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CORPORAL PUNISHMENT AS A MEANS OF CORRECTING CHILDREN

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INTRODUCTION

Societies have traditionally allowed parents to impose corporal punishment on their minor children. This power, which the Québec Civil Code called "the right of correction"[1], could also be exercised in most cases by parental delegates and the child's educators. Many countries, however, prohibited corporal punishment in schools – as early as 1793 in the case of Poland. Other European countries followed the Polish example in the 19th century. Today, corporal punishment in schools is banned in most European countries, in several African, Asian and South Pacific countries, and in at least 27 American states. The right of parents to inflict corporal punishment on their children was first abolished by Sweden in 1979, then by Finland (1983), Norway (1987), Austria (1989), Cyprus (1994), Denmark (1997) and, just recently, by Croatia and Latvia. Other countries, including Germany[2], are on the point of prohibiting all forms of corporal punishment.

Despite debate dating back more than twenty years, Canada's criminal law continues to allow certain individuals to use this method of discipline, by providing a means of defence established in section 43 of the *Criminal Code*[3] :

> "Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case

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1 Art. 245 C.C.L.C. : "The father, and in his default, the mother of an unemancipated minor have over him a right of reasonable and moderate correction, which may be delegated to and exercised by those to whom his education has been entrusted."

Art. 651 C.C.Q. : "The person having parental authority has a right to correct the child with moderation and within reason."

2 ASSOCIATED PRESS, "Germany to Join Europe's Child-Protecting Nations – Considers Anti-Slap Law", October 14, 1998. Germany, which already prohibits degrading disciplinary measures, plans to outlaw all corporal punishment, including spanking and slapping.

3 Another exception, stipulated in section 44 of the *Criminal Code*, continues to protect the master or officer in command of a ship, who may use corporal punishment for the purposes of maintaining order or discipline. Until 1955, employers who used corporal punishment on their apprentices were also able to invoke the same defence as parents and educators.

> may be, who is under his care, if the force does not exceed what is reasonable in the circumstances."

The Supreme Court of Canada stated in *Ogg-Moss* that section 43 produced the following effects : "It exculpates the use of what would otherwise be criminal force by one group of persons against another. It *protects* the first group of persons, but, it should be noted, at the same time it *removes* the protection of the criminal law from the second."[4]

Because vulnerable individuals make up this second group, the use of corporal punishment in general, and section 43 in particular, has been called increasingly into question in recent years, especially by professionals working with children (paediatricians, nurses, social workers, psychologists and teachers). More recently, several Canadian organizations devoted to the promotion and defence of children's rights have joined the movement in order to obtain greater protection for children's rights.

It is in this context that the Commission des droits de la personne et des droits de la jeunesse, whose mission is to ensure that the rights of children are protected and upheld[5], has undertaken to review the place given to the right of correction in Québec law. In doing this, it hopes to contribute to ongoing reflections in Canadian society on section 43 of the *Criminal Code.*

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4 *Ogg-Moss* v. *The Queen*, [1984] 2 S.C.R. 173, 183 (Dickson J.), italics in the text of the ruling. In this case, a mental retardation counsellor accused of beating an adult patient invoked section 43 as his defence. The Court concluded that the defence did not apply, in particular because the patient was not a child.

5 *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, s. 57.

1 THE RIGHT OF CORRECTION IN QUÉBEC LAW

Parents, vested with parental authority, have in respect of their children, the right and the duty of custody, supervision and education. Until 1994, the *Civil Code of Québec* also granted them the right of reasonable and moderate correction over the child[6], a right which the 1866 codifiers considered necessary for the exercise of their educational duties[7]. The fact that the provision expressly granting this right has been removed may suggest that the right itself has disappeared from our legal system. However, as we will see, not everyone shares this conclusion. This raises the question as to whether the right of correction violate the rights protected by Québec's Charter.

1.1 A Disappearing Right

One of the changes brought about by the 1991 Civil Code reform was the repeal of the provision authorizing the right of correction. But does this entail that the right of correction itself was abolished? The Minister's comments are ambivalent on this subject : "The former rule of law that granted parents a right of moderate and reasonable correction over the child has not been maintained. The general rule on the right and duty of education appears to be sufficient"[8]. The 1991 legislator therefore followed the approach adopted by the Civil Code Revision Office in 1978. It had recommended removal of the provision covering the right of correction, on the basis that this right was included in the right of supervision[9].

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6 Art. 651 C.C.Q. (1980). The provisions concerning family law were contained in the *Civil Code of Lower Canada*, adopted in 1866, and were codified in the *Civil Code of Québec* in 1980 before being recodified in the *Civil Code of Québec* in 1991.

7 Gérard TRUDEL, *Traité de droit civil du Québec*, Montreal, Wilson et Lafleur, 1942, vol. 2, p. 184.

8 GOUVERNEMENT DU QUÉBEC, MINISTÈRE DE LA JUSTICE, *Commentaires du ministre de la Justice. Le Code civil du Québec*, Les Publications du Québec, 1993, vol. 1, p. 351 (our translation).

9 *Report on the Québec Civil Code*, Vol. II, Québec, Official Publisher, 1978, art. 353.

The courts have generally controlled the reasonable or excessive nature of the exercise of the right of correction by a parent through the application of the provisions of subparagraph (g) of section 38 of the *Youth Protection Act*[10], concerning physical ill-treatment[11]. The court sometimes accepts, as a ground for establishing danger to the child's security or development, the risk created by the behaviour or way of life of the parents, as stipulated in subparagraph (*e*) of section 38[12]. When an educator exercises the right to correct, legal consideration tends to take place in the context of an action for civil liability[13] or of penal proceedings[14].

None of the reported judgments rendered since 1994 appear to have confirmed the Minister of Justice's interpretation. Two of the decisions refer to the existence of a parental right of moderate correction over their children[15], but did not state the basis for this.

On the other hand, a number of rulings have stipulated that the right of correction is not recognized anymore in Québec's civil law since the new Civil Code came into force : "In 1994, even the right of reasonable correction provided for in article 651 of the Civil Code of Québec disappeared from the new Civil Code on January 1, 1994. In our view […] the right of discipline granted to parents over their children no longer explicitly admits this right of physical correction, even when moderate and reasonable […]".[16]

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10 R.S.Q., c. P-34.1.

11 See for example *Protection de la jeunesse-238*, J.E. 87-162 (T.J.); *Protection de la jeunesse-302*, [1988] R.J.Q. 923, 926 (T.J.); *Protection de la jeunesse-553*, J.E. 92-1079 (C.Q.). See, however, *R.* v. *Laflamme*, J.E. 92-558 (C.Q.).

12 *Protection de la jeunesse-502*, J.E. 91-943 (C.Q.).

13 See for example *Ruest* v. *Provencher*, [1968] R.L. 378 (C.P.); *Poupart* v. *C.E.C.M.,* [1976] C.P. 224.

14 *Supra*, section 2.1 : The Scope of Section 43 of the *Criminal Code*.

15 *Protection de la jeunesse-712*, J.E. 94-1404 (C.Q.), p. 7 of ruling; *Protection de la jeunesse-955*, J.E. 98-1900 (C.Q.), p. 4 of ruling.

16 *Protection de la jeunesse-681*, J.E. 94-683 (C.Q.), p. 20 of ruling (our translation). See also *Protection de la jeunesse-717*, J.E. 94-1514 (C.Q.), p. 12 of ruling and *Protection de la jeunesse-905*, J.E. 97-1369 (C.Q.), pp. 3-4 of ruling.

This interpretation, it is true, has not received unanimous support from doctrinal authors. While Professor Monique Ouellette wrote that "the right of moderate and reasonable correction, a relic of ancient times and past morals, has disappeared from the Code"[17], Professor Renée Joyal was less categorical : "Although the explicit reference to this right has disappeared, it is reasonable to think that the right itself still exists, on the same conditions, as an accessory to the rights of custody, supervision and education. For the right to disappear, we believe an express provision to this effect would have been required. The removal of the reference nevertheless suggests that the legislator prefers to 'tolerate' this educational method on certain conditions, rather than authorizing it explicitly."[18]

It would be appropriate for the legislator to lift the ambiguity surrounding the existence of the right of correction in Québec's civil law. The Commission, for its part, believes the abolition of the right of correction would be a development that, as we will see hereinafter, is consistent with the principles of the *Charter of Human Rights and Freedoms*.

Where do teachers and other educators stand? Before 1977, the right to inflict corporal punishment could be delegated by the holder of what was then called "paternal rights" to the persons to whom the child's education had been entrusted[19]. Since then, however, only the custody, supervision and education of the child can be delegated[20]. From 1977 to 1994, the Civil Code did not allow the right of correction to be delegated to teachers, educators, coaches and other persons responsible for the education or supervision of the child. One of the disadvantages of an interpretation to the effect that the right of correction is henceforth

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17 Monique OUELLETTE, "Livre deuxième : De la famille" in BARREAU DU QUÉBEC AND CHAMBRE DES NOTAIRES DU QUÉBEC (eds.), *La réforme du Code civil*, vol. 1, Sainte-Foy, P.U.L., 1993, p. 149, page 181 (our translation). This opinion is shared by Jean-François Boulais : *Loi sur la protection de la jeunesse, texte annoté,* 3rd edition, Montreal, SOQUIJ, 1995, p. 177, note 38/139.

18 Renée JOYAL, *Précis de droit des jeunes,* vol. 1, 2nd ed., Cowansville, Yvon Blais, 1994, pp. 62-63 (our translation).

19 Art. 245 C.C.L.C., before it was amended by the *Act to amend the Civil Code*, S.Q. 1977, c. 72, s. 5.

20 Art. 245 and 245*b* C.C.L.C. (1977); art. 649 C.C.Q. (1980), replaced by art. 601 C.C.Q. (1991).

included in the duty of education would be to make it possible once again for third parties to exercise that right.

However, other provisions govern teachers and educators. The *Education Act* completely excludes the use of corporal punishment in schools[21]. On the other hand, although the former regulation governing home day care centres also prohibited the use of corporal punishment[22], the new *Regulation respecting childcare centres*[23] is silent on this subject. Should this be interpreted as a step backwards, via an implicit authorization, or should we instead7 conclude that it is no longer necessary to maintain a legislative prohibition? We favour the latter hypothesis, since no other provision relating to educators in childcare centres grants this power.

Lastly, while the *Youth Protection Act* does not expressly prohibit corporal punishment, unlike Ontario's *Child and Family Services Act*[24], it is nevertheless highly unlikely that the use of such disciplinary measures by foster families or rehabilitation centres would be considered to comply with the provisions of sections 2.4, 3 and 10 of the Act.

The change in Québec's legislation concerning the right of parents and people entrusted with the custody of the child is consistent with a growing acknowledgement that the children are

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21 *Education Act*, R.S.Q., c. I-13.3, s. 76 :
"The governing board is responsible for approving the rules of conduct and the safety measures proposed by the principal.

The rules and measures may include disciplinary sanctions other than expulsion from school or corporal punishment."

22 *Regulation respecting home day care agencies and home day care services,* O.C. 1669-93, December 1 1993, (1993) 125 G.O. II 6863, s. 54 :
"A person recognized as a person responsible for home day care may not use corporal punishment on a child or humiliate, disparage or belittle him verbally, emotionally or physically."

23 O.C. 1071-97, August 20 1997, (1997) 129 G.O. II 5592.

24 R.S.O., 1990, c. C-11, s. 101 :
"No service provider or foster parent shall inflict corporal punishment on a child or permit corporal punishment to be inflicted on a child in the course of the provision of a service to the child."

subjects of law. As such, children are entitled to expect that their fundamental rights – those granted to every individual by the *Charter of Human Rights and Freedoms* – will be respected.

1.2 A Development in Conformity with the Québec Charter

The imposition of corporal punishment may infringe the right to personal inviolability of the person who suffers the punishment. It also infringes his or her right to psychological inviolability, security and dignity. These fundamental rights are granted to every individual, regardless of age, by sections 1[25] and 4[26] of the Charter.

The Supreme Court has stated that the protection of the right to inviolability granted under section 1 referred to violations with lasting consequences[27]. Under this interpretation, corporal punishment does not necessarily threaten a person's inviolability. However, it sometimes degenerates into ill-treatment and can even lead to the death of a child[28].

Corporal punishment also threatens the right to psychological inviolability, since it is likely to produce psychological repercussions. Many studies have shown that corporal punishment is harmful in the long term as well as in the short term. For example, it has been found that

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25 *Charter of Human Rights and Freedoms*, s. 1 :
"Every human being has a right to life, and to personal security, inviolability and freedom."

26 *Charter of Human Rights and Freedoms*, s. 4 :
"Every person has a right to the safeguard of his dignity, honour and reputation."

27 *Québec (Public Curator)* v. *Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, 253 (L'Heureux-Dubé J.), hereinafter "Hôpital St-Ferdinand".

28 "Clinical work with abusive parents has shown that much physical abuse starts as an attempt to correct and control through corporal punishment". Murray A. STRAUS, *Beating the Devil Out of Them : Corporal Punishment in American Families*, New York, Lexington Books, 1994, p. 85; Ellen E. WHIPPLE and Cheryl A. RICHEY, "Crossing the Line From Physical Discipline to Child Abuse : How Much is Too Much?", (1997) 21 *Child Abuse & Neglect* 431, 432-433. See also Nanci M. BURNS, *Literature Review of Issues Related to the Use of Corrective Force Against Children*, Ottawa, Canadian Department of Justice, June 1993; Joan E. DURRANT and Linda ROSE-KRASNOR, *Corporal Punishment : Research Review and Policy Recommendations*, Ottawa, Health Canada, March 1995; Anne McGILLIVRAY, "He'll learn it on his body : Disciplining childhood in Canadian law", (1997) 5 *International Journal of Children's Rights* 193.

corporal punishment can increase aggressive behaviour among children and teenagers, and that this effect is maintained into adulthood. It therefore appears to be a factor in family violence and in juvenile as well as adult delinquency[29], and a risk factor in the development of depressive and suicidal behaviour[30].

Corporal punishment can also violate the right to security. In *Augustus* v. *Gosset*, the Superior Court defined the right to security as including the right to be protected from the threat of physical abuse as well as from the abuse itself[31]. One judge, in her assessment of the moderate and reasonable nature of corrections that included blows with a belt inflicted to try to force a child to improve his marks at school, made this distinction : "We cannot say that his physical inviolability was really altered, but we can state unequivocally that the child found it very difficult to live with the fear of being punished if his performance did not satisfy his mother."[32]

Corporal punishment violates the child's dignity, partly due to the humiliation he or she is likely to feel, but mainly due to the lack of respect inherent in the act. The Supreme Court has in fact ruled that the right to dignity stipulated in section 4 of the Québec Charter grants protection against "interferences with the fundamental attributes of a human being which violate the respect to which every person is entitled simply because he or she is a human being and the respect that a person owes to himself or herself"[33]. Since dignity is not necessarily defined on

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29 Murray A. STRAUS, "Discipline and Deviance : Physical Punishment of Children and Violence and Other Crime in Adulthood", (1991) 38 *Social Problems* 101; M.A. STRAUS, *Beating the Devil Out of Them, supra* note 28, pp. 99ff; Zvi STRASSBERG, Kenneth A. DODGE, Gregory S. PETITT and John E. BATES, "Spanking in the Home and Children's Subsequent Aggression Toward Kindergarten Peers", (1994) 6 *Development and Psychopathology* 445; Murray A. STRAUS, David B. SUGARMAN and Jean GILES-SIM, "Spanking by Parents and Subsequent Antisocial Behaviour of Children", (1997) 151 *Archives of Pediatrics and Adolescent Medicine* 761. These studies have, however, been criticized, in particular by Robert E. LARZELERE. See among others "A Review of the Outcomes of Parental Use of Non Abusive or Customary Physical Punishment", (1996) 98 *Pediatrics* 824.

30 M.A. STRAUS, *Beating the Devil Out of Them*, *supra* note 28, pp. 67ff.

31 *Augustus* v. *Gosset*, [1990] R.J.Q. 2641, 2652, appeal allowed in part on other points : [1995] R.J.Q. 335 (C.A.), confirmed in [1996] 3 S.C.R. 268.

32 *Protection de la jeunesse-302*, *supra* note 11, 926 (our translation).

33 *Hôpital St-Ferdinand*, *supra* note 27, 256.

the basis of the victim's awareness of the violation[34], both young children and teenagers are likely to be the victims of violations of their right to dignity. In 1996, an Italian Supreme Court decision based on the child's right to dignity had the effect of prohibiting parents from applying corporal punishment[35].

If the Québec courts were to confirm the theory that the right of correction still exists by virtue of the duty of education and supervision, the power to correct would terminate, like all other attributes of parental authority, when the child reaches full age[36], i.e. 18 years of age[37]. Hence, since age is the criterion being used to establish against whom the duty of correction may be exercised, it follows that the resulting violation of fundamental rights is also discriminatory in nature. However, as this distinction would arise from a measure provided by law, it would not contravene section 10 of the Québec Charter[38].

In addition, corporal punishment may contravene the child's right to the protection and security that his or her parents or the people standing in the place of the parents may provide. The Charter of Human Rights and Freedoms guarantees this right, in section 39.

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34 *Hôpital St-Ferdinand*, *ibid*., 256-257.

35 The *Cambria* case is summarized in Irwin A. HYMAN, Fernando CAVALLO, Theresa A. ERBACHER, Joyce SPANGLER and Joseph J. STAFFORD III, "Corporal Punishment in America : Cultural Wars in Politics, Religion and Science", (1997) 17 *Children's Legal Rights Journal* 36, 40.

36 Art. 598 C.C.Q.

37 Art. 153 C.C.Q.

38 *Charter of Human Rights and Freedoms*, s. 10 :
"Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on […] age except as provided by law […].

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such a right."

2 THE RIGHT OF CORRECTION IN CRIMINAL LAW

Contrary to the rules that used to exist in civil law, criminal law does not grant parents or educators the right to correct a child. Instead, it provides a means of defence, in the absence of which a person correcting a child by means of physical force would be exposed to prosecution for assault, an offence defined in section 265 of the *Criminal Code* :

> "S. 265 A person commits an assault when
>
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;"

The defence based on the right of correction may also be invoked in a prosecution for bodily harm[39].

In order to understand why section 43 of the *Criminal Code* is being called into question, it is necessary to look at the scope of the provision, which was codified in Canadian law in 1892.

2.1 The Scope of Section 43 of the *Criminal Code*

Section 43 of the *Criminal Code* defines the framework within which a defence based on the right of correction may be applied :

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

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39 See for example *Fonder* v. *The Queen*, J.E. 93-467 (C.A.). The offence is defined in section 267*b*) of the *Criminal Code*.

Recourse to this section is subject to three conditions relating to the people who may invoke the section, the purpose of the corporal punishment, and the proportional nature of the violation.

2.1.1 Protected Individuals

Under section 43, only the child's schoolteachers, parents and persons standing in the place of the parents may invoke the defence.

For example, it was decided that a junior kindergarten teacher who bit a child to make him understand that he should not bite other children was not protected under section 43. She was not the child's teacher, nor was she otherwise responsible for him. The statutory defence is valid only for the parents or the persons to whom the parents delegate their authority[40].

The courts are not always as restrictive, and have often acknowledged the right of school bus drivers to correct children[41]. An educator in a rehabilitation centre has also been able to invoke the section 43 defence[42].

2.1.2 The Purpose of the Punishment

The provision states explicitly that the punishment must be for the purpose of correcting the child. The identity of the people who benefit from the statutory protection also confirms the nature of the educational objective. Two principles emerge from the goal of section 43.

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40 *The Queen* v. *Vergnas*, J.E. 95-2191 (C.M.).

41 *The Queen* v. *Trynchy*, (1970) 11 C.R.N.S. 95 (Y.T. Mag. Ct.); *The Queen* v. *Lepage*, [1983] R.L. 246 (C.M.); *St-Amour* v. *Peterson*, [1998] R.R.A. 103 (S.C.).

42 *Ely* v. *Ouellette*, J.E. 83-770 (S.C.). The court concluded, however, that the physical correction was exaggerated.

First, the defence is not applicable when the aim of the punishment is not educational[43]. Hence, the correction must not be applied for arbitrary or capricious reasons or as an expression of anger or ill temper[44]. However, in a number of decisions, the anger of the parent or schoolteacher did not always, of itself, annul the defence of educational purpose[45]. It should be noted that other means of defence may be invoked when a person uses force to protect himself or herself, to protect another person or to protect personal property[46].

Secondly, the rule presupposes that the child is capable of learning a lesson from the correction inflicted, given his or her age and mental capacities[47]. Hence, we must conclude from this that not only should the correction be adapted to the child's level of understanding, but a section 43 defence can never be used to justify punishment inflicted on very young children or children suffering from deficiencies such that they are unable to "correct" themselves[48].

2.1.3 The Standard of Reasonableness

The defence is valid provided the force used does not exceed the "reasonable measure". According to the criteria laid down in the case law, when assessing the reasonableness of the correction, the court must take into account the child's age and mental and physical capacities,

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43 *Ogg-Moss*, *supra* note 4, 193-194.

44 *Ogg-Moss*, *ibid.*, 194, citing *Brisson* v. *Lafontaine*, (1864) 8 L.C. Jur. 173 (S.C.). See also *The Queen* v. *Laflamme*, *supra* note 11, where the court concluded that the blows aimed at the child were not for educational purposes, but an expression of the father's rage.

45 See for example *Protection de la jeunesse-712*, *supra* note 15. It should be noted, however, that this case was based on the *Youth Protection Act*, and not on section 43 of the *Criminal Code.*

46 See section 34 and following of the *Criminal Code.* See also the defence of necessity, which exists by virtue of section 8 of the *Criminal Code*.

47 *Ogg-Moss*, *supra* note 4, 194; *Protection de la jeunesse-633*, [1993] R.J.Q. 1972, 1977 (C.Q.).

48 *Ogg-Moss*, *supra* note 4, 194-195.

the method of correction used[49], the degree of force applied, the severity of the injury inflicted[50] and the behaviour the adult is seeking to correct[51].

Establishing the reasonable nature of the force used by the adult is not an easy task, especially since this must be done in the context of criminal proceedings. Contrary to the rules of civil liability, where the standard of proof is the balance of probabilities, the aggressor's criminal liability must be ruled out as soon as reasonable doubt is established[52]. The reasons given to justify a ruling acquitting a schoolteacher clearly illustrate this ambiguity:

> "WHEREAS the force used by the accused appears to the undersigned to be at the limit of what may be described as reasonable, […];
> WHEREAS there may very well be differences of opinion on the reasonable nature of the force employed […].

I believe the accused should benefit from reasonable doubt as to the reasonable nature of the force employed, and consequently he is acquitted."[53]

In addition, the burden of proving the reasonable nature of the correction lies with the prosecution and not with the defence. In contrast, when the action is the subject of youth protection proceedings, it is up to the defence to prove the reasonable nature of the act[54].

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49 In *The Queen* v. *Taylor*, (1995) 35 Alta. L.R. (2d) 257 (C.A.), the accused had tied a 16-year-old girl to a post, and forced her to stand naked while he beat her bare buttocks. The Court of Appeal cancelled the order to acquit because the section 43 defence cannot apply to an unacceptable method of discipline.

50 The same reasoning was followed in *Protection de la jeunesse-712*, *supra* note 15, which, however, was concerned with the right of correction in civil law, not criminal law. The judge concluded that even though the correction was an isolated occurrence, its repercussions were so severe that the measure was disproportionate.

51 *The Queen* v. *Jutras*, J.E. 87-1225 (C.Q.), p. 5 of ruling, referring to *The Queen* v. *Duperron*, (1985) 16 C.C.C. (3d) 453 (C.A. Sask.).

52 See the reasons of the minority members of the Law Reform Commission of Canada, who recommended the repeal of section 43 in *Assault*, Working Paper 38, Ottawa, Supply and Services Canada, 1984, p. 46.

53 *The Queen* v. *Jutras*, *supra* note 51, p. 6 of the ruling (our translation).

54 See for example *Protection de la jeunesse-712*, *supra* note 15.

The combination of the flexible nature of the reasonableness criterion and the prosecution's burden of proof explains why acquittals have been obtained in cases where children were "corrected" by such means as leather straps, belts, shoes, sticks or electric extension wires. Corrections causing injuries such as bruises, nosebleeds, broken teeth, scratches, welts and swellings have also been judged to be reasonable[55]. The growing demand to abolish section 43 results partly from these decisions.

2.2 Calling Section 43 into Question

As we have seen, the legitimacy of section 43 has become the subject of debate at both the legislative and judicial levels.

At the legislative level, in 1980 the Standing Committee on Health, Welfare and Science recommended that section 43 of the Criminal Code and similar provisions in provincial and territorial legislation should be reviewed[56].

Four years later, the Law Reform Commission of Canada recommended the repeal of the defence for schoolteachers[57]. Regarding its application by parents, the commissioners stated unanimously that section 43 "enshrines and licenses the use of force on children"[58], but a majority believed it was necessary to continue to allow parents and people acting with their permission to touch and inflict physical pain on children in order to correct them, so as to prevent penal law from intruding into private family life every time a minor correction was dispensed[59]. A minority group of commissioners recommended the complete repeal of a means

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55 See the decisions cited by A. McGILLIVRAY, *supra* note 28.

56 *The Child at Risk*, Ottawa, Supply and Services Canada, 1980, p. 58.

57 *Assault*, *supra* note 52, pp. 44 and 53. In 1986, the Law Reform Commission included all these recommendations in its projected new penal code : *Recodifying Criminal Law*, Report no. 31, Ottawa, Law Reform Commission of Canada, 1987, p. 40.

58 *Assault*, *supra* note 52, p. 45.

59 *Ibid*., pp. 44-45 and 53.

of defence that, in their view, deprived children of their right to personal security and increased the risk of abuse[60]. The group felt that parents should be protected against abusive intervention by the State through enforcement of the law, rather than by an express provision of the *Criminal Code*.

More recently, Senators and Members of Parliament have tabled a number of draft bills, aimed at abolishing corporal punishment. One of these proposed to repeal section 43[61]. Another, tabled in March 1998, proposed, in addition to the abolition of the section, that the Minister of Health should have the power to adopt measures to raise public awareness of the risks associated with corporal punishment and of the other methods available to educate children[62]. In addition, the Minister should cooperate with provincial authorities in order to establish guidelines for the protection of children and the repression of violations of their person[63].

So far, the courts have not been asked to rule on the constitutionality of section 43. Notwithstanding the absence of judicial opposition, however, some judges have said they are uneasy about the existence of this means of defence : "Although in 1989 it seems odd, to say the least, that we should accept corporal punishment inflicted on children, that is the state of the law, and whatever my personal convictions on the subject, I am duty bound to set them aside."[64]

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60 *Ibid*., pp. 45-46.

61 *An Act to amend the Criminal Code (protection of children)*, Bill C-276, 1st session, 36th Parliament, 1997 (M.P. Davies). The bill was similar in all respects to the one presented in 1996, but died on the order paper in 1997 : *An Act to amend the Criminal Code (protection of children)*, Bill C-305, 2nd session, 35th Parliament, 1997 (M.P. S. Robinson).

62 *An Act to amend the Criminal Code and the Department of Health Act (security of the child)*, Bill C-368, 1st session, 36th Parliament, 1997-98 (M.P. Ianno), ss. 1 and 2(1). See also prior bill presented in 1996 by Senator Sharon Carstairs, which died on the order paper in 1997 : Bill S-14, *An Act to amend the Criminal Code and the Department of Health Act (security of the child)*, 2nd session, 35th Parliament, 1996.

63 *An Act to amend the Criminal Code and the Department of Health Act (security of the child)*, cited above, note 62, s. 2(2).

64 *The Queen* v. *Jutras*, *supra* note 51, p. 4 of ruling (our translation).

However, the legality of section 43 is currently being challenged on the basis of sections 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms*[65]. Section 7 grants all individuals the right to security of the person, section 12 stipulates the right not to be subjected to any cruel and unusual treatment or punishment, and section 15 prohibits discrimination, notably when based on age. Any limitation on these rights must be justified under section 1.

A number of the elements considered in our analysis of the effects of the Québec Charter would probably be invoked when considering the effects of sections 7 and 15 of the Canadian Charter. In fact, in *Ogg-Moss*, the Supreme Court confirmed that corporal punishment constitutes a limitation on the right to dignity and physical security[66]. However, since the constitutionality of section 43 was not raised, the Court did not rule on whether or not the limitation was justified.

As far as section 12 is concerned, it is relevant to point out that the infliction of corporal punishment was considered by the Supreme Court to be a cruel and unusual punishment, in the *Smith*[67] and *Kindler*[68] rulings.

Moreover, the European Court, basing its decision on a similar provision in article 3 of the European Convention on Human Rights[69], concluded that the judicial penalty of corporal punishment inflicted on a teenage boy was degrading[70]. More recently still, the Court concluded that a provision of English law, similar in both formulation and effect to section 43 of the

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65 *Canadian Foundation for Children, Youth and the Law* v. *Attorney General in Right of Canada*, Ontario Court of Justice (General Division), no. 98-N-158948.

66 *Ogg-Moss*, *supra* note 4, 183 and 187.

67 *The Queen* v. *Smith*, [1987] 1 S.C.R. 1045, 1074 (Lamer J.).

68 *Kindler* v. *Canada (Department of Justice)*, [1991] 2 S.C.R. 779, 815 (Cory J., dissenting on other points).

69 *Convention for the Protection of Human Rights and Fundamental Freedoms*, article 3 : "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

70 *The Tyler Affair*, Ruling of April 25, 1978, European Court of Human Rights, Series A : Rulings and Decisions, vol. 26, Koln, Carl Heymanns Verlag, 1978, para. 34.

Canadian *Criminal Code*, was incompatible with article 3 of the Convention[71]. In this latter case, a stepfather had beaten the child on several occasions with a stick, and a jury had concluded that the punishment was moderate and reasonable. The Court retained the State's responsibility for the following reasons : "Children and other vulnerable individuals, in particular, are entitled to the protection of the State, in the form of effective prevention, sheltering them from such severe forms of violation of their personal inviolability […] In the Court's view, the law does not protect the applicant sufficiently from treatment and punishment that is contrary to article 3".

If it were established that section 43 contravenes sections 7, 12 and 15 of the Canadian Charter, it would be up to the Government to demonstrate, in accordance with section 1, that the provision is justified in a free and democratic society, based on the principles of rationality and reasonableness defined by the Supreme Court in *Oakes*[72]. Supporters of the abolition of section 43 consider that, even when applied moderately, corporal punishment can never be justified. First, research has refuted the pedagogical nature of corporal punishment[73]; and second, the rights violation would be disproportionate to the objective pursued[74].

Opponents of section 43 were comforted when the United Nations Committee on the Rights of the Child condemned Canada's legislation on corporal punishment, following Canada's first report on the *Convention on the Rights of the Child*[75]. The Committee, expressing its concern at "the existence of child abuse and violence within the family and the insufficient protection

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71 *A.* v. *United Kingdom*, Ruling of September 23, 1998, European Court of Human Rights, 100/1997/884/1096.

72 *The Queen* v. *Oakes*, [1986] 1 S.C.R. 103.

73 See among others Irwin A. HYMAN, *The Case Against Spanking : How to Discipline Effectively Without Hitting Your Child*, San Francisco, Jossey-Bass, 1997. See, however, Diana A. BAUMRIND, "A Blanket Injunction Against Disciplinary Use of Spanking is not Warranted by the Data", (1996) 98 *Pediatrics* 828.

74 A. MCGILLIVRAY, *supra* note 28; REPEAL 43 COMMITTEE, *Brief re : Section 43 of the Criminal Code and the Corporal Punishment of Children*, April 1994, distributed by the Institute for the Prevention of Child Abuse.

75 November 20 1989, Can. T.S. 1992 No. 3.

afforded by the existing legislation in that regard"[76], recommended that Canada should prohibit corporal punishment :

> "The Committee suggests that the State party examine the possibility of reviewing the penal legislation allowing corporal punishment of children by parents, in schools and in institutions where children may be placed. In this regard, and in the light of the provisions set out in articles 3 and 19 of the Convention, the Committee recommends that the physical punishment of children in families be prohibited. In connection with the child's right to physical integrity as recognized by the Convention, namely in its articles 19, 28 and 37, and in the light of the best interests of the child, the Committee further suggests that the State party consider the possibility of introducing new legislation and follow-up mechanisms to prevent violence within the family, and that educational campaigns be launched with a view to changing attitudes in society on the use of physical punishment and fostering the acceptance of its legal prohibition."[77]

Canada, by adhering in 1991 to the *Convention on the Rights of the Child,* effectively promised to take all appropriate steps to protect children from all forms of violence, harm, physical or mental brutality and abuse when in the care of their parents or any other individual to whom they have been entrusted (article 19). It also undertook to ensure that discipline in schools is applied in a manner compatible with the child's dignity (article 28), and that children are not subjected to cruel, inhuman or degrading treatment (article 37). More generally, it acknowledged that the child's interests must be a primary consideration in all actions concerning that child, including decisions by a legislative body, and undertook to provide the protection and care required for the child's well-being, taking into account the rights and duties of the parents (article 3).

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76 "Further measures seem to be needed to effectively prevent and combat all forms of corporal punishment and ill-treatment of children in schools or in institutions where children may be placed. The Committee is also preoccupied by the existence of child abuse and violence within the family and the insufficient protection afforded by the existing legislation in that regard", UN COMMITTEE ON THE RIGHTS OF THE CHILD, 9th session, *Consideration of Reports Submitted by State Parties Under Article 44 of the Convention, Final Observations of the Committee on the Rights of the Child : Canada*, UN CRC/C/15/Add. 37, June 20, 1995, p. 3, para. 14.

77 *Ibid.*, p. 5, para. 25. The Committee had made the same recommendations to the United Kingdom : *Final Observations of the Committee on the Rights of the Child*, Doc. UN CRC/C/15/Add.34, February 15, 1995.

The recommendation of the Committee on the Rights of the Child was twofold : the abolition of section 43, combined with awareness-raising and educational campaigns. This is the procedure generally followed by the countries that have already suppressed the right to inflict corporal punishment – for example, Sweden. The Swedish success in introducing provisions to prohibit corporal punishment was due largely to a major educational campaign that emphasized ways of preventing bad behaviour among children, and proposed alternatives to physical correction[78].

While defending the child's right to inviolability, security and dignity, the Commission des droits de la personne et des droits de la jeunesse is concerned about the harmful effects that may be caused by repealing section 43 of the *Criminal Code*. Abusive criminalization may be contrary to the interests of all family members, including children. Several people believe that abusive criminalization can be avoided by the application of the law.

According to research carried out in Sweden, the prohibition of corporal punishment has not led to unjustified legal action against parents[79]. However, it should be remembered that, as the Swedish legislator's objective was educational and not punitive in nature, the educational measures are accompanied in Sweden by provisions governing prosecution. The law establishes the right to refuse to bring legal action for trivial acts, even if those acts would be punishable under the Criminal Code. In addition, the definition of corporal punishment excludes physical force used to prevent damage to the child or another person[80].

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78 Nanci M. BURNS, *Legislative and Attitudinal Comparison of Western Countries on Corporal Punishment*, September 1992, cited in Joan E. DURRANT, "The Abolition of Corporal Punishment in Canada : Parents' versus Children's Rights", (1994) 2 *International Journal of Children's Rights* 129, 135; Joan E. DURRANT, "The Swedish Ban on Corporal Punishment : Its History and Effects" in Detlev FREHSEE, Wiebke HORN and Kai-D BUSSMANN (eds.), *Family Violence Against Children. A Challenge for Society*, Berlin/New York, Walter de Gruyter, 1996, 19, 22.

79 Adrienne A. HAEUSER, "Swedish Parents Don't Spank", (1992) 63 *Mothering* 42. An author reports that, in a ten year period, only one parent has been prosecuted for moderate corporal punishment : N.M. Burns, *Literature Review*, *supra* note 28, 17.

80 Joan E. DURRANT, "The Swedish Ban …", *supra* note 78, 22.

In Canada, it would be appropriate, if section 43 of the *Criminal Code* were eventually repealed, to introduce mechanisms aimed at preventing the risk of legal action for aggressions that could be described as trivial, for example within the framework proposed in Bill C-368[81]. Instead of exposing parents who use corporal punishment for educational purposes to criminal action, it may be possible, among other things and in the appropriate circumstances, to envisage recourse to section 810 of the *Criminal Code*, which states that a court order to maintain good behaviour may include a commitment to use prevention services, for example with a view to learning disciplinary methods that are respectful of the child's rights.

In addition, the *Criminal Code* already provides for other means of defence when a person uses force to protect himself or herself, to protect another person or to protect personal property[82].

81 *Supra* note 63.

82 See section 34 and following of the *Criminal Code*. The defence of necessity, which exists by virtue of section 8 of the *Criminal Code*, but which has so far been interpreted in a very limited way, could be codified to apply to situations not covered by section 34 and following.

CONCLUSION

In view of the fact that children have a right to physical and psychological inviolability, security and dignity, and in view of the fact that children are entitled to the protection that their parents and persons standing in the place of their parents are able to provide, the Commission des droits de la personne et des droits de la jeunesse supports the growing movement to abolish the legalization of corporal punishment. It wishes to emphasize that this position is part of its ongoing reflections on violence against children, and the harmful effects of such violence.

As the first part of this document suggests, the right of correction is no longer acknowledged as such in Québec law. However, the Commission notes that this legal development is still largely unknown, and that the law as it currently stands needs to be clarified. It therefore recommends that the Minister of Justice proceed with this clarification. It also recommends that the Minister of Health and Social Services, the Minister of the Family and Childhood and the Minister of Education adopt measures to raise parental awareness of the harmful consequences of corporal punishment, and provide them with information on alternative forms of disciplinary education. Québec would thus be fulfilling its commitment, within its fields of jurisdiction, to uphold and maintain the rights set out in the *Convention on the Rights of the Child.*

The Commission also recommends that the Minister of Justice make representations to the federal Minister of Justice to obtain the repeal of section 43 of the *Criminal Code.* These changes should be made with a view to helping and supporting families.