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CONSEIL DE L'EUROPE

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS  
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

**17 January 2014**

**Case Document No. 5**

**Association for the Protection of All Children (APPROACH) Ltd v. France**  
Complaint No. 92/2013

**RESPONSE BY APPROACH  
TO THE GOVERNMENT'S SUBMISSIONS  
ON THE MERITS**

**Registered at the Secretariat on 17 January 2014**



## **APPROACH Ltd**

### **Response to the Submissions of the Government of the French Republic on the merits of Complaint No. 92/2013, Association for the Protection of All Children (APPROACH) Ltd v. France**

**January 2014**

#### **I. Introduction**

1. This is the response of APPROACH Ltd to the Submissions of the Government of the French Republic on the merits of Complaint No. 92/2013, dated 27 September 2013. We first discuss the Government of France's assertions that national law prohibits and domestic courts prevent and sanction all violence against children (parts 1 and 2 of its Submissions). We then address the Government's comments on the jurisprudence of the European Court of Human Rights.

#### **II. French law is not effectively interpreted as prohibiting all corporal punishment of children (response to Parts 1 and 2 of the Government's Submissions)**

2. The Government of France claims in its Submissions that national law prohibits any kind of violence against children. Yet, as noted in our Complaint, in other contexts the Government has accepted that judicial decisions have continued to acknowledge a "right of correction", including a right to use physical punishment. The Charter, as interpreted by the European Committee of Social Rights, not only requires that a state's domestic law prohibits and penalises "all forms of violence against children...", but also that 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" (Decision on the Merits, OMCT v. Portugal, Complaint No. 34/2006, paras. 19-21; also quoted in the Committee's Conclusions 2011 on France's most recent report under Article 17).
3. The Government claims in its Submissions (para. 16): "In practice, the French courts prevent and sanction all the many forms of violence against children, whether perpetrated in the child's home or at school." The Government then selectively quotes cases in which teachers and also parents have been convicted of various forms of punitive violence against children. Our Complaint does not dispute the existence of such decisions. But equally, the Government does not deny that, as quoted in our Complaint, there have been other cases in which courts have accepted the "right of correction" as a defence for acts of violent punishment. As we quote in the Complaint, and underline again now, in its 2010 national report to the ECSR, the Government suggests that the "right" may justify correction of moderate intensity, giving as examples "slaps, clothes seized, ears and hair pulled".<sup>1</sup>

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<sup>1</sup> 16 December 2010, RAP/RCha/FR/X(2010), pp. 54-55

4. It is clear that the provisions of the Penal Code and the Civil Code which the Government suggests are sufficient to protect children are not interpreted consistently as prohibiting all corporal punishment of children; nor are provisions against violence and abuse in other laws.
5. We would also note that the Government's use (para. 19) of case No. 09-84801 of 23 June 2010 as an example of a "case of violence committed in a family context" is misleading. In fact, in this highly atypical case the child victim was not only slapped and scratched by her aunt but also forced by the aunt and other adults in the household to live in squalid conditions "contrary to human dignity" and threatened with being returned to Burundi where her parents had been killed in war and where, she was told, she would have to work as a prostitute. This case can hardly be said to be representative, and the court's refusal of an appeal in this case certainly cannot be taken to mean that other cases of corporal punishment of children would be treated similarly.
6. Moreover, the Government's suggestion that the Criminal Chamber of the Court of Cassation "apparently no longer refers" to the "right of correction" (para. 20) is misleading, since there has been no definitive statement from this court that this right no longer exists. In any case, as the Committee has seen in the case of OMCT v. Portugal, Complaint No. 34/2006, a decision by the highest court in a state outlawing all physical punishment in clear terms may be contradicted by a subsequent decision of the same court. Only clarity in the law can prevent such inconsistency in its application. Also, as our Complaint notes, the jurisprudence of the Court of Cassation allows tribunals and courts of appeal to interpret the right of correction for themselves. The Government itself acknowledges in its Submissions (para. 20) that "some trial court decisions have mentioned parents' and teachers' 'right to smack'". Of the relatively small number of cases which are brought against parents and others for violence against children, the vast majority are dealt with in lower courts, with very few reaching the Court of Cassation.
7. Our Complaint highlighted a 2012 Court of Appeal case in which the "right of correction" was used: the mayor of a city who had slapped a child aged under 15 was excused; the court considered this justified under the circumstances because the behaviour of the child was unacceptable in view of the authority of the mayor's office.<sup>2</sup>
8. Other recent cases not quoted in our Complaint also refer to the "right of correction". In a 2008 case, a father who had smacked and slapped his 13- and 16-year-old daughters, and kicked and hit the younger daughter because she slammed a door, was not sanctioned for violence against them on the grounds that he was exercising his "right to correction": "les premiers juges ont relaxé Jean-Louis X... des faits de violences sur ses filles Angélique et Amandine. En effet, les violences... sont légères, rares et n'ont pas dépassé l'exercice du simple droit de correction explicité par Jean-Louis X..." (*Unofficial translation: "the judges acquitted Jean- Louis X... of acts of violence against his daughters Angelica and Amandine. Indeed, the violence... was light, rare and did not exceed the exercise of the simple right of correction explained by Jean- Louis X..."*)<sup>3</sup> This verdict was despite the fact that the violent punishment took place in the context of repeated and ongoing family violence: in the same case,

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<sup>2</sup> Court of Appeal of Douai, 10 October 2012, Chamber 4, No. 12/729

<sup>3</sup> Court of Appeal of Douai, 29 October 2008, Chamber 9, No. 08/02725

Jean-Louis X was found guilty of physical and sexual violence against the girls' mother.

9. Shortly after the Government made its Submissions, a man was fined by the Criminal Court of Limoges (Haute-Vienne) for "smacking" his nine-year-old son's naked buttocks. While undoubtedly positive, this finding in a lower court (much covered in the media), again highlights the extent to which children's protection is dependent on individual courts and judges.
10. **School corporal punishment:** The Government's Submissions (paras. 13 and 14) note the existence of ministerial circulars stating that corporal punishment should not be used in schools. Our Complaint referred to circulars applying to both primary and secondary schools. We emphasise again that, while they provide useful guidance, they do not have the force of legislation. There is no explicit prohibition of school corporal punishment in education legislation and case law has confirmed that a "right of correction" can justify some forms of physical punishment by teachers and other educators. This situation is plainly in violation of the Charter.

### **III. Consideration of the case law of the European Court of Human Rights (response to Part 3 of the Government's Submissions)**

11. While the European Committee of Social Rights has noted judgments of the European Court, including in its 2001 General Observation on corporal punishment and compliance with Article 17 (as quoted in our Complaint), the Committee is not constrained by the jurisprudence of the Court. We note that the Court is required to consider the particular circumstances of the application submitted to it. We also note that the Court has referred to the European Convention as a "living instrument" and successive judgments suggest that its jurisprudence on corporal punishment of children is developing. As the Government correctly submits, the Court has to date determined that in order to breach Article 3 of the Convention, punishment must reach a certain degree of severity. Thus the Court found a violation of Article 3 in *Tyrer v. UK*, 1978 (judicial corporal punishment in the Isle of Man) and in *A v. UK*, 1998 (corporal punishment by a stepfather), but not in *Costello Roberts v. UK*, 1993 (corporal punishment in a private school). In this latter judgment, now two decades old, the Court stated that it did not exclude the possibility that there might be circumstances in which Article 8 could be regarded as affording in relation to disciplinary measures a protection which goes beyond that given by Article 3. While in that judgment it did not find a breach of Article 8, it stated that it did not wish "to be taken to approve in any way the retention of corporal punishment as part of the disciplinary regime of a school".
12. The interpretation of the requirements of the Charter by the European Committee of Social Rights does take account of the UN Convention on the Rights of the Child, and its interpretation by the UN Committee on the Rights of the Child, including in its General Comment No. 8 on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment. In its General Comment, the Committee emphasises:

*"In its examination of reports, the Committee has noted that in many States there are explicit legal provisions in criminal and/or civil (family) codes that provide parents and other carers with a defence or justification for using some degree of violence in 'disciplining' children. For example, the defence*

*of 'lawful', 'reasonable' or 'moderate' chastisement or correction has formed part of English common law for centuries, as has a 'right of correction' in French law. At one time in many States the same defence was also available to justify the chastisement of wives by their husbands and of slaves, servants and apprentices by their masters. The Committee emphasizes that the Convention requires the removal of any provisions (in statute or common - case law) that allow some degree of violence against children (e.g. 'reasonable' or 'moderate' chastisement or correction), in their homes/families or in any other setting.” (para. 31)*

13. We are confident that the ECSR will agree that compliance with Article 17 requires the explicit removal of the customary law “right of correction” to ensure that the legislation is consistently interpreted to protect children from violent punishment.
14. We note that the European Committee, in its 1999 Decision on the first collective complaint to be considered under the Additional Protocol, stated: “... the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact.” (International Commission of Jurists v. Portugal, complaint No. 1/1999, decision on the merits of 9 September 1999, § 32).
15. It appears to us that the Government of France, in resisting the pressure on it from the ECSR and other human rights monitoring bodies to clarify in legislation that violent punishment of children cannot be defended under an arbitrary and ancient “right of correction”, is disregarding the real situation in France, where very large numbers of children continue to experience painful and humiliating violent punishment from their parents and other adults: see summary of recent research findings in the section of our Complaint on the “Prevalence of and attitudes to corporal punishment in France”. It appears that official figures also show a consistent rise in the number of cases of violence, abuse and abandonment of children recorded by both the national police and the gendarmerie for every year between 2007 and 2011.<sup>4</sup>
16. The widespread social acceptance of violent punishment in childrearing can also be seen in media and public reactions to the recent case mentioned above, in which the Criminal Court of Limoges fined a man for “smacking” his son. As one newspaper article stated, the case “sparked outrage,” with public discourse generally strongly against the court’s decision. In June 2013, the NGO Fondation pour l’Enfance launched a TV and web awareness-raising campaign, featuring a short video entitled “Il n’y a pas de petite claque!” (“There’s no such thing as a little smack!”) The felt need for this campaign further demonstrates the high level of support for and acceptance of corporal punishment in childrearing among adults in France.
17. Lastly, the Government of France suggests that the “principle of generally prohibiting all corporal punishment is far from achieving consensus in the member countries of the Council of Europe”; the Government further claims that in 2011, only one of the 27 countries which had accepted article 17 of the European Social Charter had prohibited all corporal punishment. But it is not, surely, the purpose of human rights monitoring bodies like the European Committee and Court to reflect a “consensus” among Member States. In any case, we would note that this assessment does not reflect current reality: by January 2014, of the 29 countries which have accepted

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<sup>4</sup> Observatoire national de la délinquance et des réponses pénales (2013), *Criminalité et délinquance enregistrées en 2012: Les faits constatés par les services de police et les unités de gendarmerie*, Paris: ONDRP

Article 17(1) of the Charter, 11 have prohibited all corporal punishment and nine have made clear public commitments to doing so.

18. In its decisions on the merits of previous collective complaints concerning the lack of effective prohibition of corporal punishment, the ECSR refers to the Charter as a “living instrument”; see, for example, the decision on the merits of Complaint No. 21/2003 against Belgium (para. 38): “The Committee furthermore recalls that the Charter is a living instrument which must be interpreted in light of developments in the national law of member states of the Council of Europe as well as relevant international instruments”.
19. We would note that in the decade since that decision there has been substantial international and European progress confirming the immediate human rights obligation to effectively prohibit and eliminate all violent punishment of children and substantial progress towards universal prohibition by Council of Europe Member States. During this period the ECSR has further developed its case law on corporal punishment, in particular in its decision on the merits in Complaint No. 34/2006 and in subsequent conclusions on reports under Article 17, including on reports from France. The UN Committee on the Rights of the Child has issued General Comment No. 8 on the right of the child to protection from corporal punishment and other forms of cruel or degrading punishment and General Comment No. 13 on the right of the child to freedom from all forms of violence. It has continued to recommend prohibition to all States whose reports it examines (in the case of France, as our Complaint sets out in detail, there have been further recommendations in 2004 and 2009). The comprehensive UN Secretary General’s Study on Violence against Children, requested by the Committee on the Rights of the Child, included among its key recommendations in 2006 the prohibition of all forms of violence including corporal punishment. There has also been substantial coverage of the need for prohibition in the first two cycles of the Universal Periodic Review process in the Human Rights Council. And during the decade since the first collective complaints on corporal punishment were submitted in 2003, 13 Member States of the Council of Europe have effectively prohibited all corporal punishment.
20. We referred in our Complaint (p. 7) to the fact that France received recommendations to prohibit all corporal punishment during its Universal Periodic Review in January 2013; we were pleased to see that in June 2013 the Government accepted these recommendations, although we note that it made a general statement that acceptance of a recommendation did not necessarily imply a commitment to further action.<sup>5</sup>

#### **IV. Conclusion**

21. There is nothing in the French Government’s Submissions which would enable the Committee to conclude that in France, the relevant legal provisions are as yet “sufficiently clear, binding and precise, so as to preclude the courts from refusing to apply them to violence against children”. As we maintained in our Complaint, French courts, including its highest court, have continued to imply that a “right of correction” exists and can be used to justify some degree of violent punishment of children by parents, teachers and others caring for children. In addition, the Government’s Submissions provide no evidence of the Government acting with due diligence to ensure that violent punishment of children is eliminated in practice, while available

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<sup>5</sup> 28 May 2013, A/HRC/23/3/Add.1, Report of the working group: Addendum, para. 10

research suggests that it remains widely socially approved and used across the state.  
We urge the Committee to find that France remains in violation of Article 17.