

DECISION ON THE MERITS

5 December 2006

World Organisation Against Torture (OMCT) v. Portugal

Complaint No. 34/2006

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 219th session attended by:

Mr	Jean-Michel BELORGEY, President
Mrs	Polonca KONČAR, First Vice-President
Messrs	Andrzej SWIATKOWSKI, Second Vice-President
	Stein EVJU, General Rapporteur
	Rolf BIRK
	Matti MIKKOLA
	Nikitas ALIPRANTIS
	Afredo BRUTO DA COSTA
	Tekin AKILLIOĞLU
Mrs	Csilla KOLLONAY LEHOCZKY
Mr	Lauri LEPPIK
Mrs	Ersigliagrazia SPATAFORA

Assisted by Mr Régis BRILLAT, Executive Secretary of the European Social Charter,

After having deliberated on December 2006,

On the basis of the report presented by Mr Jean-Michel. BELORGEY,

Delivers the following decision adopted on this date:

PROCEDURE

1. The complaint registered on 31 May 2006. OMCT alleges that, in the light of the Supreme Court judgment of 5 April 2006 (06P 468), the situation in Portugal is not in conformity with Article 17 of the Revised Charter since domestic law does not explicitly and effectively prohibit all corporal punishment of children. According to OMCT, the effect of this judgment is explicitly contrary to what the Committee previously understood as being the effect of prior judgments of the Court, on which it based its dismissal of its previous complaint.
2. The Committee declared the complaint admissible on 12 June 2006.
3. Pursuant to Article 7§§1 and 2 of the Protocol providing for a system of collective complaints ("the Protocol") and the Committee's decision on the admissibility of the complaint, the Executive Secretary communicated the text of the admissibility decision on 16 June 2006 to the Portuguese Government ("the Government"), to the World Organisation Against Torture ("OMCT") ("the complainant") and to the Contracting Parties to the Protocol, to the States party to the Protocol, the States having ratified the Revised Charter and having made a declaration under its Article D§2, as well as to the Union of the Confederations of Industry and Employers of Europe (UNICE) and to the International Organisation of Employers (IOE).
4. Pursuant to Rule 31§1 of the Committee's Rules, the Committee fixed a time limit of 30 September 2006 for the presentation of the Government's submissions on the merits of the complaint and subsequently, at the Government's request, the President, pursuant to Rule 28§2, extended this deadline to 30 November 2006. The submissions were registered on that date and were transmitted to OMCT for information.
5. The President set 30 September 2006 as the deadline for any observations from the States party to the Protocol as well as from the UNICE and the IOE. UNICE submitted its observations on 29 September 2006.

SUBMISSIONS OF THE PARTIES

A – The Complainant organisation

6. The complainant asks the European Committee of Social Rights to say the Portugal does not respect Article 17 of the Revised Charter.

B – The Government

7. The Government maintains that:

“The Portuguese criminal code explicitly prohibits violence against any person. There is no provision of Portuguese law that authorises any violation of children’s physical integrity or the administration of corporal punishment.”

RELEVANT DOMESTIC LAW

8. The Constitution

Article 36 (5):

“Parents have the right and duty to maintain their children.”

Article 69 :

“1. Children have the right to be protected by the community and the State for their full development, particularly against all forms of abandonment, discrimination and oppression and against the abuse of authority in the family or other institutions.

2. The State shall guarantee special protection to children who are orphaned, abandoned, or in any way deprived of a normal family environment.

3. Access to work shall be forbidden, in accordance with the law, to school-age minor children.”

9. The Criminal Code

Article 143 (1) :

“Whoever causes bodily injury or impairment of health of another shall be punished with confinement up to 3 years or a fine...”

Article 152 :

“Whoever is in charge of or has under his or her responsibility, direction, education or service a person under 18 years old, an incapable person, or a person who is diminished because of his or her age, because of pain, or because of physical or psychological weakness and inflicts upon him or her physical or psychological ill-treatment; or treats him or her cruelly; or overbears him or her with excessive tasks; is punishable with imprisonment from 1 to 5 years...”

10. The Civil Code :

Article 1878

"1. Parents, in the interest of their children, should ensure their safety and health, provide for their sustenance, direct their education, represent them...and administer their goods.

2. Children must obey their parents; these, however, in accordance with the maturity of the children, must take into account their opinion in the important family issues and recognize their autonomy in organizing life."

Article 1885

"In so far as they are able, parents should foster the physical, intellectual, and moral development of their children".

11. The Case Law

According to a Supreme Court decision adopted on 9 February 1994, parents have no right to use any form of physical aggression as a form of discipline and a slap is considered as "light corporal assault", a crime punishable under Article 143§1 of the Criminal code.

The Supreme Court delivered a judgment on 5 April 2006 which made no reference to that of 9 February 1994. OMCT produced a translation in English of the judgment. As the Government never responded to the Committee's request for a translation in an official language of the Council of Europe, the Committee considers that it accepts the translation provided by OMCT.

The summary of the decision states that:

« Moderate punishments administered to the minor by the person entitled to do it and whose purpose is exclusively educational and adequate to the situation, are not unlawful. »

Referring to jurisprudence that it itself relied upon a 1997 judgement, the Court stated:

" We thus agree with the 14 November 1997 judgement of this Court (CJ STJ, V, 3, 235) where it establishes as the relevant point to assess if this offence was committed, not the repetition, but the gravity of the conduct due to the cruelty, insensibility or even revenge used.

VI. – This inherent gravity of the expressions "ill-treatment" and "cruel treatment" constitutes the element leading us to the denial of this appeal. As far as the children in question is concerned, not only is such level of gravity not attained, but also the acts with which the defendant is charged should, in our view, be considered lawful.

In the upbringing of the human being moderate punishment that can be corporal or other forms of punishment is justified. It would be unrealistic to think otherwise and we believe that from a scientific point of view the theories supporting the non-use of this type of moderate punishment have been set aside.

Taipa de Carvalho, in the said article, states that the “educational purpose may justify one or the other slight body injury” and Paula Ribeiro de Faria (also in the Comentário Conimbricense do Código Penal, Volume I, page 214) says that “according to the predominant point of view, the injury to physical integrity may be justified when it is adequate to reach a certain educational goal and administered by the person having charge or control over the child with that intention”. Similarly, this Court in its 10 October 1995 judgement (summary available on www.dgsi.pt) considered that “parents have the power/duty to moderately punish their children”.

VII – This power-obligation to punish raises, however, very delicate border problems. One has to know where the limit lies, and then, consequently, the person acting within that limit is deemed not to have committed any unlawful act. We have always to be aware that this is an extremely vulnerable and dangerous relation as far as abuses are concerned. In our case, even more so, as we are dealing with minors who have psychic disabilities and have been placed in an institution.

We are talking about the relation between one person with power in relation to another one who has none. The former will frequently be disturbed, in terms of serenity and consideration, by the children’s unstable behaviours.

*VIII – The borderline is between two points:
One related to the purpose of the punishment;
The other is linked to its adequacy to the child’s upbringing.*

Punishment will always have to aim at the child’s chose in action that takes the form of its upbringing. Are, thus, excluded to the very frequent cases where the offender tries (conscientiously or not) to project his own problems onto the child, who he uses as a way of emotional stress relief.

*To assess the adequacy we dare use the “good-parent” figure, now, curiously, carrying out the duties directly deriving from the well-established expression.
Let us examine, then, if a good parent would act as the offender did.*

IX – As far as the grounds of this appeal is concerned, we can even answer with a question:

“Who being a good parent does not, once or twice, slap the bottom of the child refusing to go to school? Does not slap the child who throws a knife at him? Or punishes a child by sending it to his room when it does not want to eat?”

As for the first two, we can even say that if the person having the lawful control or charge of the child would refrain from acting, then yes, that would amount to educational neglect. Many children refuse at times to go to the school. Because of its utmost importance, going to school has to be strongly imposed. It is obvious that in case of repeated school phobia, it would be advisable to find out the reasons and even get professional counselling. But should it happen once or twice, slapping (always moderate) the bottom is part of the method of upbringing.

Similarly, to throw a knife and what’s more at the person raising him, justifies, within the framework of a stable upbringing, emphasizing to the child that it did wrong and let it see

the possible consequences. A slap in the heat of the moment cannot be considered extreme.

As regards the decision to send EE to his room because he did not want to eat his salad, it is arguable. Children generally do not enjoy salad and no difference should have been made here. Still, in our opinion the severity of the defendant's reaction too was not unacceptable. In fact, we are talking about the relationship between the child and the person having the lawful control or charge of the same child, a common situation within the best of families."

The Committee notes that, as the Court pointed out, the child concerned was hyperactive and suffered from psychological problems.

THE LAW

ON THE ALLEGATION OF VIOLATION OF ARTICLE 17 OF THE REVISED EUROPEAN SOCIAL CHARTER

12. Having regard to the Revised Charter, and in particular to Article 17 which reads as follows:

Article 17 –The right of children and young persons to social, legal and economic protection

Part I: "*Children and young persons have the right to appropriate social, legal and economic protection.*"

Part II: "*With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:*

- 1 a. *to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;*
- b. *to protect children and young persons against negligence, violence or exploitation;*
- c. *to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support;*
- 2 *to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools."*

A. Arguments of the parties

a) The complainant organisation

13. The complainant organisation maintains that the Supreme Court judgment of 5 April 2006 means that Portugal is failing to comply with Article 17 of the revised Charter because it does not explicitly or effectively prohibit all corporal punishment of children, either by their parents or by others, and has not conducted any comprehensive awareness-raising on the law and children's rights to protection.

14. In the absence of an explicit ban in the legislation, comprehensive awareness-raising and public education on children's rights to protection and promotion of positive, non-violent forms of discipline, the complainant believes that hundreds of thousands of Portuguese children are suffering from preventable breaches of their rights to respect for human dignity and physical integrity.

“15. The OMCT asks the Committee to confirm that Article 17 requires an explicit statutory ban on all corporal punishment and degrading punishment or treatment of children.

b) The Government

16. The Government maintains that: “The Portuguese criminal code explicitly prohibits violence against any person. There is no provision of Portuguese law that authorises any violation of children's physical integrity or the administration of ‘corporal punishment’.”

The Government's submissions indicate that the Criminal Code is currently being revised and that one of the purposes of this is to establish a new offence of domestic violence, which would classify corporal punishment as a form of ill-treatment. No information has yet been received on when this reform might come into force”.

B. Assessment of the Committee

17. The Committee recalls that within the scope of the collective complaints procedure it bases its assessment of conformity with the Charter on the domestic law and practice applicable on the date of the decision on the merits of the complaint (See European Council of Police Trade Unions v. Portugal, Collective complaint N° 11/2001, decision on the merits of 21 May 2001, §§ 47-48 and 67-68). In the present case, it therefore only takes into account the currently applicable texts and refrains from assessing the proposed amendments, which may be subject to further modifications in the course of the legislative procedure.

18. The Committee refers to its interpretation of Article 17 of the Charter with respect to the corporal punishment of children (see collective complaints OMCT v. Greece (17/2003), Italy (19/2003), Ireland (18/2003), Portugal (20/2003) and Belgium (21/2003), decisions on the merits of 7 December 2004).

19. To comply with Article 17, states' domestic law must prohibit and penalise all forms of violence against children, that is acts or behaviour likely to affect the physical integrity, dignity, development or psychological well being of children.


20. The relevant provisions must be sufficiently clear, binding and precise, so as to preclude the courts from refusing to apply them to violence against children.


21. Moreover, states must act with due diligence to ensure that such violence is eliminated in practice.

22. The conclusion to be drawn from the Supreme Court's decision of 5 April 2006 is that Portuguese law does not include such provisions, even though this was the interpretation that had been drawn from a previous decision of that court. In addition, the Government has not supplied information to show that the measures in practice are likely to result in the eradication of all forms of violence against children.

CONCLUSION

For these reasons, the Committee concludes unanimously as to the violation of Article 17 of the Revised Charter.


Jean-Michel BELORGEY
Rapporteur
President


Régis BRILLAT
Executive Secretary