

Israel Supreme Court, Criminal Appeal 4596/98 Plonit v A.G. 54(1)P.D. p. 145

Unofficial translation

Facts:

The appellant was convicted in the district court of the crimes of assault and abuse committed against her two minor children. According to the description in the charge sheet, at various occasions over the course of the years 1994-1995 the appellant struck her children on their buttocks and slapped their faces. Additionally, at an undetermined time, she struck her daughter with a vacuum cleaner, and punched her son in the face, breaking one of his teeth. The son was hit on his buttocks, his head, and his neck with a slipper, and she sometimes threw shoes at him. Accordingly, she was brought to trial for the crimes of abuse of a minor and assault on a minor. Following her conviction on the charges brought against her, the court sentenced her to a year of imprisonment, suspended, together with the supervision of the probation service for a year and a half. The appeal is made against the conviction and the sentence. According to the appellant, the evidence does not support a conviction for the crime of abuse. Additionally, she claims, even if the factual elements of the crimes were proven, her actions do not amount to a criminal offense, for what is described are corporal punishments that the appellant imposed upon her children as disciplinary measures, in order to educate them and improve them – punishments which violate no judicial norm.

Two central questions required decision in this appeal:

1. Did the crime of abuse take place in this case, or, in other words, what is abuse;
2. Does a defense of use of reasonable force by a parent in order to punish his/her child exist?

Justice D. Beinisch (Majority Opinion):

1. What is Abuse?

The criminal code does not define the expression “abuse”, and therefore in order to interpret the term we look to the purpose of the law. The purpose of the law may be derived from the inclusion of the crime in an amendment to the criminal code whose subject is offenses against minors and the helpless; from the legislative history of the law and from the social background which preceded the enactment. The purpose of this legislation is to defend minors and the helpless from the injuries to which they are exposed. From the phrasing of the law it is clear that the legislature recognized three types of abuse - physical, sexual and mental. In the matter before us, the dominant component in the violence of the appellant is the physical component, and upon it we will focus.

What is the borderline between the crime of abuse and the crime of assault? As a rule, it appears that abuse describes incidents which, because of their characteristics and nature, one’s conscience and sentiments do not permit one to relate to them only as instances of assault. We are speaking of a crime of behavior and not a crime dependent upon result, and therefore the prosecution is not obliged to prove actual damage to the victim. The mental element required in the crime of abuse is awareness of the nature of the behavior and the relevant circumstances, and does not require proof of intent to cause an injurious result.

Abuse can be carried out through positive action, but can also take the form of an omission. As a general rule, abuse is the use of force or physical means against the body of the victim, directly or indirectly, done in a manner and measure that are likely to cause damage or suffering, either physically-bodily or mentally-emotionally, or both. Usually the victim is in an inferior position and dependent relation to the one who abuses him or her, and therefore in reaching the conclusion that abuse exists one should not give decisive weight to the attitude of the victim. The conclusive viewpoint for determining whether the offense took place is the objective viewpoint of the neutral observer.

It is difficult to define abuse, but one can point out several characteristic indicators of behavior that constitutes abuse that are likely to aid in identifying behavior that amounts to abuse: Usually we are inclined to see “physical abuse” when we are discussing a continuing series of acts or omissions. The accumulation of acts and their continuation over time are what brings about a degree of seriousness and cruelty, humiliation and degradation or instilling of fear that constitutes abuse. A one-time act or omission can also constitute physical abuse, when, generally, the use of force is characterized by one or more of the following: cruelty, instilling significant fear and terror in the victim, notable humiliation and degradation of the victim, or a particularly grave potential of injury (physical or mental) to him or her. An additional indicator that characterizes abuse is expressed in the fact that the behavior is usually intended to impose authority, to frighten, to punish or to coerce, though not necessarily so. Similarly, the abuser will usually occupy a position of strength or authority relative to his victim.

In the circumstances of the case, I find that the appellant committed the offense of abuse against her children: The appellant struck her children on different places on their bodies, at times with a slipper and at times by throwing shoes. We are not dealing with a one-time act, but with a mode of continuing violent behavior. The systematic nature of the blows, their continuation over time and the frequency with which the minors experienced violence from their mother indicate that the mother’s cruel behavior, her debasement of her children’s dignity, arose from her view of them as property towards which she could act as she wished. Indeed, it is possible that the appellant did not intend to cause damage to her children but, as mentioned, the offense of abuse is a behavioral crime, and therefore requires only an awareness of the nature of the behavior and the existence of the relevant circumstances codified in the law.

2. Does the appellant have the defense of reasonable corporal punishment of her children?

The appellant claimed the defense of justification for her behavior, arguing that her actions failed to amount to a criminal offense. According to her claim, she only imposed corporal punishment upon her children as disciplinary measures, in order to educate them and to improve their ways.

First let it be said, that since we have established that an act which falls within the definition of “abuse” includes, by its nature, a moral failing, there are no circumstances in which a defense of justification will apply to this type of act. The essence of abuse as a behavior that includes cruelty, the imposition of fear or humiliation, gives it the stamp of a moral failing - a stamp that does not necessarily attach to every use of force, even unlawful uses of force. Therefore, the claim of legal justification for reasonable corporal punishment that is made by the appellant cannot apply to acts of abuse, and is relevant only to the crime of assault of which the appellant was convicted.

Does a defense based on reasonable corporal punishment exist?

The question of the legitimacy of corporal punishment of children by their parents is not unique to Israel, and many other countries are facing it. One can find a variety of approaches to the matter, whose differences flow from moral, social, educational and ethical outlooks that have developed over the years in different societies.

One approach, which was the inheritance of the English common law, is that which grants to the parent a defense against criminal liability if he or she uses “reasonable” corporal punishment upon the child. This approach emphasizes the rights of the parents and their authority. According to this approach, the right of the parents to rear their children is expressed, among other things, in their authority to decide upon the substance of their children’s upbringing and education; within the framework of fulfilling their roles for the benefit of the child, the parents are permitted to adopt various disciplinary measures, including the use of force. Accordingly, if a parent acts from a reasonable and proper belief that corporal punishment is an appropriate disciplinary measure, one should not override his discretion as long as the use of force against the child is not inordinate and is not more than is required to achieve the educational goal. According to this approach, the benefit of the “reasonable” punishment test is that it supplies the flexibility needed to examine the circumstances of each incident on its merits. See D. Orentlicher “Spanking and other Corporal Punishment of Children by Parents: Overvaluing Pain, Undervaluing Children” 35 Hous. L. Rev. (1998) 147, 168-170; S. A. Davidson “When Is Parental Discipline Child Abuse? The Vagueness of Child Abuse Laws” 34 U. Louisville J. Fam. L. (1995-6) 403, 405-407, 410-411.

It has been established at common law since 1860 that a parent will not bear criminal liability if he inflicted “reasonable and moderate” corporal punishment upon his child. In the relevant case, R. v. Hopley 175 E.R. 1204 (1860), the court wrote that

a parent or a schoolmaster...may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable. If it be administrated for the gratification of passion or of rage, or if it be immoderate and excessive in its nature or degree, or if it be protracted beyond the child’s powers of endurance, or with an instrument unfitted for the purpose and calculated to produce danger to the life or limb; in all such cases the punishment is excessive, the violence is unlawful, and if evil consequences to life and limb ensue, then the person inflicting it is answerable to the law, and if death ensues it will be manslaughter.

Over time, the English decisions established that the “reasonableness” of the punishment would be examined according to the totality of circumstances of the incident, taking into consideration the child’s age, his or her physical condition, his or her level of understanding and his or her emotional maturity. The method of punishment would also be examined by the length of time over which it was conducted and the reason for the use of force. See Lyon & de Cruz, supra, at p.8; A. B. Wilkinson & K. Mck. Norrie THE LAW RELATING TO PARENT AND CHILD IN SCOTLAND 179-180 (1993); P. M. Bromley & N. V. Lowe FAMILY LAW 274 (7th ed., 1987).

The authority of the parent to impose corporal punishment upon his or her child also found expression in English legislation. The law in this matter extended as well to teachers, educators, and guardians. Section 1 of the Children and Young Persons Act 1933 which was amended in the framework of the Children Act 1989, codifies the crime of cruel treatment of a

child under the age of 16. Section 1(7) of the Act establishes that

Nothing in this section shall be construed as affecting the right of any parent, teacher, or other person having the lawful control or charge of a child or young person, to administer punishment to him.

An attempt in England to outlaw the common law rule granting authority to parents to use corporal punishment upon their children did not bear fruit. See C. Barton & G. Douglas LAW AND PARENTHOOD 151 (1995). Despite this, section 47 of the Education Act 1986 statutorily nullified the authority of teachers and educators in public schools and state-supported schools to use corporal punishment against students.

The American Model Penal Code, which serves as a basis for the criminal codes of many American states, also grants a defense to a parent who uses force against his child for educational and disciplinary goals:

The use of force upon or toward the person of another is justifiable if: (1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person and: (a) The force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and (b) The force used is not designed to cause or known to create substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation.

(Part I, Article 3, s. 3.08).

Pursuant to the Model Penal Code, many American states have enacted a defense which permits parents to use “reasonable” corporal punishments for educational purposes and to impose discipline. In those states it has been determined that a court, in considering the “reasonableness” of a punishment imposed on a child, should examine the personality of the child; the child’s age and sex; his or her physical and mental status; the necessity for the use of force and its strength. Accordingly, it has been held that a parent who imposes corporal punishment on his or her child out of anger and loss of control is serving no educational goals and is therefore not exempted from criminal liability. (See, e.g., State of Iowa v. Arnold, 543 N.W. 2d 600 (1996).

Some American states have given a statutory definition to the “reasonableness” of the corporal punishment that a parent is permitted to impose upon his or her child. Occasionally, the definitions are broad. For example, the law in Pennsylvania, similar to the Model Penal Code, establishes that corporal punishment of a child by his or her parent will not result in criminal liability if

the force used is not designed to cause or known to create a substantial risk of death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation.

18 Pa. C.S.A. s. 509 (1)(ii)

In North Dakota, corporal punishment of a child by his or her parents is not unlawful as long as it does not encompass “serious physical harm or traumatic abuse”. See N. D. C. C. s.

50-25.1 - 02(2) (Supp. 1995); Raboin v. North Dakota Department of Human Services, 552 N.W. 2d 329 (1996) (Ruling that since no evidence of such damage was presented, “educational” blows by parents did not amount to child abuse.)

A limited number of American states grant parents an exemption from criminal liability for the use of “reasonable force” as long as it is not shown that they acted out of an intent to injure the child. See V. I. Vieth “When Parental Discipline Is a Crime: Overcoming the Defense of Reasonable Force” 32 AUG Prosecutor 29. For the various legislative approaches of different American states, see K.K. Johnson “Crime or Punishment: The Parental Corporal Punishment Defense - Reasonable and Necessary, or Excused Abuse?” U. Ill. L. Rev. 413 (1998).

In Canada, paragraph 43 of the Criminal Code, captioned “Correction of child by force,” establishes that

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.

R.S.C., 1985, c. C - 46, s. 43 (1985)

This paragraph has been included in the Canadian criminal code since 1892. Canadian rulings have established that the requirement of paragraph 43, according to which the use of force needs to be for the sake of improving the behavior and education of the child, does not exist if the goal of the use of force was to instill fear in the child, see R. v. Komick [1995] O.J. 2939, para. 51, or if the parent used force against the child thoughtlessly, out of anger and loss of control. See R. v. D.W. [1995] A.J. 905, para. 13; R. v. D.H. [1998] O.J. 3347, para. 31. The requirement of “reasonableness” of force has been interpreted in a limited fashion. In the case of R. v. Dupperon [1984] 16 C.C.C. (3d) 453, it was held that in its examination of the question of the reasonableness of the use of force by a parent against his or her child, the court would take into consideration factors such as: the child’s age, his or her level of understanding and the possible influence of the use of force, the amount of force used; the circumstances surrounding its use; and the nature of the damage caused to the child, if damage was caused.

Paragraph 43 has been interpreted and applied in Canadian jurisprudence, but the paragraph has earned wide criticism in the various Canadian courts. The criticism points out the lack of clarity in the definition of “reasonable” force which will prevent criminal liability. According to the arguments, parents who used very little force have been tried and found guilty, though other parents who used inordinate force have often been found innocent. For example, one decision expressed dissatisfaction that the condition of “reasonableness” of the use of force has been interpreted and applied differently by different judges and therefore inconsistency in the application of the paragraph has been created in various judgments; criticism has been expressed over the fact that the criteria set down in R. v. Dupperon regarding “reasonableness” of the use of force by a parent against his or her child do not establish clear boundaries between “reasonable” use of force and “inordinate” use of force. Because of this, parents lack clear guidance on what force is permitted and what is not. In the same decision the court pointed out that Canada is a signatory of the Convention on Children’s Rights of 1989, and wrote that

the Convention stands in direct conflict with the state of the law. One wonders how section 43 can remain in the Criminal Code in the face of Canada’s international commitment. To the extent this paradox might inform any discussion of the constitutionality of the defence, it

is not a question likely to be tested by a court, because the party who would have to raise the question would be the crown itself...

...The only personal view I will express is that I think this is an area that begs for legislative reform.

R. v. James [1998] O.J.1438.

A similar criticism of paragraph 43 was expressed in another ruling:

I consequently hope that the law makers will see to establish clearer rules, so that parents will know with some degree of certainty when they are permitted to physically discipline their children; or alternatively, if Parliament determines that corporal punishment is no longer tolerable in our society, to then repeal Section 43 of the Code. The current state of uncertainty is inadequate to protect children, while simultaneously, potentially placing otherwise law abiding parents at risk of obtaining a criminal record.

R. v. J.O.W [1996] O.J. 4061

In contrast to this approach, which grants the parent a defense from criminal liability if he or she imposed “reasonable” corporal punishment on his or her child, there exists an approach which deprives the parent of the authority to impose corporal punishment on his or her child. This approach stresses the right of the child to dignity, bodily integrity and health of mind. According to this approach, corporal punishment as an educational method not only fails to achieve its goals, it also causes physical and emotional damage to the child which may leave their mark on him or her even in adulthood. In various articles published recently in the United States, the authors have pointed out the gap between the judicial attitude, which often reveals tolerance of reasonable corporal punishment for educational goals, and the attitude of medical, educational and psychological professionals who see no benefit in the use of force. See Orentlicher’s article and the article by Johnson.

The professional-educational approach which rejects corporal punishment as an educational tool has found expression over the years in the legislation of a number of states, including Sweden, Finland, Denmark, Norway, and Austria, which have outlawed or strictly limited the authority of parents to impose corporal punishment upon their children. See Barton & Douglas, *supra* at p. 151; Orentlicher, *supra* at p. 166.

We proceed from the various legal attitudes to corporal punishment to the appellant’s claim, based on the use of corporal punishment for educational purposes.

The appellant claims that she acted in the framework of her authority as a parent, and that she imposed reasonable corporal punishments upon her children in order to educate them and to make them listen to her, and that she believed that this was for their benefit. According to the appellant’s approach, this constitutes a legal justification for her behavior, and frees her from criminal liability. Is this so?

I will first note that a defense claim based on reasonable corporal punishment cannot be applied to abusive acts. I have already shown that the act of abuse bears the stamp of a moral failing. Therefore, abuse can have no justification in law or in accepted social norms. Accordingly, I believe that if the appellant’s acts were abusive, she cannot escape liability through a justification of the sort offered by reasonable punishment for educational goals.

The appellant’s claim is broader, and according to her, the use of the force attributed to her is not a criminal offense. In my view, a discussion of the claim to a defense based upon the

educational justification for corporal punishment applies only to the appellant's conviction of the crime of assault. The discussion is relevant, therefore, to the approach of those who believe that the acts carried out by the appellant against her children do not amount to an "act of abuse", but constitute a series of assaults.

The claim of the appellant regarding the existence of a legal justification for her behavior is based on the ruling of this court in Dalal Rasi v. Attorney-General (hereinafter Rasi). There Justice S. Z. Cheshin wrote that

In the case before us there is no serious disagreement between the parties that a father and an educator are permitted to punish minors under their authority, even using corporal punishment... Parents are free to impose on their children corporal punishment in order to teach them proper behavior and discipline.

In the same ruling the court quoted the applicable English law, as established in R. v. Hopley, cited above.

The ruling of the late Justice S. Z. Cheshin in this case was based upon the English common law, which existed at the time in Section 46 of the order in council 1922. Justice Cheshin's words have served as a basis for a number of rulings in the lower courts over the years.

A similar approach whose source is also in the English law was adopted in the Civil Wrongs Ordinance, which grants a defense from tort liability to parents and teachers who commit assault and wrongful imprisonment. Paragraph 24 of the Civil Wrongs Ordinance establishes that in a suit for the tort of assault, the defendant will have a defense if

(7) The defendant is the parent or guardian or teacher of the plaintiff, or his or her status in regard to the plaintiff is similar to that of a parent or guardian or teacher, and he or she punished the plaintiff in an amount reasonably necessary in order that the plaintiff correct his or her behavior.

(A similar defense to the tort of imprisonment is found in Paragraph 27(6) of the Civil Wrongs Ordinance.)

Paragraph 24(7) of the Civil Wrongs Ordinance has its origin in the English phrasing of the Ordinance of 1944. This paragraph reflects a world view anchored in the culture in which it was written. The decision of Justice S. Z. Cheshin in Rasi was given in 1953. It is based on the English common law rule which, with the passage of the Foundations of Law Act 1980, we are no longer obliged to consult. With the passage of time, this question has come before us: Does the view upon which Paragraph 24(7) of the Civil Wrongs Ordinance and the Rasi verdict are based reflect the current attitude of Israeli criminal law?

I will first note that the defense codified in Paragraph 24(7) of the Civil Wrongs Ordinance does not exempt a parent from liability imposed by the criminal law.

A decision on the legitimacy of corporal punishment of children is greatly influenced by societal-moral considerations. These considerations are of course subject to change in accordance with social and cultural developments; what seemed fit and proper in the past may not seem so in the present.

The ruling in the case of S'dei Or reflects the changes that have taken place in Israeli society in a field very close to the matter before us. Although the 1953 Rasi case established

that teachers and educators were authorized to impose “moderate and reasonable” corporal punishments on their students, the recently decided S’dei Or case (written by Justice Dorner joined by Justices Or and England) held that:

Indeed, the first decision to deal with the matter of corporal punishment in the framework of the educational establishment – Rasi – held that corporal punishment by teachers and educators was permissible. Since that decision roughly 45 years have passed, and the view that it expresses, which permits the use of violent methods for educational purposes, no longer represents our accepted social norms...

... According to the educational views accepted today, the use of force for educational goals itself prevents the achievement of those goals, when we are discussing education towards a society tolerant and free of physical and verbal violence ... In this matter there is no significance to the seriousness of the corporal punishment imposed on the child. As a rule, corporal punishment cannot constitute a legitimate tool in the hands of teachers or other educators. The use of corporal punishment reflects a mistaken outlook in this context, one which endangers the welfare of children and is likely to damage the fundamental values of our society – human dignity and bodily integrity.

In my view these words, used in connection with teachers and educators, are equally applicable to parents, despite the difference in the parents’ status and rights regarding their children as compared to educators.

The right of parents to rear and educate their children is originally a natural right. The right expresses the natural connection between parents and children. Israeli law of course recognizes these parental rights. Paragraph 15 of the Law of Legal Capacity and Guardianship 1962:

The Parents’ Roles

The guardianship of the parents includes the right and duty to care for the minor’s needs, including his or her education, studies, preparation for work and for a vocation, and similarly the care of his or her property, its administration and development, and with it the authority to keep the minor and to establish his or her dwelling place, and the authority to represent him or her.

The criminal law imposes criminal liability for failing to fulfill the parental obligations towards the minor. Paragraph 323 of the Criminal Law:

The Obligation of the Parent or Person Responsible for the Minor

A parent or one who bears responsibility for a minor of his or her household who has not reached 18 years of age has an obligation to supply the minor’s essential needs, to take care of his or her health and to prevent abuse or damage to his or her body, and will be viewed as the cause of any harm which affects the minor’s life or health because of the parent’s failure to fulfill the stated obligation.

Parents are those first and foremost responsible for their children, and the rights and duties granted to them by law give them discretion in the rearing and education of their children. The basic understanding, from both a legal and psychological-education viewpoint, is that under normal circumstances the discretion of the parents is the best means to ensure appropriate decisions in the rearing of children. At the same time, this discretion does not mean that parents are completely autonomous with regards to decisions affecting their children. Parental discretion is limited and always subject to the needs of the child, his or her welfare and rights. In the words of Prof. P. Shiffman: “It is the right of the parents that they – they and no one else – fulfill the duty to rear the child.”

With this background it is clear that the rights of parents to rear and educate their children are not absolute rights. The relative nature of the rights is expressed in the obligation of the parents to care for the child, for his or her benefit and rights.

The law imposes an obligation on the state authorities to intervene in the family unit and to defend the child when necessary, including from his or her parents. The law’s view, properly understood, is that the child is not its parents’ property, and they may not do with the child whatever they may wish. When the parent does not properly fulfill his or her duties or abuses his or her discretion or parental authority in a manner that endangers or injures the child, the state will intervene and defend the minor. The power of the state to intervene in the family unit flows from its obligation to defend those who cannot defend themselves.

In accord with this view, the criminal law, as mentioned, imposes criminal responsibility on a parent for assault on the child, abandoning the child or abusing him or her. The defenses that parents may use in certain circumstances in tort suits brought by their children following the exercise of their parental authority cannot, by themselves, exempt parents from criminal liability where the elements of a crime which imposes liability on parents are proven.

Psychological and educational research show that the use of parental punishment that causes children hurt or humiliation is not only undesirable, but that it can also cause mental, as well as physical, damage. The reasons for this are varied. In many cases, “light” punishment devolves over time into more serious violence, since the parent feels it is his or her duty to increase the level of punishment in order to inculcate the “educational message” in which he or she is interested. The studies also indicate that corporal punishment whose main goals are disciplinary will devolve into systematic abuse which endangers the welfare of the child. A punishment which causes hurt or humiliation as a system of education is likely to injure not only the body of the minor but also his spirit. Instead of encouraging self-discipline in the child, it is likely to cause recognizable psychological damage: The child will feel humiliated, his self image will be damaged, and intensified anxiety and anger are likely to be ingrained in him; as the parent is the child’s role model, the child is likely to adopt a violent mode of behavior, so that the cycle of violence will follow him or her throughout his or her life, and he or she is likely to be transformed from a victim of violence to a violent person in adulthood.

A court cannot and is not permitted to close its eyes to social developments and the lessons that have been learned from educational and psychological studies, which have completely changed the attitude towards education by means of corporal punishments.

Beyond the fact that painful or humiliating punishment fails as an educational system and causes the child physical and emotional damage, such punishment violates the basic right of the population of children in our society to dignity, and to integrity of mind and body.

The court examining the normative aspect of the parent’s behavior towards his or her child must bring into its consideration the current judicial attitude to the position of the child and his or her rights. This is currently done in many of the world’s states, and must be done in Israel in the period after the legislation of Basic Law: Human Dignity and Liberty. No less

significant in this respect is Israel's status as a signatory to the Convention on Children's Rights.

Today it is possible to rule that in a society such as ours the child is an autonomous human being, possessed of independent interests and rights of his or her own, and that society has the obligation to defend the minor and his or her rights. In the words of Justice M. Cheshin:

The child is a human, a human being, a person – even if he or she is a person of small proportions. And a person, even a little person, has all the rights of a big person.

On the matter of a child's rights and their nature see also the words of President of the Court Shamgar:

The concept "children's rights" teaches us that the child has been given rights. The concept "children's rights" affords constitutional protection to the child. Its expression is a recognition of children's rights and the totality of rights acts a guarantee of the security of the child's welfare.

Basic Law: Human Dignity and Liberty, which raises the status of human dignity to a super-legal constitutional rank, also serves as an important legal source in our case. The law gives obligatory force to the dignity and protection that society is obliged to supply to the weak and helpless amongst us, among them minors who fall victim to violence from their parents. President of the Court Barak has written regarding the rights of minors according to the Basic Law:

At the center of Basic Law: Human Dignity and Liberty stands the "human" ... "as a human." This phrasing grants rights to the adult and minor human.

As for the influence of Basic Law: Human Dignity and Liberty on proper judicial policy in relation to the use of violence by parents against their children, Justice Ch. Cohen wrote convincingly in his article "The Values of a Jewish and Democratic State – Studies in Basic Law: Human Dignity and Liberty":

And yet it seems to me that in the wake of the Basic Law the legislature will do well to examine afresh several of the leniencies currently found in the law, for some may be found to be disproportionately broad. I refer particularly to the right of parents and teachers to injure their children's or students' bodies "in the amount reasonably necessary for the (victim) to improve his ways" ... The right of self-defense that the Basic Law grants to all adults needs all the more so to be applied to the minor – not simply because one is capable of self-defense and one is not, but because children's welfare and well-being is one of the state's greatest values – both as a Jewish state and as a democratic state.

The outlook which recognizes the child's rights to protect his or her physical and mental integrity received clear expression in the Convention on Children's Rights which was affirmed

in Israel on August 8, 1991, and went into force here on November 2, 1991. The Convention explicitly forbids the use of physical or mental violence against children, and obligates the state to take measures to prevent violence against children. Thus paragraph 19(1) of the Convention states:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, legal guardians or any other person who has the care of the child..

Accordingly, we decide that corporal punishment of children, or humiliation and derogation from their dignity as a method of education by their parents, is entirely impermissible, and is a remnant of a societal-educational outlook that has lost its validity. The child is not the parent's property and cannot be used as a punching bag the parents can beat at their leisure, even when the parents honestly believe that they are fulfilling their duty and right to educate their child. The child depends upon the parents, is entitled to parental love, protection and the parents' gentle touch. The use of punishment which causes hurt and humiliation does not contribute to the child's personality or education, but instead damages his or her human rights. Such punishment injures his or her body, feelings, dignity and proper development. Such punishment distances us from our goal of a society free of violence. Accordingly, let it be known that in our society, parents are now forbidden to make use of corporal punishments or methods that demean and humiliate the child as an educational system.

Support for this approach regarding the criminal liability of a parent who injures his or her child for the sake of "education" may be found in the failure of Paragraph 49(5) of the proposed criminal law to pass the Knesset in 1992. According to the proposed language, whose caption was "Justification", an individual would not bear criminal liability for his or her acts if

(5) He or she committed the act for the sake of the education of a minor in his or her care, as long he or she did not exceed what is reasonable.

Between the first reading and second and third readings of the bill, Paragraph 49(5) was deleted, and it did not constitute part of the amendment to the criminal law that was finally passed. MK Yael Dayan explained her approach to the matter during the second and third reading of the bill in the full Knesset.

In our society, which suffers from child abuse, from violence against the weak, from violence against the helpless, from violence bearing the force of authority, and in the family, especially in the family, we are sometimes unable to rely upon the "reasonable". We do not know what is "reasonable"... One sees education in three slaps to the cheek, another sees it in burning with an iron or appliance, and another sees it in imprisonment. It is absolutely impermissible to include any type of compromise norms, for it must be unequivocal – violence may not be used and no coercive measures may be used against a minor or against one who is under the power or authority

or guardianship of another.

It may be argued that this ruling is one that the community will be unable to bear, for many parents make use of force that is not disproportionate in nature against their children (e.g., a light slap on the bottom or the hand) in order to educate and discipline them. Are these parents criminals?

The proper response is that in the legal, social and educational reality in which we live, we cannot leave open the definition of 'reasonable' and thus compromise at the risk of danger to the health and welfare of children. We must also take into account that we live in a society in which violence is as pervasive as a plague; an exception for "light" violence is likely to degenerate into more serious violence. We cannot endanger the bodily and mental integrity of the minor with any type of corporal punishment; the type of permissible measures must be clear and unequivocal, the message being that corporal punishment is not permitted.

We must also not forget that the parent may still make use of all the defenses already codified in the criminal law, which establish barriers to criminal responsibility in the proper circumstances. These defenses apply to all instances of the use of force by the parent against the child to protect the body of the minor or to defend others. In my view, the present barriers to criminal responsibility permit us to discern between the use of force for "educational punishment" which is void and forbidden, and the use of reasonable force to prevent injury to the child or to others, or to permit light contact, even if forceful, with the child's body in order to preserve order.

Additionally, the criminal law possesses enough "filters" that unimportant cases will not be included in its sweep. Thus, for example, the prosecution has discretion not to go to trial in the absence of the public interest. Similarly, the criminal law contains the "de minimis" defense, which may also be used to prevent the imposition of criminal liability for the use of mild force by a parent against his or her child.

One more item. Usually, acts which an ordinarily constituted individual would not complain about will not serve as a basis for criminal liability. Thus, for example, not every ordinary contact between one individual and another will lead to the imposition of criminal liability, even if the act apparently fits into the formal elements of the crime of assault. It should be understood that parent-child relations include continuous physical contact, and therefore routine physical contact between a parent and child will not constitute a basis for a criminal offense.

In my view, one may rely upon the indicators I have mentioned to prevent criminal liability from being imposed on a parent in incidents of little significance that do not justify the application of the framework of the criminal law.

In the present case, the appellant's beating of her children was not a one-time incident of little significance, but a mode of continuing behavior which created an air of tension and violence in her home. The claim of the appellant that the acts were done for the good of her children in order that they better behave contradicts the fundamental values of our society regarding human dignity and the integrity of the body and mind of the minor.

Therefore, the appeal of the conviction must be denied.

Justice Englard (dissenting as to the conviction for the crime of abuse, concurring in the question of the non-existence of a 'reasonable' force defense):

I concur with my colleague, Justice Beinisch, that in the case before the Court, the violent manner in which the mother punished her children was neither reasonable nor can be defined as a minor offense, and constitutes a crime under the relevant section of the criminal code.

Despite this, I find it difficult to find the appellant guilty of the crime of abuse per se. My colleague, Justice Beinisch, discussed above the problems associated with the use of the term "abuse" in criminal law. She pointed out the fact that the literal definition of abuse in the dictionary, "Cruel and harsh behavior; inhumane behavior," does not necessarily indicate the term's legal implications, and, thus, recommended that we refrain from relying solely upon the word's plain meaning. In her opinion, the meaning of the word in the legal context must be extracted from the language and purpose of the law and from proper judicial understanding and consideration.

The main problem is the following: what is the difference between a crime of abuse and a crime of assault, and where do we draw the line between the two. More precisely, what are the additional elements which, in the case of physical (and not sexual or psychological) harassment, deem the crime of attacking a minor or a helpless person abuse per se, according to the provision in the law.

In her opinion, Justice Beinisch went into a detailed explanation of how to distinguish the crime of abuse from other forms of physical assault. She noted that the term abuse, and with it physical-psychological abuse, is employed in cases in which our conscience and sensitivity does not allow us simply to deem the act a mere assault. She also pointed out that the crime of abuse carries with it a social stigma of immorality, [a stigma] which is not necessarily associated with other violent crimes.

My colleague asserted that she does not purport to offer a comprehensive definition of abuse, but rather merely to present the underpinnings of physical abuse and its basic characteristics which include the use of direct or indirect physical force against the victim, designed to cause physical and/or mental injury or anguish.

In her opinion Justice Beinisch listed the various characteristics of abuse, which she noted, is not exhaustive. They include: first, continued acts or omissions. While these acts (or omissions) on their own might not be considered abuse, the fact that they are repeated time and again adds to their severity, to their cruelty, to their ability to intimidate, to the degradation they cause. Second, even acts which are committed on a one-time basis which are cruel in nature, cause fear and intimidation, or degradation can be considered acts of abuse. Third, acts which are designed to cause fear, punishment or blackmail, may also be considered abuse. Fourth, abuse is characterized by an imbalance of power between the perpetrator, who holds a position of authority or power, and the victim, who holds an inferior Position or stands powerless in the face of his/her oppressor.

As to the emotional element which triggers the physical act of abuse, my colleague asserted that the abuser to have the necessary *mens rea* for the act.

My colleague then turned to the specific circumstances of our case and pointed out that, what we have here is not an isolated event, but rather continuous, violent behavior. The beatings were perpetrated on a regular basis, in a systematic manner, causing the minors to internalize the "lesson" that their behavior is connected to the acts of violence against them.

Thus, she argued that while each act of the mother on its own perhaps could not be deemed an act of cruelty. Nonetheless, taken together and over time, the systematic nature of

the beatings, their continuous nature, their frequency, the fact that the mother often employed foreign objects such as shoes or slippers with which to hit the minors, the general atmosphere of terror and intimidation which prevailed in the house, and the fact that insignificant acts on the part of the children could trigger such violence, all these indicators point to the fact that here we are dealing with cruel behavior on the part of a mother who utterly disregarded the dignity of her children, and who treated them like mere objects or property.

Before I begin my in-depth analysis of my colleague Justice Beinisch's approach, I would like to point out a number of important things. In my opinion, the principle of *nulla poena* is of extreme importance, as established by the Criminal Code. Furthermore, section the same code dictates that if there are various ways to interpret the law, the least stringent interpretation should be adopted." The law calls for all crimes to be defined in a clear manner, so that citizens are aware of the law and are not subjected to arbitrary or subjective legal rulings.

In the United States, oftentimes rulings are overturned based on due process concerns for their vagueness. With regard to the subject of children's welfare see, e.g. *State v. Gallegos*, 384 P.2d 967 (Wyo. 1963), Section... a part of the child protection act, declares it is the policy of the act to protect children from all types of abuse which jeopardize their health, welfare or morals. Without doubt statutes directed to that end are essential for the safeguarding of youth and for the preservation of health and moral standards. However, criminal statutes cannot be couched in terms so vague and indefinite as to deny due process to an accused (p.968)

I believe that this case calls upon us to draw upon legal commentary to help us overcome the problem of vagueness in the applicable law. We must base the opinion in the concept of legality, as demanded by our criminal code. It should be noted that U.S. law allows for the use of legal commentary to overcome vagueness in the law, a method termed "the rule of lenity." See *In re S.K.*, 564 A.2d 1382 (D.C. App. 1989)

The statute under which the alleged [child] abuser is charged must sufficiently apprise him or her of what is prohibited...If that statute is ambiguous, it is strictly construed, for the rule of lenity applies. (p.1388)

[Justice Englard then goes on to trace the meaning of the Hebrew word for abuse, "hitollilut," by tracing its Biblical origins and exploring its various definitions as provided in the dictionary.]

Nevertheless, as pointed out by my colleague, the literal meaning of the word does not necessarily shed light on its legal definition. Thus, according to Justice Beinisch, we should not rely upon the literal meaning of the word alone to determine what constitutes abuse in the legal context, but, rather, we should look towards the meaning and purpose of the law in play for guidance. Justice Beinisch is satisfied with merely establishing the basic principles underlying the concept of abuse, and then dealing with each case of purported abuse on a case by case basis, guided by our "conscience and sensitivity" alone. I take issue with this approach. In my opinion the principle of legality established by law, requires us to define the crime in a specific manner. The idea that our sensitivity and conscience would dictate, after the fact, the specific nature of the criminal act seems arbitrary and against the Talmudic dicta: "One should not be punished without proper warning" (Sanhedrin 46:2)

My colleague, nevertheless, offered a list of characteristics of abuse (which she remarks is incomplete). The first of these characteristics is the continuous perpetration of acts or omissions. In her opinion, an isolated act may not constitute abuse, as it may not, on its own, be

sufficiently cruel or degrading. “Nonetheless, the various acts (or omissions) taken together amount to severe and cruel behavior, to degradation, or to intimidation which should be seen as abuse.” If such an approach is correct, we are still faced with the question of where to draw the line between isolated events which do not equal abuse and continuous and established patterns of behavior, which can be defined as abuse according to my colleague’s opinion. Again, we are faced with the problem of vagueness, which is undesirable in criminal law.

How have Israeli courts dealt in the past with the vagueness of the term “abuse”? The first time the word appears in Israeli law is in the context of abuse of power in the army. See *The Military Prosecution v. Corporal Nehmad* 209/55/2-70. In that case, the military court relied upon an earlier military case:

We cannot simply assume prima facie that a single strike or even a number of strikes amount to abuse. Rather we must look at the circumstances and the manner in which the strikes were delivered.

In *The Chief Military Prosecutor v. Lieutenant Timor* [citation omitted] the Court held:

We do not find that the behavior amounts to abuse, as we cannot prove that the defendant wished to degrade or hurt the victim in front of his peers, or that the acts were part of a personal vendetta.

In 1955, the army’s stance towards abuse shifted. See *Lieutenant Aharon v. The Military Prosecution* [citation omitted]:

According to the applicable law, abuse is not limited to the physical violation of another, but rather the violation of a soldier’s honor, the degradation, and the humiliation of a soldier can all amount to abuse. The test for determining whether or not an act amounts to abuse is objective. That is to say that it is not necessary to prove that the commander sought to violate a soldier’s respect, but, rather, it is sufficient to look objectively at the commanders behavior.

The Court continued:

In other opinions...it has been determined that abuse is defined as acts which come to “degrade” a soldier or “to injure him.”

Whereas military courts purported to employ an objective standard to determine if an act or acts constituted abuse, using degradation as the measuring stick, military judges still differed on the extent of mental anguish required to deem an act abusive. There were certain military judges who argues that an abusive act amounts to such when it is designed to humiliate. However, most judges held that abuse can be determined from objective standards, without inquiry as to the intent of the acts. [citations omitted].

I will now turn to the civil courts holding on the subject of abuse by exploring the judicial interpretation of the crime of abuse, according to the criminal code.

Hachmov v. The State of Israel, 295/94 (unpublished) held:

There is no doubt that the appellant shaved her 12 year old daughter’s hair using undue force... This deed amounts to an act of harsh

violence, which is as if she locked up her child, stripped her of her freedom, and degraded her...

Judge G. Bach, in Anonymous v. The State of Israel (unpublished) 3958/94 described the abusive acts in question as follows:

We are dealing with the harsh abuse of the children, which was executed oftentimes by means of different instruments, including a stick and a belt. This abuse also included biting, pinching, banging the children's' heads against the wall, and punishing them in a disproportionate and unreasonable manner. The most severe episode of abuse occurred when the mother applied a burning knife onto her child, causing him severe burns on his fingers. Many other abusive acts continued...

And in 7861/96 Anonymous v. The State of Israel (soon to be published) the court held:

The appellant would gather the children in the living room and degrade and humiliate his wife in front of them. He threatened that if she would complain, he would kill her. The appellant would also lock the children in their room for an entire day. Once, he entered his daughter's room and spat on her. Another time he shaved his son's sidelocks against his will. He also slapped and kicked his children in front of his peers. In addition, he struck another son with a camcorder and threw a shoe at him.

Similarly, my colleague, Y. Kedmi in Anonymous v. The State of Israel 3754/97 (unpublished) held:

While the merciless beatings to which the father subjected his daughters, did not cause any broken bones or internal injuries, they nonetheless amount to abuse. It is sufficient for this Court to look at the manner of the beatings, their severity, the emotional scars which they left on the children, not to mention the fears and nightmares which they produced...

In addition, in Anonymous v. The State of Israel 3796/98 the Court described the acts which brought down a verdict of guilt on the question of abuse:

From time to time he would strike them with a belt or a broom or a hanger or with his fists, or he would kick them, etc. Oftentimes, they would suffer injury as a result of the beatings...He arranged the living room in his house to be his own personal room. He withheld from them basic life provisions, including food and the use of electricity. He would often call his wife and daughters degrading names.

From the above case we see that a conviction for abuse stems from harsh and cruel violent acts which were designed to degrade the victim. Thus, I believe that it is proper to hold that the act of abuse is based on evidence of physical abuse, i.e. acts of harsh violence and cruelty which are designed to degrade and humiliate the victim. This definition matches the

literal definition of abuse, and I see no reason to shy away from such a meaning.

The requirement that the physical abuse must include especially severe acts, which manifest as cruel and humiliating violence, matches the legislative approach towards those who perpetrate crimes against minors and other helpless people. With regard to crimes against minors and other helpless people the sentence is five years imprisonment. If the perpetrator is the victim's guardian, the sentence is 7 years imprisonment. If the perpetrator caused serious injury to the victim, the sentence is 9 years jail. In the case of physical abuse (emotional or sexual) the punishment is also 9 years. It appears that the legislator deemed abuse to be the kind of attack which causes **serious injury** to the victim. Thus, it seems proper to restrict the application of the term abuse only to especially severe acts which are quite violent and degrading and are designed to cause extreme suffering to the victim.

This conclusion brings me to the following question: Is the crime of abuse merely a behavioral crime, as my colleague Justice Beinisch believe, or is it a causative crime. The answer, which is not an easy one, is inextricably tied to the legal requirement of intent to perpetrate the crime. "Abuse" is defined by the criminal code as an act of physical, emotional or sexual abuse against a minor or helpless person. This definition alludes to the requirement that the victim of abuse be caused to suffer. Furthermore, since the crime of abuse is similar to the crime of assault on minors and the helpless, it appears logical that abuse be viewed, too, as a causative crime. Practically speaking, it is hard to believe that a person would be convicted of physical abuse, without actually causing the victim to suffer. It is also important to note, that normally an act which is deemed a crime must be accompanied with the proper intent (*mens rea*), and that a crime is measured by the intent of the perpetrator and not by the result of his/her actions. Therefore, if the law does not explain in detail the connection between responsibility for the crime and the results, we can assume that the crime is a behavioral one. Thus, despite the fact that the crime of abuse is related to causing a minor or helpless person suffering, the crime itself should remain simply a behavioral crime. Therefore, no proof of injury on the part of the victim is required.

In my opinion it is improper to term behavior "abuse" if it is not accompanied by especially severe acts. If we do not impose such standards, we threaten to lessen the moral implications of the crime. Such is the situation with regard to the case before the court. In my opinion there is no reason to convict the mother of abuse, which calls for a punishment of up to 9 years in prison. It would suffice to convict the mother of assault which brings with it a maximum sentence of 4 years. No additional social goal is achieved by convicting the mother of abuse as well. Thus, in my opinion I would have found the appellant guilty of assault but not guilty of abuse.