

DECISION ON THE MERITS

Adoption: 5 December 2014

Notification: 26 January 2015

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Association for the Protection of All Children (APPROACH) Ltd v. Slovenia

Complaint No. 95/2013

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter (“the Committee”), during its 275th session attended by:

Luis JIMENA QUESADA, President
Monika SCHLACHTER, Vice-President
Petros STANGOS, Vice-President
Colm O’CINNEIDE, General Rapporteur
Lauri LEPPIK
Birgitta NYSTRÖM
Rüçhan IŞIK
Jarna PETMAN
Giuseppe PALMISANO
Karin LUKAS
Eliane CHEMLA
Jozsef HAJDU
Marcin WUJCZYK

Assisted by Régis BRILLAT, Executive Secretary

Having deliberated on 9 September and on 5 December 2014,

On the basis of the report presented by Birgitta NYSTRÖM,

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 Slovenia is in violation of Article 17 of the European Social Charter (“the Charter”) on the grounds that there is no explicit and effective prohibition of all corporal punishment of children in the family, as well as in all forms of alternative and day care. It equally alleges that Slovenia has failed to act with due diligence to eliminate such punishment in practice.
3. In accordance with Rule 29§1 of the Rules, on 22 March 2013, the President of the Committee asked the Government of Slovenia (“the Government”) to make, before 3 May, written observations on admissibility of the complaint.
4. The Government’s submissions on admissibility were registered on 2 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. The Government’s submissions on the merits were registered on 26 September 2013.
7. 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, having made a declaration in accordance with Article D§2 of the Charter, to transmit to it any observations they may wish to make on the merits of the complaint before 27 September 2013.
8. No such observations were received.
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.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

10. APPROACH asks the Committee to find Slovenia in violation of Article 17 of the Charter on the grounds that that there is no explicit and effective prohibition of all corporal punishment of children in the family and in all forms of alternative care and because Slovenia has failed to act with due diligence to eliminate such a punishment in practice.

B – The respondent Government

11. The Government rejects the allegations put forward by APPROACH in their entirety.

RELEVANT DOMESTIC LAW AND PRACTICE

12. The Constitution of the Republic of Slovenia (Official Gazette RS Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13; English translation available on the Internet page of the Constitutional Court of the Republic of Slovenia at <<http://www.us-rs.si/en/about-the-court/legal-basis/>>) includes the following provisions:

“Article 54 - Rights and Duties of Parents

Parents have the right and duty to maintain, educate, and raise their children. This right and duty may be revoked or restricted only for such reasons as are provided by law in order to protect the child's interests.

[...].”

“Article 56 - Rights of Children

Children shall enjoy special protection and care. Children shall enjoy human rights and fundamental freedoms consistent with their age and maturity.

Children shall be guaranteed special protection from economic, social, physical, mental, or other exploitation and abuse. Such protection shall be regulated by law.

[...].”

13. Section 5 of the Marriage and Family Relations Act (Official Gazette of the Republic of Slovenia, nos. 69/04 – official consolidated text 1, 101/07) requires that parents, other persons, state authorities and bearers of public authority act in a child's best interest in all activities and procedures affecting the child. They must satisfy its material, emotional and psycho-social needs by treatment that is accepted by the society, and which manifests their concern and responsibility for the child, taking account of the child's personality and wishes.

14. Pursuant to the Family Violence Prevention Act (Official Gazette of the Republic of Slovenia, No. 16/08), a child enjoys special protection in cases of family violence. The Act defines the tasks of the authorities and organisations in the consideration of family violence, as well as provides on the protection of the victims. Physical violence is defined in Section 3§2 as “any use of physical force that causes pain, fear or shame to the family member regardless of the fact whether injuries were inflicted”. Family members consist of relatives, foster carers, guardians, as well as other persons living in a common household.

15. Article 6 of the above Act requires all authorities and organisations, healthcare staff, personnel in institutional care and educational institutions, as well as individuals to report family violence to a social work centre, the police or the prosecution service regardless of any rules on confidentiality when the victim is a child. Pursuant to Article 10 of the Act, the procedures in force for the purpose of ensuring coordinated action in instances of family violence are jointly agreed upon by the relevant Ministries.

16. Furthermore, the Criminal Code (Official Gazette of the Republic of Slovenia, No. 50/12-UPB2) includes penal provisions applicable to violence perpetrated against children. It provides, *inter alia*, as follows:

Section 191 – Family Violence

“1. Whoever within a family treats badly another person, beats them, or in any other way treats them painfully or degradingly, threatens with direct attack on their life or limb to throw them out of the joint residence or in any other way limits their freedom of movement, stalks them, forces them to work or give up their work, or in any other way puts them into a subordinate position by aggressively limiting their equal rights shall be sentenced to imprisonment for not more than five years.

2. The same punishment shall be imposed on whoever commits the acts under the preceding paragraph in any other permanent living community.

[...].”

Section 192 – Neglect and Maltreatment of a Child

“1. A parent, adoptive parent, guardian or other person who seriously breaches his obligations to a child shall be sentenced to imprisonment for not more than three years.

2. A parent, adoptive parent, guardian or other person who forces a child to work excessively or to perform work unsuitable to his age, or who out of greed inures a child to begging or other conduct prejudicial to his proper development, or who tortures him shall be sentenced to imprisonment for not more than five years.

3. A parent, adoptive parent, guardian or other person who seriously breaches his obligation to a child shall be sentenced to imprisonment for not more than three years. A parent, adoptive parent or other person who forces a child to work excessively or to perform work unsuitable to his age, or who out of greed inures a child to begging or other conduct prejudicial to his proper development, or who tortures him shall be sentenced to imprisonment for not more than five years.”

17. The Protection of Public Order Act (Official Gazette of the Republic of Slovenia, No. 70/06) includes the following provision:

Section 6 – Violent and Audacious Conduct

“1. A person who provokes or encourages someone to fight or acts audaciously, violently, rudely, offensively or in a similar manner or follows someone and with such behaviour makes them feel humiliated, threatened, distressed or afraid, shall receive a fine between 60,000 and 120,000 tolar.”

“2. A person who punches another person shall receive a fine between 80,000 and 150,000 tolar.”

[...]

“4. If minor offences under the preceding paragraphs are committed against a spouse, cohabiting partner or a partner in a registered same-sex partnership, former spouse or cohabiting partner or a partner in a registered same-sex partnership, blood relative in direct line, adoptive parent or adopted child, foster parent or foster child, guardian or a person entrusted in the care of that person or against a person living in the same household with the offender, the offender shall receive a fine between 150,000 and 300,000 tolar.”

18. A child victim of corporal punishment is furthermore entitled to compensation from the state pursuant to the Crime Victim Compensation Act (Official Gazette of the Republic of Slovenia, Nos. 101/05 and 86/10), when the act is considered a criminal offense. A request for compensation may be made by a victim who has been under the age of 18 years at the time of the offense.

19. Corporal punishment of those participating in education is prohibited. The Government refers in this regard to the School Inspection Act (Official Gazette of the Republic of Slovenia, No. 114/05), the Organisation and Financing of Education Act (Official Gazette of the Republic of Slovenia, Nos. 16/07 – official consolidated text. 36/08, 58/09, 64/09 – amended, 20/11, 40/12 – ZUJF and 57/12 –ZPCP-2D), the Elementary School Act (Official Gazette of the Republic of Slovenia, Nos. 102/07, 107/10, 87/11, 40/12 – ZUJF and 63/13), as well as to the Rules on the School Order in the Secondary Schools (Official Gazette of the Republic of Slovenia, No. 60/10), the Rules on Residence in Halls of Residence for Secondary School Students (Official Gazette of the Republic of Slovenia, No. 97/06) and the Rules on the Treatment of Domestic Violence for Educational Institutions (Official Gazette of the Republic of Slovenia, No. 104/09).

20. Finally, a government bill on a new Family Code including an explicit prohibition of corporal punishment and other forms of degrading treatment against children was adopted by the National Assembly of the Republic of Slovenia on 16 June 2011. The law was nevertheless rejected by a referendum of 25 March 2012 and has not entered into force.

RELEVANT INTERNATIONAL MATERIALS

I. The Council of Europe

21. 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

22. 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

23. 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 Slovenia on 6 July 1992) 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.”

Article 28

...

“2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.”

24. 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.”

25. 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

ALLEGED VIOLATION OF ARTICLE 17§1 OF THE CHARTER

26. Article 17§1 of the Charter 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.”

A – Arguments of the parties

1. The complainant organisation

27. APPROACH alleges that all corporal punishment of children has not been expressly prohibited in Slovenia. It further maintains that the provisions against violence and abuse are not interpreted by the domestic courts and other authorities as prohibiting all corporal punishment against children, nor understood by the public as prohibiting all such punishment.

28. The Family Violence Prevention Act provides for “special protection” of children. APPROACH nevertheless submits that only severe and frequent corporal punishment of children may be qualified as family violence under the said Act.

29. APPROACH acknowledges that corporal punishment of children is prohibited in schools, educational day care centres and residential school institutions under the regulation on schools. Foster care is however regulated by the Provision of Foster Care Act (2002), which does not include an explicit ban of corporal punishment. No ban is included in the Rules on the Conditions and Procedures for Implementing Foster Care (2003), either. Corporal punishment of children is furthermore not prohibited in the Kindergarten Act (1996). It follows that there is no explicit prohibition of corporal punishment of children in all alternative care settings, including institutional and foster care, as well as in all forms of day care.

30. APPROACH considers a clear-cut legislative prohibition an essential element in eliminating corporal punishment and maintains that the policy programmes and other measures referred to by the Government are not sufficient population-wide efforts made for the prevention of corporal punishment.

31. The complainant organisation maintains that in addition to an express legislative prohibition, the Government should demonstrate due diligence through widespread dissemination of information on the law and on children's right to protection; the promotion of positive, non-violent forms of discipline; training of all those working with and for families and children; provision of detailed guidance for all involved on the implementation of the law in the best interests of the child; and the integration of the prohibition into the child protection system. It additionally argues that regular follow-up in the form of interview-based research should be organised with children and parents.

32. APPROACH also provides information on the prevalence of corporal punishment, which indicates that the corporal punishment of children continues to be in use among the general population.

33. It recalls that the Committee has repeatedly found the situation to be in violation of Article 17§1 under the reporting procedure (Conclusions 2003, 2005 and 2011). Also the Committee on the Rights of the Child in successive concluding observations has recommended an explicit prohibition on corporal punishment be enacted (CRC/C/15/Add.230, §§ 40-41, 26 February 2004). Similar recommendations have been issued by other relevant treaty bodies (CAT/C/SVN/CO/3, §15, 20 June 2011; CEDAW/C/SVN/CO/4, §23, 10 December 2010). Slovenia furthermore received recommendations to prohibit all corporal punishment during its Universal Periodic Review at the United Nations in February 2010.

34. APPROACH thus alleges that the legal framework and practice in Slovenia are inadequate as they do not effectively prohibit all forms of corporal punishment in all settings, in violation of Article 17 of the Charter.

2. The respondent Government

35. The Government submits that the national legislation provides for the protection of children against violence, negligence and exploitation within the meaning of Article 17 of the Charter and that it has exercised due diligence in the prevention of corporal punishment.

36. Slovenia has succeeded to the United Nations Convention on the Rights of the Child (see paragraph 23) and children's rights are therefore protected in a systematic manner through legislative, administrative, social and educational measures.

37. With regard to the protection of children against corporal punishment in the home, the Government firstly refers to the Family Violence Prevention Act (see paragraph 14), which obliges authorities to act quickly and efficiently when encountering violence against children.

38. Corporal punishment is nevertheless classifiable as family violence under the Family Violence Prevention Act only if it is severe or frequent in nature. The Government observes that in situations where this is not considered to be the case, a restriction of parental rights may be imposed by a social work centre or a court. The relevant sanctions are defined in the penal legislation with the highest possible sanction being imprisonment of five years.

39. Corporal punishment of children may amount to a criminal offence regardless of the perpetrator's motive, as well as of whether it has been committed out of negligence or intentionally.

40. With regard to the protection of children against physical violence in alternative, institutional and day care, the Government refers to the regulation on educational institutions and maintains that pre-school children, pupils, apprentices, secondary school students, students, as well as those participating into adult education and expert workers are sufficiently protected by means of the Constitution, the Criminal Code, as well as by the legislation related to schools (see paragraph 19). The legislation on elementary schools regulates the issuing of educational reprimands and physical violence is explicitly prohibited in secondary schools. School inspectors are furthermore empowered to suspend a worker on grounds of corporal punishment. Other regulations indirectly prohibit any forms of violence in educational institutions, as well as provide for the relevant sanctions.

41. As regards the domestic judicial practice, the Government provides certain examples of court rulings interpreting the provisions of the Criminal Code concerning acts of violence against children. Pursuant to the practice of the Supreme Court, corporal punishment may amount to the criminal offence of family violence. Family violence must however include treatment of a more permanent nature, which distorts normal interpersonal relationships between the family members, affects their sense of safety or renders them frightened or to a subordinate position. Also minor forms of violence were considered to affect victims more in a family setting than in connections where no specific interpersonal relationship existed between the victim and offender (see paragraph 16; the Supreme Court of the Republic of Slovenia, No. I Ips 815/201).

42. The Government further refers to a decision on the neglect and maltreatment of a child (the Supreme Court of the Republic of Slovenia, No. I Ips 159/2010), where a child had been beaten with a belt. The maltreatment of the child amounted to a breach of obligations towards the child, as well as significantly deviated from the

parents' duties to provide their children with conditions for healthy growth, harmonious personal development and the ability to lead an independent life.

43. It submits that in cases where the severity of the corporal punishment does not reach the threshold set out in the two abovementioned provisions, a corporal punishment of a child may be prosecuted as the minor offense of violent and audacious conduct under the Public Order Act (see paragraph 17). In light of the domestic case-law, most cases of corporal punishment against children are nevertheless treated as criminal offences and not as minor ones.

44. The Government further asserts that it has put in place measures to raise awareness on all forms of violence in the society, as well as to develop social skills among the public.

45. It argues that pursuant to the first finding of non-conformity by the Committee related to the corporal punishment of children in 2003 (Conclusions 2003, Slovenia), it has funded family centre programmes and co-funded a free help-line for children and adolescents in distress, as well as the activities of a national organisation, within which the National Commission for Children's Rights and the Forum against the Corporal Punishment of Children in the Family operate. The Government has also funded a publication on the corporal punishment of children and prepared brochures on the prevention of violence. Media-activities have been undertaken to reduce violence perpetrated by adults against children. A set of practical measures has furthermore been adopted with regard to the field of education in particular.

46. It finally argues that the lack of a general prohibition of corporal punishment cannot be regarded as a breach of Article 17, as a legal prohibition does not as such suffice to protect children from violence. Awareness-raising measures should be considered more efficient in the prevention of corporal punishment.

47. The Government maintains that the comprehensive arrangements currently in force in Slovenia consist of a broad spectrum of measures against corporal punishment of children and the domestic situation is accordingly in keeping with Article 17 of the Charter.

B – Assessment of the Committee

48. 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. It also reflects the provisions of the United Nations Convention on the Rights of the Child, on which in particular Article 17 is based.

49. 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.

50. In this regard, the Committee recalls its interpretation of Article 17§1 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.”

51. The Committee notes that the provisions of the Family Violence Prevention Act and the Criminal Code 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. When corporal punishment fails to fulfil those criteria, it may nevertheless be dealt with as a minor offense. 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. Furthermore, there is nothing to establish that a clear prohibition of all corporal punishment of children has been set out in the case-law of national courts.

52. The Committee further notes that the Government has not provided any examples to demonstrate the applicability of the general school legislation, the Constitution and the Criminal Code, to which it makes reference, to such forms of alternative care as institutional care, foster care and kindergartens.

53. It finally recalls that it has repeatedly found the situation to be in violation of Article 17 under the reporting procedure (Conclusions 2003, 2005 and 2011). No reference has been made to effective legal measures taken to improve the situation.

CONCLUSION

For these reasons, the Committee concludes, unanimously, that there is a violation of Article 17§1 of the Charter.



Birgitta NYSTRÖM
Rapporteur



Luis JIMENA QUESADA
President



Régis BRILLAT
Executive Secretary