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

17 January 2014

Case Document No. 4

Association for the Protection of All Children (APPROACH) Ltd v. Italy
Complaint No. 94/2013

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

Registered at the Secretariat on 17 January 2014

APPROACH Ltd

Response to the Observations of the Italian Government on the merits of Complaint No. 94/2013, Association for the Protection of All Children (APPROACH) Ltd v. Italy

January 2014

I. Introduction

1. This is the response of APPROACH Ltd to the Observations of the Italian Government on the merits of Complaint No. 94/2013, dated 25 September 2013. The Observations note, as did our Complaint, that the decision of the European Committee of Social Rights (ECSR) on the previous Complaint, No. 19/2003, was that Italy was not in violation of Article 17 of the Charter on the basis that a 1996 Supreme Court judgment against violence in childrearing was adequate to ensure legal protection for children from all violent punishment. But, as our current Complaint points out, in the decade since that Complaint, the Committee's case law on this issue has developed.
2. We emphasise again the particular relevance of the ECSR's decisions on two collective complaints concerning the legality of corporal punishment in Portugal. In the ECSR's decision on Complaint No. 20/2003 against Portugal, as on Complaint No. 19/2003 against Italy, a majority of the Committee relied on the existence in each country of Supreme Court decisions declaring corporal punishment to be unlawful in finding no violation of the Charter. But in Portugal a subsequent decision of the Supreme Court declared corporal punishment to be lawful. A second Complaint was submitted – No. 34/2006 – and in its decision the ECSR found a violation of Article 17 and stated:

“To comply with Article 17, states' domestic law must prohibit and penalise 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.” (paras. 19-21)

3. We believe this confirms our view that notwithstanding the positive 1996 judgment of Italy's Court of Cassation, and some subsequent judgments quoted by the Government in its Observations, article 571 of the Penal Code implies a right of correction that may involve some degree of violence. This, combined with the lack of any clear and effective prohibition of all corporal punishment in other legislation leaves it in violation of Article 17 (as does its failure to work with due diligence to eliminate all corporal punishment in practice). The successive Complaints against Portugal illustrated how, in the absence of sufficiently “clear, binding and precise”

legislation, Supreme Courts can change, even reverse their interpretation of how the law regards corporal punishment; also lower courts in Italy are not required to follow Supreme Court judgments.

4. As we further noted in our Complaint, in its conclusions on Italy's most recent report under Article 17 the ECSR asked Italy whether there are any plans to make legislative amendments, following the 1996 Supreme Court ruling, that would explicitly ban corporal punishment in all settings, such as home, schools and institutions. Pending receipt of the information requested, the Committee deferred its conclusion (January 2012, Conclusions 2011).
5. We do not doubt Italy's overall commitment to protect its children effectively from violence and the many positive developments in its legislation and practice to reflect children's rights. But we are puzzled at the apparent resistance to making a relatively simple change to ensure the necessary clarity in legislation to prohibit all violent punishment of children.
6. In this response to the Observations of the Italian Government on the current Complaint, we first highlight the inadequacy of current Italian legislation and of case law to prohibit all corporal punishment of children. We then briefly suggest the law reform which would be required to prohibit all corporal punishment, before going on to discuss Italy's failure to act with due diligence to eliminate violent punishment of children.

The Charter is “a living instrument”

7. In a succession of decisions on previous collective complaints concerning corporal punishment, the ECSR has recalled “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” (see for example decision on the merits of Complaint No. 21/2003 against Belgium, para. 38). In its Observations, while not disputing the Committee's consistent interpretation of the Charter as requiring prohibition of all violent punishment, Italy does not address in detail the developments in the Committee's case law on the issue since Complaint No. 19/2003.
8. We urge the ECSR, in considering the merits of our current Complaint against Italy to note that in the decade since 2003 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.
9. We refer above to the development of the ECSR's own case law on corporal punishment (in particular in its decision on Complaint No. 34/2006 and in subsequent conclusions on reports under Article 17). Additionally, 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

punishment¹ and General Comment No. 13 on the right of the child to freedom from all forms of violence.² It has continued to recommend prohibition to all States whose reports it examines and its recommendations have been reflected by other UN Treaty Bodies. In the case of Italy, as our Complaint sets out in detail, the Committee expressed concern in 2011 “at the prevalence of corporal punishment in the home, in particular that many parents still find it appropriate to use slapping as a means of discipline. The Committee is also concerned that the State party has not yet passed legislation explicitly prohibiting all forms of corporal punishment in all settings, including in the home (CRC/C/15/Add.41, para. 20), despite the Supreme Court ruling on prohibition of corporal punishment”³ (our emphasis). 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 (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 since 2008. As we noted in our Complaint (page 6), during its UPR in 2010, Italy received a recommendation to “incorporate in its legislation the 1996 judgment that corporal punishment was not a legitimate method of discipline in the home, and criminalize corporal punishment in all cases”, which it rejected.⁴ During the decade, 13 Member States of the Council of Europe have effectively prohibited all corporal punishment.

II. The inadequacy of Italian legislation to prohibit all corporal punishment of children

10. Article 571 of the Criminal Code is at the core of our Complaint. The Government’s Observations quote this article and subsequent articles of the Code in full (p. 4⁵), but do not otherwise comment on them. Article 571 regulates the “abuse of correctional measures or discipline”, implying the existence of the right to correction (“jus corrigendi”). It creates an offence “if the fact results in a physical or mental injury”. Thus it legitimises the use of some arbitrary level of force or violence as discipline or correction, as long as it does not result in physical or mental injury. If the abuse of correction or discipline involves “bodily harm”, then it can be punished under other articles applying to “Ill-treatment in the family or of children” and “Bodily harm”. It should also be noted that Article 571 in addition suggests that where abuse of correction or discipline results in bodily harm, the penalties shall be reduced by one third – although we note that the penalties for offences reaching the necessary

¹ Committee on the Rights of the Child (2006), *General Comment No. 8: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)*

² Committee on the Rights of the Child (2011), *General comment No. 13: The right of the child to freedom from all forms of violence*

³ 31 October 2011, CRC/C/ITA/CO/3-4, *Concluding observations on third/fourth report*, paras. 34 and 35

⁴ 18 March 2010, A/HRC/14/4, *Report of the working group*, para. 84(38)

⁵ Page references to the Submissions refer to the English translation provided by the ECSR Secretariat

threshold to be considered “ill-treatment in the family or of children” have been increased.

11. During the consideration of the previous Complaint No. 19/2003, the World Organisation against Torture in its response to the Observations submitted by the Government of Italy noted (para. 14) that,

“the report accompanying the adoption of the Penal Code states that the use of violence can be considered as being legitimate if it has educative purposes (“La semplice percossa non può costituire la materialità del reato perché la vis modica è mezzo di correzione lecito”). It also justifies lower penalties for extreme offences, where the context was discipline or correction (“il reato di abuso dei mezzi di disciplina è caratterizzato dal fine correttivo che l’agente si propone, che sminuisce il disvalore oggettivo dell’offesa all’integrità personale o alla vita della persona offesa, sì da escludere un autonoma punibilità di tale offesa”).⁶ This section of the Criminal Code was adopted in 1930 and has not been amended since.”
(Case Document No. 5, registered 5 May 2004)

12. It is not disputed that in Judgment No. 4909 of 16 May 1996, the Supreme Court of Cassation ruled clearly that the use of violence for educational purposes can no longer be considered lawful. In its Observations on Complaint No. 19/2003, the Government claimed that this judgment meant that corporal punishment of children, however “light”, was not defensible under the right to correction (“jus corrigenda”) but instead was understood to constitute “ill treatment in the family”, which is prohibited by article 572 of the Criminal Code. In its decision on Complaint No. 19/2003, the ECSR reflected the Government’s claim:

“According to the Government, it is apparent from [Judgment No. 4909 of the Court of Cassation of 16 May 1996] that the use of any degree of violence may not be regarded as a lawful correctional measure, but comes under the category of ill-treatment which is explicitly prohibited by Article 572 of the Criminal Code. Correctional measures (jus corrigendi) are therefore to be understood to mean only a system of instructions, guidelines and potential orders and advice, as well as prohibitions and mild penalties for failure to comply, all falling within the sphere of the bringing up of children.” (para. 38)

13. But it is clear that neither the offence of abuse of correction created by article 571 nor the offence of ill-treatment in the family prohibit all corporal punishment of children. Indeed, the Government in its Observations on the merits of this Complaint, states that:

“It is important to note that the expression ‘ill-treatment in the family’ does not cover mere ‘smacking’ but rather refers to punishments such as physical or mental violence that amount to ‘abuse of correctional measures’.” (p. 6)

14. And notwithstanding Italy’s claim that our Complaint demonstrates “a lack of awareness of developments in the Italian legal system with regard to corporal

⁶ See *Relazione al Progetto definitivo di un nuovo codice penale, in Lavori preparatori del codice penale e del codice di procedura penale*, V, parte II, Roma, 1929, 357 ss.

punishment” (p. 6) the various other laws cited in its Observations on the merits of this Complaint do not prohibit all corporal punishment. Articles 342bis and 342ter of the Civil Code primarily address violence between spouses and adult co-habitants and do not refer explicitly to corporal punishment of children; article 333 of the Civil Code (not quoted in the Government’s Observations on this Complaint, but referred to in the Committee’s decision on Complaint No. 19/2003) provides for children’s protection from the “detrimental conduct” of their parents but, again, does not explicitly address corporal punishment; article 147 of the Civil Code makes no reference to any form of violence; and article 582 of the Criminal Code covers only actions causing bodily harm resulting in physical or mental illness. The Constitutional provisions mentioned provide general guarantees of rights but do not protect children from all violent punishment.

III. The inadequacy of case law to prohibit all corporal punishment of children

15. In its Observations, the Italian Government “submits that the Italian legal system affords effective protection for children against corporal punishment within the family” (p. 2). However, it is clear that case law, including Judgment No. 4909 of the Supreme Court of Cassation of 16 May 1996, is not sufficient in itself to prohibit all corporal punishment and hence to comply with the Committee’s jurisprudence on the topic, stated most clearly in its decision on Complaint No. 34/2006 against Portugal, quoted on p. 1 above.
16. Despite the clarity of the Court judgment itself, legislation in Italy (article 571) continues to imply the existence of a “right to correct or discipline”; it further implies that to constitute an abuse of the right, violence needs to result in physical or mental injury. This law is certainly not sufficiently clear, binding and precise to clarify that all corporal punishment (the use of force of some degree to punish a child) is prohibited.
17. The Supreme Court of Cassation is the highest court in Italy but its judgments do not have the power to strike down legislation and can be changed by subsequent judgments. Lower courts in Italy are not required to follow the Court of Cassation’s interpretation of the law, provided they describe in detail their reasons for diverting from it.
18. The Government quotes several court decisions which it claims “have firmly upheld the principle” (p. 6) of the Supreme Court judgment. It also states that “the complaint is based solely on reports which... make no mention of the penalties handed down by the Italian courts to parents found guilty of ill-treating their under-age children” (p. 6). We accept that nowadays, as in every state, in Italy there are court decisions punishing violence and ill-treatment of children by parents and others. But nothing in the court decisions cited on p. 6-7 of the Government’s Observations demonstrates that all violent punishment is considered unlawful. The court decisions deal with

cases in which children were subjected to violence of some severity. Such assaults are treated as criminal offences in all states. The Government does not suggest that these judgments stated that all physical punishment is unlawful.

IV. The law reform needed to prohibit all corporal punishment of children

19. As the ECSR concluded in its 2001 General Observation:

“... To prohibit any form of corporal punishment of children, is an important measure for the education of the population in this respect in that it gives a clear message about what society considers to be acceptable. It is a measure that avoids discussions and concerns as to where the borderline would be between what might be acceptable corporal punishment and what is not.

“For these reasons, the Committee considers that Article 17 requires a prohibition in legislation against any form of violence against children, whether at school, in other institutions, in their home or elsewhere. It furthermore considers that any other form of degrading punishment or treatment of children must be prohibited in legislation and combined with adequate sanctions in penal or civil law.”

20. In the case of Italy, it appears to us and to other commentators that further reform of legislation is required, including amendment or repeal of article 571 of the Criminal Code, and the enactment of legislation explicitly prohibiting all corporal punishment and other cruel or degrading forms of punishment, in the family home, alternative care and day care settings.

21. We note that Save the Children Italy, which has long campaigned for law reform, proposes, in addition to amendment or repeal of article 571, explicit prohibition through the following addition to article 147 of the Civil Code on “Duties towards children” (unofficial translation):

“Natural and legitimate children have a right to receive a positive upbringing, without recourse to corporal punishment or any other type of humiliating and degrading treatment, in respect of their best interests for the full development of their personality.”

22. We would also note that Italy’s sixth shadow report to the Committee on the Rights of the Child, endorsed by 82 non-governmental organisations, also calls for Parliament to reform the law to explicitly prohibit physical punishment and other humiliating and degrading treatment of children.⁷

⁷ Gruppo di Lavoro per la Convenzione sui Diritti dell’Infanzia e dell’Adolescenza (2013), *I diritti dell’infanzia e dell’adolescenza in Italia: 6° Rapporto di aggiornamento sul monitoraggio della Convenzione sui diritti dell’infanzia e dell’adolescenza in Italia 2012-2013*, Rome: Save the Children Italia

V. Italy's failure to act with due diligence to eliminate corporal punishment

23. In addition to failing to reform its law to prohibit corporal punishment with the necessary clarity, Italy has also failed to act with due diligence to eliminate it in practice.
24. Its Observations on the merits of this Complaint contain no information on any efforts to eliminate corporal punishment. The information on the establishment of national and regional offices for children's ombudsmen, while no doubt positive, does not relate specifically to eliminating corporal punishment.
25. The research studies quoted in our Complaint (p. 7) illustrate that corporal punishment remains common and is widely socially accepted – underlining the need for due diligence. The Government does not dispute the findings of this research in its Observations.

VI. Conclusion

26. In Italy, there is no prohibition in legislation of corporal punishment in the family home, alternative care or day care settings. Given the Committee's view 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", we urge the Committee to find Italy in violation of Article 17 because its legislation is not "sufficiently clear, binding and precise"; judgments, including the 1996 Supreme Court judgment are unable in themselves to remedy insufficiently clear and precise legislation. In addition, Italy has not acted with due diligence to ensure that violent punishment of children is eliminated in practice.