

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX**



5 February 2004

**Collective Complaint No. 20/2003
World Organisation against Torture (OMCT)
v. Portugal**

Case Document No. 4

**OBSERVATIONS FROM THE PORTUGUESE
GOVERNMENT ON THE MERITS**

registered at the Secretariat on 30 January 2004

ARRIVE LE
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COMITE SOCIALE EUROPEEN

**Agentes portuguesas junto do Comité Europeu dos Direitos Sociais
Portuguese agents under the European Committee of Social Rights
Agents portugaises devant le Comité Européen des Droits Sociaux**

**Mr. Régis Brillat
Executive Secretary
of the European Social Charter
Council of Europe
F-67075 Strasbourg Cedex**

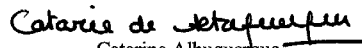
Y/Ref. HD/ESC 419 EF Y/Com. O/Ref. 26/GD Date: 30.01.2004

**Subject: Complaint number 20/2003, World Organization against Torture
(OMCT) v. Portugal**

Dear Mr Brillat,

We have the pleasure to herewith send you the Explanations and informations provided by the Government of Portugal following the admission of the Complaint no. 20/2003 lodged by the World Organisation Against Torture (OMCT).

Yours sincerely,


Catarina Albuquerque


Pedro Duro

Agents of the Government

Mod. Fax/GPLP

**Explanations and information provided by the Government of Portugal following
the admission of the Complaint no. 20/2003 lodged by the World Organisation
Against Torture (OMCT)**

Introduction

The Revised European Social Charter (ETS 163), in its article 17(1)(b) calls upon States Parties to «take all appropriate and necessary measures designed [...] to protect children and young persons against negligence, violence or exploitation». In its complaint against Portugal, the OMCT alleges that the Portuguese Government «has not explicitly and effectively prohibited all corporal punishment of children» and is therefore violating the above-mentioned provision.

In the following, we will try to explain how the Portuguese legislation does, in fact, prohibit all forms of corporal punishment of children and how the Portuguese legislator took the special situations of children into account when drafting laws, which could have a direct effect on children.

As a preliminary note we would like to explain the procedure followed to prepare these explanations. The Agents of the Portuguese Government have met with several State Departments dealing with the rights of the child, namely

- President of the Commission of Children and Youngsters at Risk
- Office of the Ombudsperson
- Ministry of Education
- Ministry of Justice

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The Agents also met with two NGOs, namely the Portuguese Committee for UNICEF and the Institute of Child Support.

The Constitution of the Portuguese Republic

Firstly, we mention the Portuguese Constitution, which includes specific provisions dealing with the situation of children and their education. Article 36(5) of the Constitution states that «Parents have the right and the duty to educate and maintain their children», which is an ethical-social and also juridical duty (cfr. J.J.Gomes Canotilho e Vital Moreira, *Constituição da República Portuguesa Anotada*, 3.^a Edição, Coimbra Editora). Also Article 69 (entitled «Childhood») of the Constitution of the Portuguese Republic determines *inter alia* that 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. This is the first sign of the importance and high ranking the Portuguese legislative framework accords to the protection of children against any form of violence, including corporal punishment. This provision appears within the chapter on fundamental rights and duties of the Constitution and guarantees thus the right of children to protection, namely against physical and psychological violence. This also means that all ordinary legislation issued in Portugal must be in conformity with the fundamental law – the Constitution.

The Criminal Code

The Criminal Code too contains specific provisions prohibiting and punishing the use of corporal punishments against children.

According to its Article 143(1) «[w]hoever causes bodily injury or impairment of health of another shall be punished with confinement up to 3 years or a fine». According to the

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well-established Portuguese doctrine, following the German scholars, the acts that constitute offences against the human body are «those involving the impairment of physical condition, including the loss of organs, limbs, or skin (not forgetting that classifying the organ or the limb as “important” entails the immediate classification of the offence against the physical integrity as serious under Article 144), bodily injuries, such as bruises, wounds or swells, physical changes, as a radical cut of hair [...], or painting certain parts of the body of the victim with a substance difficult to remove v. g., tar or oil painting [...], the functional disturbance of body functions through, for example, the production of a harmful noise, among others [...]» (cfr. Faria, Paula Ribeiro, *Comentário Conimbricense do Código Penal, Parte Especial, Volume I, Article 143, III § 9, pp. 205-206.*)

With respect to this issue, the Portuguese Supreme Court, in a Decision of 18 December 1991, stated that it constitutes a violation of Article 142 of the Criminal Code, and thus a crime, even in those cases where the victim does not suffer any bodily harm, incapacity to work or even any pain or physical suffering, as in the case in question where the victim was just slapped. The conclusions of this Decision were confirmed by several other Court Decisions, like for example the Supreme Court Decision, of 21 January 1999, according to which «Article 143 of the Criminal Code provides for an offence against the physical or psychic integrity of the victim and admits the possibility of a physical offence without an external injury». Another Decision of the Supreme Court, of 4 March 1999, also refers that acts against the physical integrity of the victim constitute an offence even in those cases where the victim has not suffered any physical harm or pain.

We also wish to quote a Decision of the Court of Appeal of Évora, of 12 October 1999, regarding the case of a father who slaps her 16-year-old daughter twice in the face during a discussion. From the Court’s Decision it is very clear that there is no legal basis for the right to educate and «discipline» a child with recourse to physical aggressions. In this context the Court quotes the Civil Code to show that it does not permit the use of physical aggressions towards children. According to this Decision, the

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Agents portugaises devant le Comité Européen des Droits Sociaux

Civil Code, even before its revision in 1977, never accorded parents a right to educate their children using physical violence. In fact, before 1977 it only granted parents a functional power (and not a right) to moderately discipline children. This provision of the Civil Code was then, of course, eliminated by the 1977 revision and, pursuant to the Decision in question, this change must have had in consideration Principle VI of the 1959 UN Declaration on the Rights of the Child. Finally, the Court concludes that neither the lack of respect of a daughter for her father, nor the latter's power-duty to educate her, justify the resort to violence by the educator.

According to the 1977 Portuguese Civil Code «parents, in the interest of the children, should ensure their safety and health, provide for their sustenance, direct their education, represent them [...] and administer their goods». The Civil Code goes further in determining the content of "paternal power" through the following wording «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 their life». As violence is not an explicit means of education, we must apply the Criminal Code.

Moreover, the Portuguese Supreme Court also defends this point of view and calls for a direct application of the provisions of the Criminal Code whenever a child is slapped by her father. The Supreme Court (9 February 1994) clearly considered that there is no rule that confers a right to discipline or educate a child using physical aggressions and therefore sentences a father to imprisonment for having slapped her daughter twice in the face.

Thus, one must conclude that the allegation of the OMCT that «Less severe corporal punishment of children by parents remains lawful» does not correspond to the reality. From the case law that has been quoted, even by the OMCT itself, it is clear that the Portuguese legislation prohibits corporal punishment of children in all circumstances, including at home. In fact, the legislation in force in Portugal allowed the Supreme Court to take such decisions.

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Portuguese agents under the European Committee of Social Rights
Agents portugaises devant le Comité Européen des Droits Sociaux

In our view, the suggestion made by OMCT that Portugal should introduce in the Criminal Code a provision dealing specifically with the corporal punishment against children is dangerous and contra productive. The particularities of the interpretation of criminal law, calling for a restrictive and very tied interpretation, require us, in some aspects of the criminal policy, to draft wisely and openly the general conceptual delimitation of these rules (as it is the case of Article 143). In other words, a specific provision on corporal punishments against children incorporated in the Criminal Code could dangerously have the opposite effect to the one intended, namely, it could entail the danger of excluding other categories of vulnerable persons from the scope of the rule. Actually, it is almost impossible to ensure that an Act or Code explicitly provides for all imaginable real-life situations and categories. So, this is the reason why the scope of the Portuguese law is focused on behaviours and not on victims. This is the motive for the judicious Portuguese legislator to draft rules that safely and rigorously protect all the victims, including children, from any physical harm.

In this context one should not forget the explicit aggravation of penalties applicable in cases of aggression among parents and children. In fact, we have to emphasize that according to our law (Article 146 of the Criminal Code) a father's aggression against a child is an especially aggravated offence. The rule deriving from the combination of Article 146(1) and (2) with Article 132(2)(a) results in an aggravated criminal reaction where the victim is a descendant, ancestor, adopted child or the adopter of the aggressor. In these particular cases, the law stipulates that the aggressor's behaviour is considered specially offensive or perverse.

The Pupil's Statute

In addition to the criminal legislation, other different legal instruments stipulate the prohibition of the use of any form of corporal punishments against children. As the OMCT rightly states in its complaint, the law no. 30/2002 of 30 December, entitled **the Pupil's Statute**, prohibits the use of corporal punishments in school.

According to this law, pupils have the right to enjoy a school environment that ensures the necessary conditions for the promotion of the pupil's physical, intellectual, moral, cultural and civic development, as well as the right to be treated with respect and have his or her physical and mental integrity respected in school. Moreover, Chapter V of the same law, entitled «Discipline», stipulates the type of disciplinary measures that may be applied to pupils, as well as their aims. According to the law, the disciplinary measures shall have pedagogical and preventive ends, as well as preserve the teachers' authority. Article 24(3) of the law explicitly determines that «no disciplinary measure may, in any form, harm the pupil's physical, psychic or moral integrity nor be of a pecuniary nature». Thus, any corporal punishment inflicted by teachers or other school personnel is explicitly considered illegal.

The Law on Educational Guardianship

The law no. 166/99 approves the **law on Educational Guardianship** and applies to children aged between 12 and 16 years who have committed an act considered a crime and gives rise to the application of an educational guardianship measure. Article 4 of the law identifies the only measures that may be applied to children who are subject to the application of the law. In that list no reference is made to the use of physical, or moral, violence against the children, instead reference is made to measures like deprivation of the right to drive motorcycles, the compensation for the offended person, the carrying

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out of tasks for the community, the attendance of training programmes, just to quote some significant examples.

Moreover, one of these measures – qualified by the law as a measure of last resort – consists in the child's internment into an educational centre (see Article 4(1)(i)). Article 171 of the law enumerates the rights of children subject to a measure of internment and determines with regard to that that they have the right to respect for their life, physical integrity and health. According to the same provision, children have the right to respect for their dignity and intimacy, as well as the right to exercise their civil, political, social, economic and cultural rights.

Furthermore, Article 188 of the law, entitled «Respect for the child's physical integrity and dignity», stipulates an absolute and explicit prohibition of the application of measures that may be considered a cruel, inhuman or degrading treatment or that may endanger the physical or psychic health of the child. Paragraph 2 of this provision states equally that «the application of a disciplinary measure may not, in any case, translate, directly or indirectly, into the application of corporal punishment, the deprivation of food or the right to receive visits [...]».

Finally, pursuant to Article 90 of the decree law no. 323-D/2000, of December 20 - approves the General and Disciplinary Rules of the Educational Centres - the personal physical containment is explicitly limited to the use of physical force to restrain the child.

Conclusions

The different legal instruments quoted, including the Constitution of the Portuguese Republic, the Criminal and Civil Codes, the Pupil's Statute and the law on Educational Guardianship as well as the well-established jurisprudence of the Portuguese Supreme Court clearly demonstrate that inflicting corporal punishment upon children is forbidden in Portugal.

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The fact that the Portuguese Criminal Code, besides having a general provision on physical punishments, also explicitly aggravates those aggressions occurring among children and their parents, clearly demonstrates that even under a black letter approach it is evident that children are fully protected by the Portuguese legal system against any form of corporal punishment.

The Portuguese Government therefore hopes that the European Committee of Social Rights recognises these facts.

Lisbon, 30 January 2004

Catarina de ALBUQUERQUE

Pedro DURO

Agents of the Portuguese Government