal punishment violates children's rights to dignity, physical integrity and equal protection of the law, has called on the Council of Europe to initiate a campaign across Europe for the elimination of corporal punishment (Parliamentary Assembly, 2004, paras 5,7). The Council of Europe responded to this call in 2006 by launching a programme entitled 'Building a Europe for and with Children', the objective of which is to eliminate all violence against children (Council of Europe, 2007, pp. 34-35). More recently, it committed itself to meeting the 2009 deadline set by the United Nations for abolishing corporal punishment in Europe (Council of Europe, 2007, p. 7). However, due to the persistent failure on the part of several states, including the UK, to outlaw corporal punishment by parents, this commitment has not been realised (Freeman, 2010, 225-226).

The ECtHR has developed a jurisprudence on corporal punishment that parallels the discourse of the Council of Europe. In a series of judgments commencing in the 1980s, it has progressively outlawed corporal punishment as a criminal sanction,<sup>1</sup> as well as in schools<sup>2</sup> and the family.<sup>3</sup>

The international and European legal landscape is thus unequivocally committed to the abolition of the corporal punishment of children, regardless of the context in which it occurs. As appears from the foregoing, the condemnation of this form of violence against children is founded entirely on a human rights discourse, namely the importance of upholding children's rights to dignity, physical integrity and equal protection of the law. Despite the Christian origins of human rights (see, e.g. Save the Children Sweden et al., 2011, p. 4), religious beliefs do not feature in this discourse. In this respect, as in many others, the principle of secularism has trumped religion.

### **3. THE CONSTRUCTION OF 'RELIGIOUS BELIEF' CONCERNING CORPORAL PUNISHMENT**

Drawing on ECtHR and English case-law, this section contends that the secularism that informs contemporary human rights discourse on corporal punishment has resulted in the courts' acceptance of dominant religious discourses in support of corporal punishment and the exclusion of competing religious discourses that favour the liberation of the child.

The primacy of the principle of secularism in the jurisprudence of the ECtHR is evident in recent judgments dealing with the right to religious freedom in article 9, as well as article 2 of Protocol 1, of the European Convention for the Protection of Human Rights and

Fundamental Freedoms 1950 ('ECHR').

Article 9 provides as follows:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

Article 2 of Protocol 1 provides that:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.

In *Sahin v Turkey*,<sup>4</sup> the Grand Chamber of the ECtHR held that, although the Turkish government had violated the applicant's right to freedom of religion and freedom to manifest her religion by banning the Islamic headscarf at Turkish universities, this violation constituted a justifiable limitation in terms of article 9.2. In the course of its decision, the Grand Chamber emphasized the centrality of secularism to 'the values underpinning the Convention', adding that a standpoint that does not respect secularism 'will not enjoy the protection of Art. 9 of the Convention' (para 114).

This secularist interpretation of the ECHR also informs the case law concerning the relationship between article 9 and/or article 2 of Protocol 1, on the one hand, and the injunction against corporal punishment, on the other. In *Seven Individuals v Sweden*,<sup>5</sup> the applicants, members of a Swedish church, believed that Biblical precepts dictated the use of corporal punishment for children. They argued that the criminalization of corporal punishment in Swedish law violated their rights to respect for private and family life and freedom of religion in terms of articles 8 and 9 ECHR respectively, as well as their right, in terms of article 2 of Protocol 1, to have their children educated in accordance with their religious beliefs. The then European Commission found no violations of any of these articles, accepting the Swedish government's contention that it was entitled to pursue the 'humanitarian objective' of upholding children's rights and respect for children (p. 116). In the course of its decision, the European Commission did not examine the nature of the parents' religious

beliefs, but dismissed them in favour of the state's pursuit of a secularist humanitarian agenda.

The principle of secularism, and its impact on the courts' consideration of religious beliefs, has recently come to the fore more strongly in the House of Lords' decision in *R (on the application of Williamson) v Secretary of State for Education and Employment*.<sup>6</sup> The claimants, parents and teachers from a number of Christian schools, believed that Biblical injunctions required the use of corporal punishment in schools. They justified this belief by reference to a number of Biblical passages, including the key passage in Proverbs 13:24 that 'He who spares the rod hates his son, but he who loves him is diligent to discipline him' (para 10). Accordingly, they argued that the prohibition of corporal punishment in English schools violated article 9 ECHR, as well as article 2 of Protocol 1 ECHR. Lord Nicholls, speaking for the majority of the court, found that, as the degree of corporal punishment advocated by the claimants was not sufficiently serious to constitute a violation of article 3 (the right to freedom from torture or inhuman or degrading treatment or punishment) or article 8 (the right to respect for private and family life), their belief fell within the purview of article 9 (para 27). Furthermore, by authorizing teachers to use corporal punishment of this nature, parents are manifesting their religious beliefs (article 30). Consequently, the claims engaged article 9 (para 35). However, he found that the state's interference with article 9 due to its prohibition of corporal punishment was a justifiable limitation of the claimants' right in terms of article 9.2 ECHR (paras 48-50).

The significance of this decision for the purposes of the present article inheres in the courts' unwillingness to engage in an analysis of the tenets of the Christian faith as regards the imposition of corporal punishment. Lord Nicholls stated that:

... it is not for the court to embark on an inquiry into the asserted belief and judge its "validity" by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion (para 22).

The court, as the impartial and objective body constituted by the state to adjudicate claims in terms of the ECHR, cannot deal with the subjectivity and lack of empirical foundation of supernatural beliefs. This approach is not unique to the House of Lords, but flows from the jurisprudence of the ECtHR (para 22),<sup>7</sup> and is founded on the principle of secularism that informs the ECHR.

It is the view of the present writer that the consequence of this

retreat into objectivity, and the concomitant refusal to examine the content of the religious belief in corporal punishment, has had the effect of subsuming conservative Christian interpretations of Biblical texts supporting corporal punishment into legal discourse and excluding competing interpretations that oppose corporal punishment. In this way, conservative interpretations are clothed with the power of legal discourse and become representative of the Christian belief in this respect. Consequently, a dichotomy emerges between religion, on the one hand, which is represented as favouring corporal punishment, and secular human rights, on the other, which outlaw it. The emphasis on children's rights in the judgement of Baroness Hale (paras 80, 84) to justify the violation of the claimants' right to religious freedom consolidates this dichotomy and affirms the dominance of secularism over religious belief. It is contended in section 5 below that this dichotomy between the religious and the secular has polarized faith communities and secular authorities in the UK and Ireland in a way that hinders state efforts to eliminate corporal punishment.

This dichotomization of the religious and the secular is not an inevitable consequence of the adjudication of human rights disputes. Had the court been prepared to consider the content of the tenets of various strands of Christianity regarding corporal punishment by permitting the adduction of expert testimony, for instance, competing discourses on corporal punishment would have been clothed with the power of legal discourse, resulting in the refiguring of the relation between the religious and the secular in a way that emphasizes similarities between religious precepts and the rights of the child.

#### **4. COMPETING RELIGIOUS DISCOURSES ON CORPORAL PUNISHMENT**

This section explores these competing discourses, drawing on Christian and Islamic scholarship. As appears from section 3 above, the book of Proverbs has been the foundation of Christian arguments in favour of corporal punishment (see Save the Children, et al., 2011, pp. 28-29). In addition to the above-quoted passage, other passages from Proverbs appear to enjoin corporal punishment. For instance, Proverbs 29:15 reads 'The rod and reproof give wisdom: but a child left to himself brings shame to his mother'. In addition, Proverbs 23:13-14 provides:

Do not withhold discipline from a child, if you beat him with a rod he will not die. If you beat him with the rod you will save his soul from Sheol.

However, the interpretation of such provisions is contested, with several scholars contending that their promotion of corporal

punishment is not as unequivocal as conservative Christians suggest. Martin has put forward a two-fold argument in this respect. First, he has shown that the Hebrew word translated as 'child' in the book of Proverbs actually refers only to male children above the age of puberty, thereby excluding girls and younger children from the ambit of corporal punishment (Martin, 2006, pp. 49, 80). Second, he has contended that, because Christians believe that Biblical texts are cemented by the Gospel, the limited permissibility of corporal punishment in Proverbs must be read in the light of the New Testament (Martin, 2006, p. 56). In view of the fact that there is no reference in any of the books of the New Testament to the passages in Proverbs favouring corporal punishment, Martin maintains that the use of corporal punishment falls 'outside of the culture of Christianity' (Martin, 2006, pp. 90, 99). By contrast, a Gospel-centred Christianity focuses on the approach adopted by Jesus to children. For instance, Jesus is reported to have stated 'Let the children come unto me; for to such belongs the Kingdom of God' (Luke 18:16). In addition, he is recorded as having said that 'Whoever receives a little child in my name receives me' (Matt. 18:15; see *Save the Children, et al., 2011, p. 38*). Against the backdrop of such an interpretation of Biblical texts, religious leaders, such as Catholic Archbishop Aymond, have argued that Catholic teaching does not permit corporal punishment (*Save the Children, et al., 2011, p. 64*).

Unlike Biblical texts, there is no express reference in the Q'uran or any Hadiths to the permissibility of corporal punishment. By contrast, a survey of Islamic texts reveals the centrality of the 'no harm' principle. According to Abu Hurairah (r.a.), the Prophet Muhammad (s.a.w.s.) said: 'The whole of the Muslim is forbidden to another Muslim; his blood, his property and his honour' (*Al-Azhar University & UNICEF, 2005, p. 61*). Consequently, any aggression to the body, including 'smacking or other forms of corporal harm,' is prohibited by the Shari'ah (*Al-Azhar University & UNICEF, 2005, pp. 60-61*). In relation to children, the Prophet Muhammad (s.a.w.s.) enjoined mercy and kindness. According to Al-Tirmidhi, Rasullullah (s.a.w.s.) is reported to have said 'He is not one of us ... who shows no mercy to our young' (*Al-Azhar University & UNICEF, 2005, p. 54*). He is also reported to have said 'Play with the child for seven years; discipline him (or her) for seven years; accompany him (or her) for seven years; and then release him (or her) to lead his (or her) own life' (*Al-Azhar University & UNICEF, 2005, p. 56*). In addition, there is no reference in the Qu'ran to the Prophet (s.a.w.s.) hitting a child (*Save the Children, et al., 2011, p. 39*).

The impermissibility of administering corporal punishment to children,

coupled with the Prophet's (s.a.w.s.) injunctions to show kindness and mercy to children, have led scholars to contend that the Shari'ah encompasses children's rights (Save the Children, et al., 2011, p. 19).

These Islamic precepts, as well as progressive interpretations of Biblical texts, constitute rich sources for infusion into legal discourse. If, as suggested in section 3 above, the courts were to be willing to relinquish the aperspectivity demanded by the principle of secularism, and permit the adduction of expert testimony on the content of religious beliefs drawn from Christianity and Islam (among other religions), the dichotomy between the religious and the secular may be reconfigured in a manner that highlights the similarities between religious precepts and the rights of the child.

Furthermore, the infusion of such precepts into government policy regarding corporal punishment will do much to undermine the polarization of faith communities and secular authorities in this respect. The 'desecularisation' of government policy is considered in section 6 below.

## 5. CORPORAL PUNISHMENT IN FAITH COMMUNITIES

However, in order to demonstrate the nature of this polarization between faith communities and government, this section briefly considers the incidence and dynamics of corporal punishment in faith-based institutions, using the examples of Catholic schools in Ireland and *madrassahs* in the UK.

Revelations of endemic child abuse in Catholic schools and other institutions in Ireland in the last decade of the twentieth century provoked protracted controversy, capturing widespread media attention, and prompting a Commission of Inquiry into its nature and extent. The Commission was established in 2000, and conducted an inquiry which spanned almost a decade. Reporting in 2009, the Commission documented the incidence of physical and sexual abuse at the hands of teachers, priests, monks, nuns, care workers and other persons at a range of Catholic institutions (Commission to Inquire into Child Abuse 'CICA', 2009). It found that, at several of these institutions, such as the Christian Brothers' School in Letterfrack, County Galway, the corporal punishment administered was 'severe, excessive and pervasive' (CICA, 2009, p. 4). Victims at most institutions reported that their daily lives were riven with physical abuse to such an extent that it was not only institutionalized, but normalized violence (CICA, 2009, p. 13). Many of the religious orders colluded in the abuse by moving 'violent Brothers ... from one school to another', enabling them to persist in the abuse (CICA, 2009, p. 5). Even more worryingly, the orders' violations of the policy

requirements governing the administration of corporal punishment were known to the Department of Education, who turned a blind eye to these violations (CICA, 2009, p. 20).

For the purposes of the present article, it is noteworthy that the Commission, in the course of making recommendations for the elimination of corporal punishment and other forms of abuse at these institutions, failed to advert to religious precepts. Instead, its recommendations were underpinned by the principle of secularism, focusing on the importance of respect for children's rights, particularly their dignity (CICA, 2009, p. 28). Given the reality that the primary perpetrators of the abuse were priests or members of Catholic religious orders, recommendations informed by the competing religious discourses against corporal punishment discussed in section 4 above, particularly the unequivocal statement by a member of the Catholic religious leadership to the effect that Catholicism does not permit corporal punishment, would have been more effective in galvanizing these institutions into positive action against such punishment. By contrast, recommendations drawn from secularism perpetuate the polarity between Church and state, which the Church has become reticent to bridge (see, for instance, *Gaudium et Spes*, (1965), for the post-Vatican II attitude to the separation of Church and state). The persistence of this polarity feeds the Church's predilection for secrecy rather than engendering the impetus to change, as the continued stream of revelations of child abuse in Catholic institutions in other countries, such as Australia (see Zwartz, 2011) and Belgium (see Traynor, 2010), demonstrates.

While there is also evidence of corporal punishment administered by religious instructors in *madrassahs* in the UK, unlike the abuse in Catholic institutions, it is not endemic or institutionalized. However, the rate of corporal punishment is significant, with an estimated 40 per cent of religious instructors hitting or scolding children (Muslim Parliament of Great Britain, 2006). In order to address this problem, the Muslim Parliament of Britain has called on the government to 'establish a national registration scheme for [*madrassahs*]', to ensure that *madrassahs* are monitored by local authorities, and to provide training to staff (Muslim Parliament of Great Britain, 2006). Unfortunately, the governmental involvement envisaged by the Muslim Parliament of Great Britain is entirely secular in nature. No mention is made of the importance of infusing government policy with discourses flowing from the Islamic texts quoted in section 4 above in order to highlight the inconsistency between corporal punishment and Islamic law. In view of the already fragile relations between Muslim communities and the government in the aftermath of the 9/11 and 7/7



terrorist attacks (see, for example, Chakraborti, 2007), this ejection of the religious in favour of the secular is likely to exacerbate the polarity between Muslim communities and the government more significantly than is the case with Catholic institutions.

#### 6. 'DESECULARISING' THE STATE'S RESPONSE

It is the contention of the present author that the dismantling of these polarities and, concomitantly, the effective elimination of corporal punishment in faith-based educational institutions, requires English and Irish policymakers to emphasise religious discourses opposing corporal punishment instead of, or at least in conjunction with, secular arguments concerning children's rights. In consequence, faith communities will be more favourably disposed to changing their attitudes and practices in regard to corporal punishment.

The *raison d'être* of this contention differs from that of religiously inspired human rights instruments such as the Kyoto Declaration (2006). This declaration is steeped in the language of human rights, advocating the promotion of 'the child as a person with rights and dignity' and calling on 'governments to adopt legislation to prohibit all forms of violence against children, including corporal punishment, and to ensure the full rights of children, consistent with the Convention on the Rights of the Child and other international and regional agreements' (paras 2, 6). While it is true that the signatories to the Kyoto Declaration have pledged to employ 'religious texts to provide good examples that can help adults to stop using violence in dealing with children' (para 2), the secular human rights discourse of the instrument clearly trumps its religious content. Furthermore, the use of religious precepts is restricted to the activities of religious leaders, who aim to act in collaboration with governments whose policies are entirely secular in nature.

By contrast, this paper envisages a process of state-controlled monitoring, investigation and awareness-raising that draws on religious texts and discourses in addition to, or even instead of, secular human rights instruments as authorizing its interventions. It requires the state to reconfigure its post-Enlightenment objectivity by incorporating elements of religious precepts into its policies in regard to corporal punishment in faith communities, with the aim of securing a greater level of allegiance by members of such communities to its campaign to eliminate corporal punishment. The infusion of such precepts is particularly likely to be beneficial in state interactions with Muslim communities in the current climate of polarity and lack of trust that has been generated by state counter-terrorist policy.

## 7. CONCLUSION

This paper has argued that the dichotomy between the secular and the religious that informs the responses of the government and the courts to corporal punishment in faith-based schools and other similar institutions, such as *madrassahs*, has exacerbated the polarization of faith communities and secular authorities, thereby hindering the effectiveness of state efforts to eliminate such punishment. This polarization has played itself out in cementing the culture of secrecy in the Catholic Church concerning child abuse. In addition, it has entrenched the 'siege mentality' of Muslim communities that has arisen due to the state's incursions into Muslim space that flow from government counter-terrorism policy. In order to reconfigure these polarized relations, the paper has contended that state policy, in both the UK and in Ireland, ought to be infused with the progressive Christian and Islamic precepts concerning children's rights that flow from religious discourses that have hitherto been excluded from the discourse of the law. To speak in the language of religion rather than secularism will facilitate the breaking down of barriers between faith communities and the state, generating the possibility of greater adherence by faith communities to the state's proscriptions of corporal punishment in schools. While the infusion of government policy with religious precepts may sound warning bells for the British and Irish governments, invoking images of the Reformation as well as the conflict in Northern Ireland, it resonates with, and gives more persuasive content to, their stated commitment to multi-culturalism in a diverse society.

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1. See *Tyrer v. UK* [1978], ECHR 5856/72.
  2. See *Campbell & Cosans v. UK* (1983), 13 EHRR 441.
  3. *A v. UK* (1999), 27 EHRR 611.
  4. (2007) 44 EHRR 5.
  5. Application No. 8811/79, 13 May 1982.
  6. [2005], 2 AC 246.
  7. See *Metropolitan Church of Bessarabia v. Moldova* (2001), 35 EHRR 306, para 117.