Legal Analysis of Legislative Reforms in Venezuela, Uruguay and Costa Rica
on the Prohibition of Corporal Punishment and of the Brazilian Draft Bill

General Comments

In order to analyze corporal punishment from a legal standpoint, we must start by explaining the meaning of the term. A general definition of violence is provided in Article 19 of the Convention on the Rights of the Child (hereafter the CRC) as “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse”. For our purposes, we will take the definition of violence used in the Report of the independent expert for the United Nations study on violence against children\(^1\), which, in turn, adopts the definition previously established in the World Report on Violence and Health\(^2\): “the intentional use of physical force or power, threatened or actual, against a child, by an individual or group, that either results or has a high likelihood of resulting in actual or potential harm to the child’s health, survival, development or dignity”. Specifically with relation to corporal punishment, we follow the definition set forth by the Committee on the Rights of the Child in its General Comment No. 8\(^3\), which states that corporal or physical punishment is “any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light”.

Next, it is important to establish which human rights of children and adolescents are affected by this practice. Corporal punishment mainly infringes three human rights, although it also has an impact on others. These three rights are: first and most obviously, the right to physical integrity; second and parallel to the first, the right to full respect of their human dignity and, on a more formal and symbolic plane, the right to equal protection under the law. Therefore, corporal punishment is a violation of Articles 5.1, 5.2, 11.1, 19 and 24 of the American Convention on Human Rights, also known as the Pact of San José\(^4\). Also, with regard to the obligations of States, it implies the non-compliance of Articles 1 and 2 of that normative instrument. Consequently, the practice of corporal punishment also conflicts with Articles 19, 28 paragraphs 2 and 37 of the Convention on the Rights of the Child. As the Inter-American Court of Human

\(^1\) Resolution A/61/299, approved by the General Assembly of the United Nations on 29 August 2006, in the 61\(^{st}\) session.
Rights recognized in its decision in the Case of the “Street Children” (Villagrán Morales et al.)⁵ and repeated in Advisory Opinion OC-17/2002 “Juridical Condition and Human Rights of the Child”⁶, the Convention on the Rights of the Child integrates the corpus juris of the Inter-American human rights system.

In legal terms, it is important to distinguish the three usual levels of regulation of violence against children and adolescents in the countries of the Inter-American system. They correspond in general terms to the degree of force used against the child or adolescent, in other words, the intensity of the violent action. The first level, corresponding to the more significant actions, those with the greatest degree of violence and which inflict upon children or adolescents some type of injury, is usually considered a criminal offense (insignificant, slight, serious, extraordinarily serious injuries)⁷. These violent actions are so serious that they must be placed in the criminal sphere. Currently all the States of the Inter-American system have legislation to penalize this kind of violent actions.

A second level corresponds to those violent actions which are not defined as crimes because they do not cause children or adolescents bodily injuries; these actions have no consequences in the criminal system but they are so serious that they deserve some form of state intervention. These cases are usually considered mistreatment, physical abuse or other forms of aggression. Although these violent actions are not the object of criminal prosecution as such, they do have consequences at the administrative level (generally with the government agency responsible for the protection of children and adolescents) and the judicial level (children’s and juvenile courts, domestic violence courts or family courts). In turn, these consequences will be of different nature (from counseling, support and family follow-up to suspension of parental rights). The Inter-American States have legislation regarding this second level of violence: adults are prohibited from engaging in mistreatment, abuse or aggressions against children and adolescents, and other laws protect the victims of these violent conducts.

On the third level are all forms of physical violence against children and adolescents which are less serious and in many cases are considered justified because they are “corrective” or “disciplinary” measures. Social justification of this kind of actions is such that they are usually not seen as a form of violence. This “lesser” type of violent actions is usually known as corporal punishment. It is precisely this kind of violent

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⁷ These names are used for the purposes of this document. However, the names given to these offenses in the different States may vary.
actions involving the use of corporal punishment that are not specifically prohibited in the legislation of most Inter-American States.

**Legislative Reforms in the States of the Inter-American System**

Three States of the Inter-American system have reformed their legislation in order to provide a complete framework for the protection of children’s and adolescents’ rights that includes specific prohibitions on the use of corporal punishment. They are Uruguay, Venezuela and Costa Rica. Following are the texts that establish this prohibition in each of the States:

**Uruguay**

**Law No. 18.214 of December 9\(^{th}\), 2007, under the official name of “Personal Integrity of Children and Adolescents”\(^8\)**

*Article 1.* The following article is added to Law No. 17.823 of September 7\(^{th}\), 2004 (Code on Children and Adolescents):

"ARTICLE 12 bis. (Prohibition of corporal punishment). It is prohibited for parents and other persons legally responsible for children and adolescents, and all those in charge of caring, treating, educating or supervising children and adolescents, to use corporal punishment or any form of humiliating treatment as corrective or disciplinary measures.

The Institute for Children and Adolescents of Uruguay (INAU, in Spanish), in coordination with the other State institutions and civil society, is responsible for:

A) Carrying out awareness-raising and educational programs for parents and other persons legally responsible for children and adolescents, and all those in charge of the care, treatment, education or supervision of minors; and,

B) Promoting positive, participatory and non-violent forms of discipline, as alternatives to corporal punishment and other forms of humiliating treatment”.

*Article 2. Letter F)* of article 16 of Law No. 17.823 of September 7\(^{th}\), 2004 (Code on Children and Adolescents) is substituted by the following:

“F) Correct their children or wards, without using corporal punishment or any form of humiliating treatment”.

*Article 3. Article 251 and subsections 2) and 3) of Article 384 of the Civil Code are repealed.*

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\(^8\) The Senate and Chamber of Deputies of Uruguay. “Amendments to provisions of the Code on Children and Adolescents and the Civil Code”.

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Regarding the family setting

Article 32

Right to personal integrity
All children and adolescents have a right to personal integrity. This right comprises physical, mental and moral integrity.
Paragraph 1. No child or adolescent shall be subjected to torture or any other cruel, inhuman or degrading treatment or punishment.
Paragraph 2. The State, families and all society must protect all children and adolescents from any form of exploitation, mistreatment, torture, abuse or negligence that might affect their personal integrity. The State must ensure the existence of support programs and comprehensive care to be provided free of charge to children and adolescents who have suffered injuries to their personal integrity.

Article 32-A.

Right to be well treated
All children and adolescents have a right to be well treated. This right comprises non-violent upbringing and education, based on love, affection, mutual understanding, respect and solidarity.

Fathers, mothers, guardians, family members, educators and other persons legally responsible for the children must use non-violent methods in the upbringing, training, education and correction of children and adolescents. Therefore all kinds of physical or humiliating punishment are forbidden. The State, with active participation from the society, must ensure the existence of policies, programs and protective measures aimed at banning all forms of corporal or humiliating punishment of children and adolescents. Corporal punishment is the use of force, as part of the authority to provide upbringing and education, with the intention of causing some degree of pain or physical discomfort aimed at correcting, controlling or changing the behavior of children and adolescents, provided that they are not criminal offenses. Humiliating punishment is any form of offensive, insulting, denigrating, stigmatizing or derisive treatment, used as part of the authority to provide upbringing and education with the aim of correcting, controlling or changing the behavior of children and adolescents, provided that they are not criminal offenses.

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In the educational setting

Article 56

Right to respect from educators

All children and adolescents have the right to respect from their educators, and to receive an education that is based on love, affection, mutual understanding, national identity, respect for ideas and beliefs and solidarity. Therefore all kinds of physical or humiliating punishment are forbidden.

In the adolescent justice system

Article 631

Rights of the adolescent deprived of his or her liberty

Adolescents deprived of their liberty have the rights enshrined in the previous Article, and also the following:

(...)

c) To be examined by a physician immediately upon arrival at the confinement facility, for the purpose of recording any prior violations of their personal integrity and identifying any physical or mental conditions that require treatment.

(...)

i) Never to be held in solitary confinement or be subjected to corporal punishment.

Republic of Costa Rica

Law No. 8654 of August 1st, 2008, under the official name of “Right of children and adolescents to discipline without corporal punishment or humiliating treatment”

ARTICLE 1. Article 24 bis is added to Chapter II of the Code on Children and Adolescents, with the following text:

“Article 24 bis. Right to discipline without corporal punishment or humiliating treatment

Children and adolescents have the right to receive counseling, education, care and discipline from their mother, father or legal guardians or caregivers, and from the persons in charge of or working in the centers for teaching, health care, attention, juvenile confinement or otherwise, without these persons being authorized under any circumstances to use corporal punishment or humiliating treatment.

The Child Welfare Agency (PANI, in Spanish) will coordinate with the different authorities of the National Comprehensive Protection System and non-governmental organizations the promotion and application of public policies that include training programs and projects to encourage the use of parental authority with respect for the physical integrity and personal dignity of children. It will also encourage children and adolescents to respect their fathers, mothers and other persons in charge of their custody and upbringing.

The Child Welfare Agency will ensure that the different agencies of the National Comprehensive Protection System include the programs and projects mentioned in this

10 Legislative Assembly of the Republic of Costa Rica.
article in their institutional plans, and will inform the National Council for Children and Adolescents of their execution”.

ARTICLE 2. Article 143 of the Family Code is amended. The text will read as follows:

“Article 143.

Parental authority and representation. Rights and duties

Parental authority confers the right and imposes the duty to guide, educate, care, supervise and discipline children; this does not entail authorizing the use of corporal punishment or any other form of humiliating treatment on minors, whatever the circumstances.

Furthermore, it empowers to ask the Court to authorize the adoption of necessary measures for guiding the minor, which could include their confinement in a suitable facility during a reasonable period of time. The same provision will apply to minors in a situation of neglect or social risk, or who are not subject to parental rights; in the latter case, the Child Welfare Agency may file the corresponding request. Confinement will last until the Court decides to end it, after performing the required expert examinations. These expert examinations must be performed within a specific period of time after confinement.”

Analysis of the reforms

The legislation prohibiting corporal punishment took a different path in each State; nonetheless, in all three cases the reforms are transcendental in that they complete the legal framework for protecting children and adolescents against the most common, accepted and frequent type of violence. Several countries of the Americas have changed their legislation to ban physical punishment of children in different settings; however, these reforms have been partial or incomplete in that they do not specifically prohibit corporal punishment. The prohibitions have failed to take into account all the different settings in which corporal punishment usually takes place. This document highlights the reforms carried out in Uruguay, Venezuela and Costa Rica because they are comprehensive and establish a general prohibition on corporal punishment.11

Generally speaking, Uruguay and Costa Rica have applied similar legislative techniques, since both States have added a new article to their Code on Children and Adolescents where the general prohibition in the use of corporal punishment is included. Said prohibition is further strengthened by the regulation of the rights and powers of parental authority (a term which should evolve in the Inter-American region to that of parental responsibility, as it is used in the European Union) with regard to

guardianship, upbringing and education of children. In Uruguay this has been achieved by an amendment to Article 16 of Chapter IV, “Duties and Obligations of Parents”, of the Code on Children and Adolescents, the repeal of Article 261 (Chapter I, Title VII, Book One) and subsections 2) and 3) of Article 384 (Chapter V, Title X, Book One) of the Civil Code. Costa Rica has amended Article 143 (Title III, Chapter I) of the Family Code with respect to the duties and rights of parental authority.

Venezuela, on the other hand, has prohibited the use of corporal punishment as part of a general reform of what other States call their “Code on Childhood and Adolescence” and in that country is the “Organic Law for the Protection of Children and Adolescents”. The adoption of that law includes four main articles on this subject: articles 32, 32-A and 56 (Chapter II, Title II) and article 631 (Section 3, Chapter III, Title V).

A common aspect of the legislation in these three States is that the prohibition of corporal punishment is established as an essential element of the right to personal integrity. This is obvious since in the three cases the prohibition is included in the chapters on rights of the corresponding codes on childhood (the Organic Law in Venezuela).

In Uruguay, although it is not listed as a right in the name of the law or in its articles, this nature may be inferred from the fact that it is included in Chapter II of the abovementioned code, which is headed “On the Rights of Children and Adolescents”. Venezuela has established this prohibition of corporal punishment with a specific reference to the right to personal integrity and also to rights that have been called the right to good treatment and the right to respect from educators. The Costa Rican law establishes a right to discipline without corporal punishment or humiliating treatment, included in Title II “Rights and Obligations”, Chapter II “Individual Rights”. The reforms in Uruguay and Costa Rica are particularly significant concerning the regulation of the rights and powers of parental authority with regard to guardianship, upbringing, supervision and education of children, since in both States the texts before amendment included the authority to “administer moderate correction” or “correct the child with moderation”. In both cases the problem lay in the ambiguity of the term “moderate” or “with moderation”, since these terms are open to personal interpretation and therefore constitute indeterminate and indeterminable legal concepts. The use of these terms in the Civil Codes of the region is a remnant from the

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15 The Royal Academy of Spanish Language (RAE, in Spanish) defines “moderación” as good sense, sensibleness, temperance in words or actions. It defines “moderadamente” as with moderation or temperance, without excess.
Napoleonic Code\textsuperscript{16}, which in turn includes concepts about treatment of children and parental authority which come from Roman law. In the case of Venezuela, it may be inferred that a similar change has not been adopted since, as we have said, the prohibition of corporal punishment was part of the comprehensive reform of only one body of regulations. The text of Article 265 of the Venezuelan Civil Code\textsuperscript{17}, however, still includes the same ambiguity that led Costa Rica and Uruguay to change the text with regard to parental rights. The prohibition contained in Venezuela’s Organic Law for the Protection of Children and Adolescents\textsuperscript{18} duly bans the practice of corporal punishment and completes the framework for protecting children’s and adolescents’ physical integrity.

In most States of the region, the imprecision implied in terms such as “moderate” still exists, and a quick look beyond the legal texts to social reality shows that the vague terms included in civil or family codes allow parents to use corporal punishment as an expression of their parental authority, in contradiction with the human rights rules and case law on the human rights of children and adolescents. As the Declaration of San Pedro Sula (Toward a Culture of Non-Violence)\textsuperscript{19} has recognized, social behavior and different cultural, economic, ethnic factors, among others, place children and adolescents in especially vulnerable situations and in greater risk of being victims of violence at home, at school and in public. That resolution commits the States of the Americas to adopting the necessary measures the protection of children and adolescents from all forms of violence.

With regard to the settings or environments where corporal punishment is usually applied, it must be pointed out that all three States have a general prohibition which includes all the adults who are responsible for the care and supervision of children and adolescents. In other words, the legal protection framework includes the violent situations that could occur within the family or at home; at school or in any educational center; in adolescent detention facilities; and in temporary or permanent care centers.

These three States have established the prohibition of using corporal punishment for all adults who are responsible for or have a direct relationship with children and adolescents in a manner that entails full respect for their physical integrity and therefore their human dignity. Furthermore, this rule means recognizing equal rights to adults and children and adolescents because before the reform these States lacked (as the remaining States of the Americas still lack) a rule limiting the right of correction.

\textsuperscript{16} Civil Code of France (Code Civil des Français). Adopted by law of 21 March 1804.


\textsuperscript{18} See above, footnote 10.

\textsuperscript{19} AG/DEC. 60 (XXXIX-O/09). Adopted at the fourth plenary session, held on 4 June 2009.
Even more importantly, the reform eliminates any possibility of using physical violence against children and adolescents.

It is interesting to note that none of these three reforms establish penalties for the parents or guardians who infringe these new laws and continue to use corporal punishment. Nonetheless, we can infer that this omission is intentional. Presumably States that have amended their legislation to ban physical punishment have adopted the premise that it is not possible to eliminate violence against children and adolescents by means of violent actions, such as penalties, against parents and guardians. Laws that prohibit corporal punishment are intended to provide guidance and have symbolic effects, contributing to: a) develop greater awareness about respect for the physical integrity of children and adolescents, b) change violent attitudes and the excessive use of power by adults against children and adolescents, and c) discourage the use of violence against children and adolescents.

A significant element of the abovementioned reforms is that they have gone beyond merely prohibiting the practice of corporal punishment. They have also established general guidelines for defining public policies intended to produce societies with lower levels of violence against children and adolescents and for promoting awareness-raising and training programs to encourage the use of parental authority with greater respect for the physical integrity of minors and, in general, positive and participatory forms of discipline.

**Analysis of the Draft Bill of Brazil**

After analyzing the laws adopted to prohibit corporal punishment as a form of discipline, it is also important to study the existing legal initiatives, particularly the draft Bill No. 7672/2010 currently under discussion in the National Congress of the Federative Republic of Brazil. This bill is designed to amend law No. 8069 of July 13th, 1990, which created the Child and Adolescent Statute, and to establish children’s and adolescents’ right to be educated and cared for without the use of corporal punishment.

It must be emphasized that this Brazilian initiative, besides what has already been mentioned with regard to the laws in the other three States, also includes penalties for the persons who engage in corporal punishment or cruel, degrading or humiliating treatment. Nonetheless, the topic of penalties for adult “offenders” who apply corporal punishment is still being debated in the different States. Brazil takes the stance of applying penalties, which implies making the rule more coercive and easier to enforce; it is also important to note that those penalties have an administrative rather than criminal nature and are designed to provide guidance.

Another noteworthy feature of the Brazilian draft bill is that it includes a definition of corporal punishment and of cruel or degrading treatment, which is a laudable
legislative technique and a clearer solution than the ones analyzed previously. Both definitions are adequate and appropriately general.

A third outstanding element of the Brazilian bill is that it not only establishes the public policies to be adopted by the State but, unlike the laws already approved in other countries, it also details the main guiding principles for those actions.

A study of the experience already accumulated in some States with regard to the prohibition of corporal punishment may prove to be very helpful for drafting other bills designed to eradicate corporal punishment. This violent practice, which even in our times is still justified and accepted socially, is highly discriminating and unfair.

As a general conclusion, the adoption of legislation that ensures equality under the law for all human beings is essential when unequal power relationships and different situations foster or enable the existence of practices such as corporal punishment. This is why the reforms in Uruguay, Venezuela and Costa Rica mark the beginning of a new type of relationship between adults and children and adolescents: less violent, more participatory and, hopefully, more democratic. This last term represents a basic value which should rule the relations between the different entities of the Inter-American system, from private relations to those between States.  

\[20\] Articles 1, 2, 3, 7, 8, 9 and 10 of the Inter-American Democratic Charter. Adopted at the 28th extraordinary session, held on 11 September 2001 in Lima, Peru.