

DECISION ON THE MERITS

Adoption: 20 January 2015

Notification: 28 January 2015

Publication: 29 May 2015

**Association for the Protection of All Children (APPROACH) Ltd.
v. Czech Republic**

Complaint No. 96/2013

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter (“the Committee”), during its 276th session attended by:

Eliane CHEMLA, Acting President
Monika SCHLACHTER,
Petros STANGOS,
Colm O’CINNEIDE
Lauri LEPPIK
Birgitta NYSTRÖM
Giuseppe PALMISANO
Karin LUKAS
Jozsef HAJDU
Marcin WUJCZYK

Assisted by Régis BRILLAT, Executive Secretary

Having deliberated on 5 December 2014 and 20 January 2015,

On the basis of the report presented by Monika SCHLACHTER,

Delivers the following decision adopted on the latter date:

PROCEDURE

1. The complaint submitted by the Association for the Protection of All Children (APPROACH) was registered on 4 February 2013. It was communicated to the Government on 7 February 2013.

2. The complainant organisation alleges that the Czech Republic is in violation of Article 17 of the 1961 European Social Charter (“the 1961 Charter”) on the grounds that there is no explicit and effective prohibition of all corporal punishment of children in the family and in all forms of non-institutional child care. It equally alleges that the Czech Republic has failed to act with due diligence to eliminate such a punishment in practice.

3. In accordance with Rule 29, paragraph 1 of the Rules, on 26 March 2013, the President of the Committee asked the Government of Czech Republic (“the Government”) to make, before 3 May, written observations on the admissibility of the complaint.

4. The Government’s submissions on the admissibility were registered on 3 May 2013 and the response from APPROACH to these submissions on 13 May 2013.

5. On 2 July 2013, the Committee declared the complaint admissible. On 10 July 2013, the admissibility decision was communicated to the parties and the Government was simultaneously invited to make written submissions on the merits of the complaint by the time-limit of 27 September 2013.

6. On 16 July 2013, referring to Article 7§1 of the Protocol providing for a system of collective complaints (“the Protocol”), the Committee invited the States Parties to the Protocol, and the States having made a declaration under Article D§2 of the Revised Charter, to transmit to it any observations they may wish to make on the merits of the complaint before 27 September 2013.

7. No such observations were received.

8. The Government’s submissions on the merits were registered on 25 September 2013.

9. The deadline set for APPROACH's response to the Government's submissions on the merits was 2 December 2013. At the request of APPROACH, the President of the Committee granted an extension of the time-limit until 20 January 2014. The response was registered on 17 January 2014.

10. On 31 March 2014, the President of the Committee agreed to the request by the Government to submit a further response on the merits of the complaint within the time-limit of 7 May 2014. The Government's submissions were registered on 6 May 2014.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

11. APPROACH asks the Committee to find the Czech Republic in violation of Article 17 of the 1961 Charter on the grounds that there is no explicit and effective prohibition of all corporal punishment of children in the family and in non-institutional forms of child care, as well as because Czech Republic has allegedly failed to act with due diligence to eliminate such a punishment in practice.

B – The respondent Government

12. The Government rejects the allegations put forward by APPROACH.

RELEVANT DOMESTIC LAW AND PRACTICE

13. In their submissions, the parties make reference to, *inter alia*, the following domestic legal sources:

- Constitution of the Czech Republic of 16 December 1992, as amended;
- Constitutional Act No. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, as amended;
- Act No. 94/1963 Coll., Family Act (Section 31§2), as amended;
- Act No. 200/1990 Coll., Misdemeanour Act (Section 49), as amended;
- Act No. 359/1999 Coll., on the Social and Legal Protection of Children, as amended;

- Act No. 109/2002 Coll., regulating Institutional Education or Protective Care in Educational Facilities and on Preventive Educational Care in Educational Facilities and on the amendment of certain acts, as amended;
- Act No. 40/2009 Coll., Criminal Code (Sections 146 and 198), as amended;
- Act No. 89/2012 Coll., Civil Code, effective as of 1 January 2014 (Section 857§2 and 884§2), as amended.

14. The revised Civil Code provides the following on parental responsibilities (unofficial translation):

“Article 857

a. The child is obliged to obey its parents.

b. Until the child becomes legally competent (*sui juris*), its parents have the right to guide the child with educational measures, in keeping with its developing capacities, including restrictions when pursuing the protection of morals, health and rights of the child, as well as the rights of others and public order. The child is required to comply with these measures.”

“Article 884

a. Parents have a crucial role in the upbringing of a child. Parents should be universally an example for their children, especially concerning their way of life and behaviour in the family.

b. Educational means can be used only in the form and extent as is reasonable under the circumstances, when this does not endanger health of the child or its development and does not affect the human dignity of the child.”

RELEVANT INTERNATIONAL MATERIALS

I. The Council of Europe

15. The European Convention on Human Rights 1950 (“the Convention”) includes the following provisions:

Article 3 - Prohibition of torture

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Article 8 - Right to respect for private and family life

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

a. Relevant judgments of the European Court of Human Rights

- Case of A. v. The United Kingdom, Application No. 100/1997/884/1096, judgment of 23 September 1998;
- Case of Costello-Roberts v. The United Kingdom, Application No. 13134/87 judgment of 25 March 1993;
- Case of Cambell and Cosans v. The United Kingdom Application Nos. 7511/76, 743/76, judgment of 25 February 1982.

b. Other materials

16. The Parliamentary Assembly of the Council of Europe has adopted:
- Recommendation 1666 (2004), “Europe-wide ban on corporal punishment of children”, adopted on 24 June 2004.

II. The United Nations

17. The United Nations Convention on the Rights of the Child (New York, 20 November 1989; entry into force 2 September 1990, United Nations Treaty Series, vol. 1577; succeeded into by the Czech Republic on 22 February 1993) includes the following provision:

Article 19

“1. 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 parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”

18. General Comment No. 8 (2006) of the Committee on the Rights of the Child, “The right of the child to protection from corporal punishment and other cruel and degrading forms of punishment” (CRC/C/GC/8; §§21 - 22), includes the following statements:

“Once visible, it is clear that the practice directly conflicts with the equal and inalienable rights of children to respect for their human dignity and physical integrity. The distinct nature of children, their initial dependent and developmental state, their unique human potential as well as their vulnerability, all demand the need for more, rather than less, legal and other protection from all forms of violence.”

“The Committee emphasizes that eliminating violent and humiliating punishment of children, through law reform and other necessary measures, is an immediate and unqualified obligation of States parties.”

19. General Comment No. 13 (2011) of the Committee on the Rights of the Child, “The right of the child to freedom from all forms of violence” (CRC/C/GC/13; §17) includes the following statement:

“The Committee has consistently maintained the position that all forms of violence against children, however light, are unacceptable. “All forms of physical or mental violence” does not leave room for any level of legalized violence against children. Frequency, severity of harm and intent to harm are not prerequisites for the definitions of violence. States parties may refer to such factors in intervention strategies in order to allow proportional responses in the best interests of the child, but definitions must in no way erode the child’s absolute right to human dignity and physical and psychological integrity by describing some forms of violence as legally and/or socially acceptable.”

THE LAW

20. Article 17 of the 1961 Charter reads as follows:

Article 17 – The right of mothers and children to social and economic protection

Part I: “Mothers and children, irrespective of marital status and family relations, have the right to appropriate social and economic protection.”

Part II: “With a view to ensuring the effective exercise of the right of mothers and children to social and economic protection, the Contracting Parties will take all appropriate and necessary measures to that end, including the establishment or maintenance of appropriate institutions or services.”

A – Arguments of the parties

1. The complainant organisation

21. APPROACH alleges that the relevant legal provisions do not include a general prohibition of the corporal punishment of children in the family and in non-institutional forms of care and are not interpreted in a consistent manner that would prohibit all corporal punishment of children in practice.

22. The complainant organisation provides information on the prevalence of corporal punishment, which indicates that the corporal punishment of children is widespread.

23. APPROACH recalls that the Committee has repeatedly found the situation to be in violation of Article 17 under the reporting procedure (Conclusions 2005 and 2011). It also states that the Committee on the Rights of the Child has in its concluding observations recommended an explicit prohibition on corporal punishment be enacted and that the widespread tolerance of corporal punishment addressed (CRC/C/CZE/CO/3-4, 4 August 2011). The Czech Republic also received recommendations to explicitly prohibit corporal punishment during its Universal Periodic Review at the United Nations in 2012.

24. It observes that even though the Government in 2010 considered the enactment of an explicit prohibition of corporal punishment against children, this was not done when modifying the relevant legislation (CRC/C/CZE/Q/3-4/Add.1, 4 August 2011; CAT/C/CZE/Q/4-5/Add.1, 13 July 2012; CAT/C/SR/1071, 30 May 2012). Instead, also the revised provisions of the Civil Code permit corporal punishment of children when it is not excessively harsh.

25. APPROACH further states that corporal punishment is prohibited in institutions and pre-schools, but allowed in non-institutional care. The Act on Institutional Care does not include a specific prohibition of corporal punishment, either.

26. APPROACH thus alleges that the legal framework of the Czech Republic is inadequate as no comprehensive and explicit legislative prohibition of corporal punishment exists, mild forms of corporal punishment are permitted and corporal punishment remains widespread in practice, in violation of Article 17 of the 1961 Charter.

2. The respondent Government

27. The Government first argues that Article 17 of the 1961 Charter does not require a general prohibition of corporal punishment. It has not ratified the revised Charter and maintains that the said treaty cannot be considered a subsequent international agreement, practice or rule of international law that would be applicable between the Parties with regard to the Czech Republic within the meaning of Article 31§3 of the Vienna Convention on the Law of Treaties.

28. Furthermore, the Government submits that the object and purpose of an international agreement, as stipulated in Article 31§1 of the Vienna Convention should be derived from the international instrument in force in respect of the State Party in question, and not from a separate treaty. It considers the object and purpose of Article 17 of the 1961 Charter to relate to labour law rights only.

29. With regard to the substance of the complaint, the Government maintains that the domestic legislation prohibits the corporal punishment of children, that is any punishment using physical force, which causes pain or even slight discomfort to the child. Corporal punishment committed with an object on a sensitive part of a child's body or punishment that leaves traces after the hitting amounts to child torture.

30. Even though the domestic law does not include an explicit prohibition of all corporal punishment of children in the family and in other settings, it should not be interpreted as permitting such punishment. Nor should the corporal punishment of children be considered accepted within the society.

31. The Government argues that the legislation in force offers a sufficiently effective protection of children by allowing educational measures, which do not pose a threat to the child's dignity or physical, mental or emotional health. The legislative provisions relevant to the corporal punishment of children have been formulated accordingly to exclude excessive punishment.

32. Pursuant to Section 31§2 of the Family Act, in force until the end of 2013, parents were required to protect the child's interests. They and other persons in a similar position had "the right to use appropriate means of education so as to avoid affecting the child's dignity or jeopardizing his/her health of his/her physical, emotional, intellectual and ethical development in any way." A similar provision is currently in Article 857§2 of the revised Civil Code (see paragraph 14). In the Government's view, appropriate educational means do not amount to corporal punishment.

33. The Government further observes that from January 2014 onwards, Section 59§1(h) of Act on the Social and Legal Protection of Children does not require an intention to degrade the child's human dignity, but provides that a misdemeanour is committed by a person who uses inappropriate means of education, upbringing or restriction against a child wilfully or by negligence. According to the Government, the revised provision applies to everyone in charge of the child's upbringing and education, that is, to parents, school and pre-school staff, staff in institutional and protective educational facilities, as well as in facilities for children requiring immediate assistance.

34. When corporal punishment reaches a certain level of intensity and is considered harmful to the society, it becomes punishable under the Criminal Code. The Government submits that under Article 198 of the Code, corporal punishment may amount to the crime of abuse of an entrusted person. The act must however include higher degree of rudeness, as well as permanence. In the alternative, it may amount to ill-treatment within the meaning of Article 199 of the Code. The act is not required to be systematic in nature, nor is the victim required to have suffered health consequences under either provision (Supreme Court of the Czech Republic, Decisions Ref. Nos. Tdo 389/2009; 3 Tdo 1431/2006).

35. Corporal punishment may furthermore be prosecuted as the offence of endangering a child's education under Article 201§1 of the Criminal Code. The act is perpetrated by anyone who, intentionally or by negligence, "jeopardizes the child's intellectual, emotional or ethical development by seriously violating their duty to take care of the child or another important duty arising from the parental responsibility".

36. Corporal punishment may moreover amount to the crime of bodily harm under Article 146 of the Criminal Code, if it has health consequences. Bodily harm to children under 15 years of age is punishable in a stricter manner.

37. When parents have been found to abuse their parental rights or have significantly neglected their duties, parental rights may be limited or withdrawn. Courts may furthermore issue a preliminary ruling on the placing of a child to a more suitable environment or order a violent person to leave a common dwelling and its immediate vicinity.

38. The Government further states that the existing provisions on the prohibition of punishments in school and facilities for institutional education adequately prevent corporal punishment in school environment. The Act regulating Institutional Education or Protective Care in Educational Facilities and on Preventive Educational Care in Educational Facilities includes an exhaustive list of acceptable correctional measures in education. Corporal punishment has not been enlisted. Violations of the ban within the educational sector are processed either within labour law or as misdemeanours or crimes.

39. With regard to the domestic practice, the Government argues having undertaken intensive efforts for the purpose of child protection. It refers to a campaign "Stop Violence against Children", children crisis centres, as well as to such activities as the "Positive Parenthood Project" and the "Methodological Guidelines on the procedure to be followed by primary care physicians in cases of suspected child abuse and when providing health care to persons at risk of domestic violence". It has equally established a Task Force for Prevention of Violence against Children, as well as a National Coordination Centre for Prevention of Injuries, Violence and Support to Child Safety.

40. It refers in particular to the National Strategy on Prevention of Violence against Children in the Czech Republic for the period 2008-2018, which was adopted in September 2008. The strategy builds on the statistics on the prevalence of the corporal punishment referred to by the complainant organisation and takes into consideration the comments by the United Nations Committee on the Rights of the Child.

41. The Government finally maintains that an explicit prohibition of corporal punishment is not necessary when effective prohibition is otherwise ensured. It argues having ensured the effectiveness of the protection through the interpretation given to the relevant legislative provisions by the Supreme Court.

42. The Government concludes that the lack of a general prohibition of corporal punishment cannot be regarded as a breach of Article 17 of the 1961.

B – Assessment of the Committee

43. Firstly, with regard to the obligations under the 1961 Charter and the Revised Charter, the Committee notes that the Czech Republic has ratified Articles 7§10 and 17 of the 1961 Charter.

44. It recalls that the matter of protecting children and young people from ill-treatment and abuse has repeatedly been addressed under the 1961 Charter (Conclusions I, 1969, Statement of interpretation on Article 7; Conclusions V, 1977, Statement of interpretation on Article 7; Conclusions XIII-2, 1995, Statement of interpretation on Article 7). The Committee has consistently interpreted Article 17 of the 1961 Charter to cover the corporal punishment of children and considered that the provision of adequate protection to children in this respect as one of the main objectives of the Charter (Conclusions XV-2, 2001, General Introduction, General observations regarding Articles 7 para. 10 and 17).

45. As the scope of Articles 7§10 and 17 of the 1961 Charter overlaps to a large extent, the Committee has decided to address the matter of ill-treatment and abuse under Article 17 with respect to the States Parties having accepted both provisions (Conclusions XV-2, 2001, General Introduction, General observations regarding Articles 7 para. 10 and 17).

46. Secondly, as concerns the substance-matter of the complaint, the Committee observes that the Charter contains comprehensive provisions protecting the fundamental rights and human dignity of children – that is, persons aged under 18 (Defence for Children International v. the Netherlands, Complaint No. 47/2008, decision on the merits of 20 October 2008, §§ 25-26). It enhances the requirements of the European Convention on Human Rights in this regard.

47. The Committee notes that there is now a wide consensus at both the European and international level among human rights bodies that the corporal punishment of children should be expressly and comprehensively prohibited in law. The Committee refers in particular in this respect to the General Comment Nos. 8 and 13 of the Committee on the Rights of the Child.

48. In this regard, the Committee recalls its interpretation of Article 17 of the Charter as regards the corporal punishment of children laid down most recently in its decision in *World Organisation against Torture (OMCT) v. Portugal* (Complaint No. 34/2006, decision on the merits of 5 December 2006; §§19-21):

“To comply with Article 17, states’ domestic law must prohibit and penalize 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.

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.

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

49. The Committee notes that the provisions of the domestic law referred to in the context of this complaint prohibit serious acts of violence against children, and that national courts will sanction corporal punishment provided it reaches a specific threshold of gravity. However none of the legislation referred to by the Government sets out an express and comprehensive prohibition on all forms of corporal punishment of children that is likely to affect their physical integrity, dignity, development or psychological well-being.

50. Furthermore, there is no clear and precise case-law prohibiting the practice of corporal punishment in comprehensive terms. The Committee observes in particular that also the revised legislation may be read as separating all forms of corporal punishment from the notion of permitted “educational measures” hence permitting corporal punishment for educational reasons, contrary to the Charter.

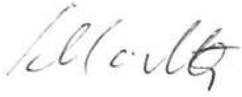
51. The Committee likewise takes note of the domestic case-law on corporal punishment (see paragraph 34). Nothing in the legislation or case law allows the Committee to conclude that all corporal punishment would be automatically prohibited. The Government does not contest this. On the contrary, bodily harm needs to attain a specific threshold of gravity before it amounts to corporal punishment, and physical punishment is allowed as long as it does not reach the prohibited level of intensity.

52. The Committee finally recalls that it has repeatedly found the situation to be in non-conformity with Article 17 under the reporting procedure (Conclusions 2005 and 2011).

CONCLUSION

For these reasons, the Committee concludes:

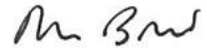
- unanimously that there is a violation of Article 17 of the 1961 Charter.



Monika SCHLACHTER
Rapporteur



Eliana CHEMLA
Acting President



Régis BRILLAT
Executive Secretary