

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



3 September 2004

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

Case Document No. 6

**ADDITIONAL INFORMATION FROM THE PORTUGUESE
GOVERNMENT ON THE MERITS**

registered at the Secretariat on 3 September 2004

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

Additional explanations provided by the Government of Portugal following the admission of the Complaint no. 20/2003 lodged by the World Organisation Against Torture (OMCT)

The Portuguese Agents wish to take this opportunity to offer the European Committee of Social Rights further elements related to the situation in Portugal regarding the question of violence, more concretely physical violence and corporal punishments against children. In fact, the Agents already had the occasion to give lengthy explanations to the Committee on the Portuguese legislation in force related to the protection of children against all forms of corporal punishment, which prohibits all forms of corporal punishment against children. The agents have equally given examples of the way Portuguese courts apply the law and, in fact, consider corporal punishment, including smacking, against children as a violation of the Penal Code.

OMCT also put forward the argument according to which there is in Portugal a significant distance between what the law stipulates and the practice, as well as that the Portuguese Government never launched an awareness-raising campaign against corporal punishment on children.

Against this background the Agents wish to enumerate some of the measures that the Portuguese Government has adopted in order to put an end to all forms of violence against children, which are a clear sign of the importance and high priority it gives to this matters.

1. Firstly, and as a preliminary observation related to the additional explanations given by OMCT on the 30th of April of 2004, the Portuguese Government regrets that the OMCT decided to follow a sociological approach, founded in a single inquiry reflecting personal convictions that are not controllable by the Government in a democratic context. Any kind of purely sociological analysis runs serious risks and could establish a precipitated relation between the role of the State and the rhythm of public awareness. To take the path of an analysis of this kind reveals the lack of support of the legal argument and the subjectivity of the interpretation criteria pleaded by OMCT, being, as it is, outside of our legal system. It seems legitimate to ask – with reference to *smacking* (such as it appears in the Portuguese version of the inquiry (estalada/palmada), the softer physical aggression) – a similar inquiry in countries with an apparently more declarative legislation would not have presented results proportionally surprising. Therefore, we do not believe that an inquiry as this can be used, consistently, as an evidence of the Portuguese Government's lack of commitment.

2. In Portugal it was not until the 1980s that discussion started to focus on the special attention that should be granted to children who are the victims of ill-treatment, sexual abuse or negligence. The Centre for Judicial Studies (national school for magistrates) and the Child Support Institute (a Portuguese Child Rights NGO) played a significant role in discussions on the rights of children who are ill-treated by their families and on the definition of the higher interests of the child.

It is true that in Portugal, in the past, parental authority was routinely considered to be almost absolute; grave outrages to physical integrity went unpunished because they were considered to fall within the parents' absolute right to punish their children as they pleased, within the private sphere of the family. As citizens became increasingly aware of their rights, in particular of human rights, the view spread that the State had a legitimate right, through the courts, to intervene in the family sphere in order to guarantee the health (understood to mean both physical and psychological health), security and well-being of a child when it had been proven that the child was in danger and that his or her rights had indeed been violated.

Since the revision of the Penal Code and since ill-treatment of children is considered a crime, the media have broadcast several programs for the general public on this offence.

2.1. In order to give a response to the problems arising from the existence of ill-treatment within a family, the Family and Children's Support Project (PAFAC) was created. PAFAC provides the family and the child with therapeutic support – medical, psychological and pedagogical. The Project for the Support of the Family and the Child was set up in 1992 with the following priority aims:

- Detect situations where children are ill-treated;
- Diagnose family ill-functioning that provokes ill-treatment of the child;
- Act as necessary in order to stop the risk situation.

This project is designed to cover children who are the victims of physical and/or psychological violence and who received medical care in health centres or hospitals. In each central hospital an office of this project was set up. Each office is made up of one pediatrician, one psychologist, one nurse, one social service technician and one lawyer. At a second stage, the project will be enlarged to cover district hospitals. Different departments of the State, from the Ministries of Health, Social Security and Justice, are involved in the implementation of this project.

2.2. Another State institution that aims equally at the physical and psychological recovery and social reintegration of child victims of violence or neglect is the Ombudsman's Office.

The Ombudsman, who is democratically elected by 2/3 of the members of Parliament, is independent in the exercise of his/her functions, has the power to control the activities of the Public Administration and to recommend certain behaviours to the public powers in order to combat illegalities or injustices, has the competences to monitor the application of all existing legislation, including the Convention on the Rights of the Child and its principles.

The Office of the Provedor de Justiça (Ombudsman) is an independent body dedicated to the defense of the legitimate rights and interests of citizens, through informal methods that ensure the legality and justice of the administration. Through this work of protecting human rights, the intervention of the Ombudsman is naturally reflected in the application of the rights recognized by the international instruments, which are themselves reflected in the text of the Constitution.

According to the Ombudsman's statutes, citizens may submit to him/her, orally or in writing, complaints about actions or omissions of the public authorities. The Ombudsman investigates them and makes the recommendations to the competent bodies necessary to prevent or redress injustices. In addition, the Ombudsman must:

- a) Recommend ways in which to correct the illegal or unjust acts or to improve the services of the administration;
- b) Draw attention to any flaws in legislation and request an evaluation of the legality or unconstitutionality of any provision whatsoever;
- c) Give opinions on all questions which are put to him by the Assembly of the Republic; and
- d) Ensure the dissemination of information on the fundamental rights and freedoms, their content and value and on the objectives of his activities.

In this specific area, public information programs frequently appear in the press, or are broadcast on radio and television

In carrying out his/her duties, the Ombudsman may:

- a) Make visits of inspection to any sector of the administration, examine documents, hear the organs and agents of the administration or request any information, which he/she considers necessary;
- b) Conduct any inquiries, which he/she considers appropriate, using any procedure in order to discover the truth, within the limits of the legitimate rights and interests of the citizens in this area. One such instance was the inquiry into acts of torture committed by

some police officers and prison officers, which attracted wide media and public attention, and led to the adoption of various measures by the public authorities;

c) Seek, in cooperation with the competent organs and departments, the most appropriate solutions to the defence of the legitimate interests of citizens and the best means of improving administrative services.

The Ombudsman may order the publication of communiqués or information bulletins on his/her findings, where necessary making use of the mass media. Furthermore, he/she submits an annual report on his/her activities to the Assembly of the Republic, which is published in the official journal of that organ. The report includes statistical data on the number and nature of the complaints lodged, the allegations of unconstitutionality submitted and any recommendations he has made.

An evidence of the fact that the Ombudsman devotes a special attention to children, to the defense of their rights and to listening to their voices, consists in the creation in 1992, of a direct telephone line “Messages from children”, with the aim of receiving complaints related to children who find themselves in a situation of danger or risk.

2.3. Thirdly, in 1998 the National Commission for the Protection of Children and Youngsters at Risk was created and it was given powers for planning state intervention and co-ordinating, following and evaluating the action of public bodies and the community in matters pertaining to the protection of children and youngsters at risk.

The Commission is under the Ministers of Justice and Social Security. Its membership is made up of representatives of the Presidency of the Council of Ministers, the Ministries of Justice, Labour and Solidarity, Education, Health, the General Prosecutor, the Ombudsman and the Secretary of State for Youth, amongst others.

Within the framework of the protection of children at risk, the law is based on the following principles that guide its intervention:

- The best interest of the child;

- The right to privacy;
- Preclusive, minimal, proportional and timely intervention;
- Primacy of the family;
- Mandatory nature of reporting, mandatory hearing and participation of the child;
- Subsidiary nature of intervention (i.e. courts should only intervene in last resort).

The Commission must intervene where parents, the lawful representative of the child or the person who is in charge of the child, create a risk to the safety, health, training, education or development of the child, or do not face such risks with a view to eliminating them.

2.4. A Portuguese NGO, the Child Support Institute, also created a telephone help line called “SOS for Children” which was established in 1988. This telephone line does outstanding work in the area of prevention, support, information, guidance and handling of situations of violence against children. The work in this area of the Portuguese Association for the Support of Victims and the Portuguese Association for Child and Family Law should also be highlighted. The SOS for Children help line counts with a technical team of psychologists, social workers, educators and lawyers who listen to and talk with the children.

3. Finally, and back to the line of argumentation chosen by OMCT, the most decisive part of its statement of the 30th April 2004 was the following: “[13] (...) What other member states have done with advantage having ensured that there is no defence or justification for corporal punishment in the Criminal Code, is to add an explicit prohibition to the family or civil code and use that as the basis for awareness-raising and public and parent education”. However, we widely demonstrated that there is no exclusion of the criminal responsibility of adults who apply corporal punishments on children in other standards of the Portuguese legal system, namely the Civil Code. Consequently, in accordance with our systemic logic, there is no particular and urgent legal advantage in an express prohibition of corporal punishment against children in the Civil Code.

In conclusion, there are no new arguments to sustain that it is necessary any change in the Portuguese legislation to guarantee a complete protection of the

children. The practice of the courts in association with the “silent” but progressive public awareness assures an effective protection to the children, in a formal point of view – taking in account one appropriated interpretation of the law –, and, slowly but surely, in a sociological approach – since it implies the gradual consciousness of the parents.

The Portuguese Government therefore hopes that the European Committee of Social Rights recognizes the following points:

- a) Portugal is not one of the countries where the law still states special justifications or defences for parents and some other carers who assault their children as a form of “discipline” or punishment, as OMCT seems to recognize;
- b) As we stated before, «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»;
- c) Each country has its own legal system, which includes, in a certain way, the updated jurisprudential interpretation of the law. A country does not have to change its legislation only to assure a broadly proclamatory (but not necessarily more effective) accordance with the Revised European Social Charter. According to our system – to our judicial “language” –, Portugal has taken the appropriate legal measures to protect children, explicitly forbidding any violent behaviour against anyone, including them;
- d) There is no evidence of a link between the MORI’s inquiry results and a supposed lack of Government concern to the subject;
- e) Even if extraordinary public awareness’ measures are taken to avoid smacking among children and their parents, it will not end immediately: a certain amount of time is needed for the approximation between the social awareness and the legal approach;
- f) The Portuguese Government has taken and implemented different measures in order to protect children from any form of violence, including

corporal punishment, which is a sign of its interest and commitment in the elimination of violence against children.

Lisbon, 3 September 2004

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