

**DECISION ON THE MERITS**

**COMPLAINT No. 19/2003**

World Organisation against Torture (OMCT)  
v. Italy

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter (hereafter referred to as “the Committee”), during its 205<sup>th</sup> session attended by:

Messrs Jean-Michel BELORGEY, President  
Nikitas ALIPRANTIS, Vice-President  
Ms Polonca KONCAR, Vice-President  
Messrs Stein EVJU, General Rapporteur  
Rolf BIRK  
Matti MIKKOLA  
Konrad GRILLBERGER  
Alfredo BRUTO DA COSTA  
Tekin AKILLIOĞLU  
Ms Csilla KOLLONAY LEHOCZKY  
Messrs Gerard QUINN  
Lucien FRANCOIS  
Andrzej SWIATKOWSKI

Assisted by Mr Régis BRILLAT, Executive Secretary of the European Social Charter,

After having deliberated on 6 and 7 December 2004,

On the basis of the report presented by Mr Lucien FRANÇOIS,

Delivers the following decision adopted on this last date:

## **PROCEDURE**

1. The complaint lodged by the World Organisation against Torture ("OMCT") was registered on 1 August 2003.
2. On 9 December 2003, the Committee declared it admissible.
3. In accordance with Article 7§§1 and 2 of the Protocol providing for a system of collective complaints and with the Committee's decision on the admissibility, on 12 December 2003 the Executive Secretary communicated the text of its admissibility decision to the Italian Government ("the Government"), to the World Organisation against Torture ("the OMCT"), to the Contracting Parties to the Protocol and those States that had made a declaration pursuant to Article D§2 of the Revised European Social Charter ("the Revised Charter"), as well as to the European Trade Union Confederation (ETUC), the Union of Industrial and Employers' Confederations of Europe (UNICE) and the International Organisation of Employers (IEO), inviting them to submit their observations on the merits of the complaint. In accordance with Article 25§2 of the Committee's Rules of Procedure, the President gave a time limit of 31 January 2004 for the submission of observations.
4. The ETUC presented its observations on 29 January 2004.
5. The Government presented its observations on the merits on 30 January 2004.
6. The President set 15 March 2004 as the deadline for the OMCT to present its observations in response to the Government. Upon the OMCT's request, the President extended the deadline until 30 April 2004, on which date the OMCT presented its supplementary observations.
7. The President set 9 July 2004 as the deadline for the Government to present its observations in response to the OMCT. At the Government's request, it extended the deadline to 3 September 2004. The Government's supplementary observations were registered on 1<sup>st</sup> September 2004.
8. The OMCT submitted additional observations in reply on 27 September 2004.

## **SUBMISSIONS OF THE PARTIES TO THE PROCEDURE**

### **A – The Complainant Organisation**

9. The OMCT requests that the Committee rules that Italy fails to comply with Article 17 of the Revised European Social Charter (“the Revised Charter” because it has not explicitly and effectively prohibited corporal punishment of children including by parents or others.

### **B – The Defending State**

10. Italy asks the Committee to dismiss the complaint as being unfounded.

## **RELEVANT NATIONAL LAW<sup>1</sup>**

### **The Constitution**

11. Article 2 provides that:

“The republic recognizes and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality, and it ensures the performance of the unalterable duty to political, economic and social solidarity.”

12. Article 3 provides that:

“All citizens have equal social status and are equal before the law, without regard to their sex, race, language, religion, political opinions, and personal or social conditions. It is the duty of the Republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic and social organisation of the country.”

13. Article 29 provides that:

“The family is recognised by the Republic as a natural association founded on marriage. Marriage entails moral and legal equality of the spouses within legally defined limits to protect the unity of the family.”

14. Article 30 provides that:

“Parents have the duty and right to support, instruct and educate their children, including those born out of wedlock. The law provides for the fulfilment of those duties should the parents prove incapable. Full legal and social protection for children born out of wedlock is guaranteed by law, consistent with the rights of other family members. Rules and limits to determine paternity are set by law.”

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<sup>1</sup> The relevant national law has been translated by the Secretariat.

15. Article 31 provides that:

“The Republic furthers family formation and the fulfilment of related tasks by means of economic and other provisions with special regard to large families. The Republic protects maternity, infancy, and youth; it supports and encourages institutions needed for this purpose.” (all unofficial translations)

The Civil Code

16. Article 147 “Duties towards children” provides that:

“Marriage imposes on both spouses the obligation to maintain, raise and educate their children taking into account their ability, natural inclination and aspirations.”

17. Article 342bis “Family protection orders” provides that:

“Where the conduct of a spouse or co-habitant causes serious harm to the physical or moral integrity or to the liberty of the other spouse or co-habitant, the judge may, provided that the conduct does not constitute a criminal offence leading automatically to criminal proceedings, adopt one of the measures provided for in Article 342ter by decree and at the request of the party concerned.”

18. Article 342ter “Substance of protection orders” provides that:

« By decree as provided for in Article 342bis, the judge shall order the spouse or co-habitant whose conduct has been abusive to cease such conduct. He shall also order the person concerned to stay away from the household, and if necessary to stay away from places frequented by the plaintiff, particularly his/her workplace, the home of his/her own family, the home of his/her close relations or of other persons, and places where the couple’s children are educated, except where those places have to be visited for professional reasons.

Where required by the intervention of the local social services or of a family mediation centre or of associations providing support and shelter for women, minors or other victims of abuse and ill-treatment, the judge may also order periodical payment of a cheque to those who, as a result of the measures provided for in the first paragraph, do not have adequate means of subsistence, specifying the payment terms and arrangements and, where appropriate, ordering the sums to be paid directly to the beneficiary by the debtor’s employer, who will deduct them from the debtor’s pay.

By the same decree, in the cases provided for in the previous paragraphs, the judge shall determine the duration of the protection order, which shall run from the day on which the decree is enforced. That duration may not exceed six months and may be extended at the request of the injured party solely where there are serious grounds for doing so and for as long as is strictly necessary.

By the same decree, the judge shall set out the enforcement arrangements. In the event of problems or disputes concerning enforcement, the same judge must order, by decree, the most appropriate measures to guarantee enforcement, including recourse to the police and health officials. » (all unofficial translations)

## The Criminal Code

### 19. Article 571 “Abuse of correctional measures or discipline” provides that:

“Whoever misuses correctional measures or discipline to harm a person subject to his authority, or entrusted to him for purposes of education, instruction, treatment, supervision or custody, or for the exercise of a profession or an art, shall be punished with imprisonment for up to 6 months if the fact results in a physical or mental injury.

If the abuse results in bodily harm the penalties applied shall be the ones established in Articles 582 and 583 reduced by one third; if the abuse results in death, the penalty applied shall be imprisonment from three to eight years.”

### 20. Article 572 “Ill-treatment in the family or of children” provides that:

“Whoever, with the exclusion of the cases mentioned in the previous article, ill-treats a member of the family, or a child under 14, or a person entrusted to him for purposes of education, instruction, treatment, supervision or custody, or for the exercise of a profession or an art, shall be punished with imprisonment from one to five years.

If the act results in grievous bodily harm, the penalty applied shall be imprisonment from four to eight years; if the act results in extremely grievous bodily harm the penalty shall be imprisonment from seven to fifteen years; if the abuse results in death, the penalty applied shall be imprisonment from twelve to twenty years.”

### 21. Article 582 “Bodily harm” provides that:

“Whoever causes another person bodily harm resulting in physical or mental illness shall be punished with imprisonment from three months to three years. If the illness lasts for more than twenty days and none of the aggravating circumstances provided for in Articles 583 and 585 are present, except for those listed in No 1 of the final section of Article 577, the offence shall be punishable on the basis of a complaint by the injured party.” (all unofficial translations)

## The case-law

22. In Decision No. 4909 of 16 May 1996, the Court of Cassation pointed out that the Italian legal system enshrines the primacy of human dignity and regards minors as full individuals rather than merely as subjects to be protected. According to the Court, violence against children, no matter how slight, is never a “lawful” correctional measure, any abuse of which would be punishable under Article 571, but comes under the ill-treatment provided for in Article 572, which is subject to more severe punishment.

## AS TO THE LAW

23. Article 17 of the Revised Charter reads as follows:

**“Article 17: The right of children and young persons to social, legal and economic protection**

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;
2. to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.”

### A – Arguments of the parties

#### *a) The Complainant Organisation*

24. The OMCT alleges that, in failing explicitly to prohibit parents from inflicting corporal punishment on their children, Italian legislation does not comply with Article 17 of the Revised Charter.

25. The OMCT argues that, despite the Court of Cassation's judgment, referred to earlier, that it is unlawful to make any use of violence for bringing up children, Article 571 of the Criminal Code clearly implies that Italian law recognises a right to correction “involving” a certain degree of violence. In support of this argument, it cites the explanatory report drawn up when the Criminal Code was adopted, which states that moderate force (*vis modica*) is a lawful correctional measure.

26. The OMCT also observes that the penalties provided for in Article 571 of the Criminal Code are less severe than those provided for in Article 572 of the same Code, which prohibits ill-treatment in the family or of children, except for cases covered by Article 571. It infers from this that violence inflicted for educational purposes is treated more favourably than violence for other motives.

27. The OMCT also points out that the ban on corporal punishment has been explicitly affirmed in laws and regulations governing other areas (husband/wife relations, workplaces, schools and prisons, for example).

28. It adds that the very existence of Article 571 of the Criminal Code, which on the contrary actually authorises the use of lawful “correctional measures” on children; the absence of an explicit ban on corporal punishment in legislation, which it regards as a vital tool of social education; and the lack of adequate information and promotion campaigns, all mean that a large number of children are suffering ill-treatment within their families.

29. In support of its allegations, the OMCT claims that a survey carried out in 1998<sup>2</sup>, based on anonymous questionnaires sent to 2 388 families living in the Tuscany region, concluded that “physical punishment is a general behaviour in Italy, because about three quarters of the caretakers interviewed declared to have thrown something at the child, pushed, grabbed or shoved the child or slapped/spanked the child during the survey year”. According to the survey severe forms of violence were less common, although around 8% of children had experienced harsh physical punishment.

30. The complainant organisation also cites a report by the Italian National Statistical Institute (ISTAT), which states that between 1986 and 1996 there was an increase in violence within the family leading to criminal prosecution. The report itself concludes that information on violence against children is incomplete, the law is inadequate and there are failings when it comes to positive information measures.

31. In its additional observations, the OMCT adduces a second survey<sup>3</sup>, commissioned in April 2004, which was based on a telephone poll of a national sample of 1009 “adults” aged over 14. This found that 60% of Italians consider it acceptable to smack a child for the purposes of upbringing, and only 25% regard it as unacceptable in any circumstances. The same survey showed that 50% of Italians think that it is illegal to smack children, 25% think it is legal and 25% do not know.

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<sup>2</sup> M. Bardi, S.M. Borgognini-Tarli, “A survey on parent-child conflict resolution: intra-family violence in Italy”, *Child Abuse and Neglect*, 6 (2001) 839-853.

<sup>3</sup> J. Henderson, A. Cooney, Market & Opinion Research International, “Report on Research Study: ‘Attitudes towards smacking children in Italy’”. April 2004.

32. Finally, the OMCT points out that, in its concluding observations of 27 November 1995<sup>4</sup> on the situation in Italy, the UN Committee on the Rights of the Child said that it was preoccupied by "... the existence of child abuse, including physical and sexual abuse and violence within the family, and the insufficient protection afforded by the Penal Code in this regard, as well as the lack of adequate measures for the psycho-social recovery of child victims of such abuses." The UN Committee suggests to Italy that "... the clear prevention and prohibition of torture or other cruel, inhuman or degrading treatment or punishment, as well as a ban on corporal punishment within the family, be reflected in the national legislation."

*b) The Defending State*

33. The Government takes the view that Italian law gives children effective and adequate protection against corporal punishment in accordance with the provisions of Article 17 of the Revised Charter, and that the OMCT's allegations are unfounded.

34. According to the Government, the protection of children from all forms of violence within the family, including even mild corporal punishment, is enshrined in Articles 2, 3, 29, 30 and 31 of the Italian Constitution.

35. The protection of children 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" also flows from the 1989 United Nations Convention on the Rights of the Child, which Italy incorporated into national law in Law No. 176 of 1991.

36. The Government points out that Article 572 of the Criminal Code punishes with imprisonment any ill-treatment of children within the family, and that in Italian law ill-treatment means "any form of physical or psychological abuse, any behaviour likely to result in a state of physical or spiritual prostration or any form of submission" and "all forms of harassment of a child by an adult or a person belonging to the same household all forms of harassment of a child by an adult or a person belonging to the same household". The penalties are more severe where the ill-treatment results in physical injury or death, and depending on the presence of aggravating circumstances.

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<sup>4</sup> Concluding observations of the Committee on the Rights of the Child: Italy. 27/11/95. CRC/C/15/Add.41.

37. It stresses that, in addition to the criminal sanctions against abusers, there are a whole range of measures in civil law to protect children who are victims of abuse. When bringing proceedings under Article 572 of the Criminal Code, the Public Prosecutor is required to inform the Youth Court that has territorial jurisdiction and to ensure that the child concerned is assisted by the social services (Article 609*decies* of the Criminal Code). The Youth Court may order the abuser to stay away by means of the protection orders provided for in Article 342bis of the Civil Code, or may have the child taken away, if necessary (last paragraph of Article 333 of the Civil Code).

38. As regards Article 571 of the Criminal Code, which in the opinion of the complainant organisation recognises a right to correct involving a certain degree of violence, the Government refers to the judgment of the Court of Cassation mentioned earlier. According to the Government, it is apparent from that judgment 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.

39. In its additional observations, the Government disputes the reliability of the 2004 survey adduced by the OMCT in support of its allegations, which it defines as sociological in nature and having nothing to do with the legal considerations that are relevant to this complaint. In particular the Government stresses that the method used for selecting the sample in order to achieve statistical representativity was not explained, and the sample included children aged between 14 and 18 who were classified as “adults”.

#### B – Assessment of the Committee

40. The Committee recalls its interpretation of Article 17 of the Charter in the General Introduction to Conclusions XV–2 (Vol. 1, 2001).

41. 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. In its interpretation of Article 17 the Committee refers, in particular to,

- a. Article 19 of the United Nations Convention on the Rights of the Child as interpreted by the Committee on the Rights of the Child;

- b. Article 3 of the European Convention of Human Rights as interpreted by the European Court of Human Rights (*inter alia* Tyrer v. the United Kingdom, 1978, as regards judicial birching of children, Campbell and Cosans v. the United Kingdom, 1982 as regards corporal punishment inflicted at school and A v. the United Kingdom, 1998, as regards parental corporal punishment);
- c. Recommendation No. R (93) 2 on the medico-social aspects of child abuse adopted by the Committee of Ministers on 22 March 1993; Recommendation No. R (90) 2 on social measures concerning violence within the family adopted by the Committee of Ministers on 15 January 1990; Recommendation No. R(85)4 on violence within the Family adopted by the Committee of Ministers on 26 March 1985;
- d. Recommendation 1666 (2004) “Europe-wide ban on corporal punishment of children” adopted by the Parliamentary Assembly on 24 June 2004.

42. The Committee’s case-law is to the effect that the prohibition of all forms of violence must have a legislative basis. The prohibition must cover all forms of violence regardless of where it occurs or to the identity of the alleged perpetrator. Furthermore the sanctions available must be adequate, dissuasive and proportionate.

43. In the present case, the Committee notes that, under Article 572 of the Criminal Code, any ill-treatment of children is prohibited. It notes that, according to relevant case law, ill-treatment is defined as any form of physical or psychological abuse, any behaviour likely to result in a state of physical or spiritual prostration or any form of submission and all forms of harassment of a child by an adult or a person belonging to the same household all forms of harassment of a child by an adult or a person belonging to the same household.

44. According to the complainant organisation, the very existence of this provision suggests that parents or other persons with children under their charge are authorised to use “correctional measures” involving a certain degree of violence.

45. As to Article 571 of the Criminal Code, the Committee acknowledges that the wording of only prohibits acts if they do entail the risk of “physical or mental injury”. However it considers that what stems from its interpretation a *contrario* is only that other acts may not be subject to the particular sanctions provided under this provision and not that other acts are authorized.

46. It is apparent from Judgment No. 4909 of the Court of Cassation of 16 May 1996, referred to earlier, that the Court explicitly and conclusively removed any ambiguity concerning the lawfulness of the use of any degree of violence against children by any person, and even in circumstances traditionally regarded as justifying such conduct.

47. The Committee also notes that the complainant organisation itself accepts the legal force of the 1996 judgment and welcomes its effect. In its complaint (page 6), it directly quotes the part of the judgment in which the Italian judge states that “the use of violence for educational purposes can no longer be considered lawful” and, while not disputing its value in setting a precedent, it confines itself to pointing out that the decision has not been confirmed in legislation.

48. Moreover, the Committee notes that the Civil Code provides for a number of measures to protect children who are the victims of ill-treatment. As the Government points out, the State Prosecutor is required, when starting proceedings under Article 572 of the Criminal Code, to inform the Youth Court that has territorial jurisdiction and to ensure that the child concerned is assisted by the social services (Article 609*decies* of the Criminal Code). The Youth Court can then order the abuser to stay away and, if necessary, order the child to be taken away (Articles 342bis and 333 of the Civil Code).

49. In the light of Articles 571 and 572 of the Criminal Code, as interpreted by the Court of Cassation in its Judgment No. 4909 of 16 May 1996, referred to earlier, and of Articles 333 and 342bis of the Civil Code, the Committee holds that in Italy the prohibition of all forms of violence has a legislative basis; it has the potential to reach all forms of violence regardless of where it occurs or to the identity of the alleged perpetrator; and it is backed by adequate, dissuasive and proportionate sanctions.

50. Italian law cannot be blamed on the ground that, when violence against children is used as a means of discipline, it is treated differently than when it is based on other motives. The latter is among the most condemnable behaviours. Even if forbidden forms of violence are not less forbidden when they are used as a means of discipline, national legislators, when they acknowledge the seriousness of the prohibited behaviour and determine the scale of sanctions accordingly, are free to punish in different ways those who use excessive means of discipline and those who use violence for other purposes.

51. As for the complainant organisation’s argument that the Italian legislation in question is ineffective in practical terms, the Committee considers that the surveys adduced by the OMCT in support of its claims do not provide evidence that, despite the Criminal Code and Civil Code provisions referred to earlier, corporal punishment inflicted on children is common practice in Italian society.

52. In particular, it is apparent from the survey commissioned by the OMCT in 2004 that, despite the fact that 60% of those interviewed consider it acceptable to smack children, 50% of those interviewed think that smacking is prohibited by law and only 25% think that it is lawful. Even if the Committee considered this survey to be a sufficiently accurate reflection of the general situation in the country, it would still have to conclude that only a minority of those interviewed have a misconception of how Italian law stands on the subject.

## **CONCLUSION**

For these reasons, the Committee concludes by 11 votes to 2 that there is no violation of Article 17 of the Revised Charter.

Lucien FRANÇOIS  
Rapporteur

Jean-Michel BELORGEY  
President

Régis BRILLAT  
Executive Secretary

In accordance with Rule 30 of the Committee's rules of procedure, a concurring opinion by Mr Jean-Michel BELORGEY and a dissenting opinion by Mr. Matti MIKKOLA are appended to this decision.

## **APPENDICES**



**Concurring opinion of Jean-Michel BELORGEY  
(reasoning applying to Complaints Nos. 17, 18, 19, 20 and 21,  
World Organisation against Torture (“OMCT”)  
v. Greece, Ireland, Italy, Portugal and Belgium)**

The majority of the Committee considered that in order to comply with the obligations resulting from Article 17 of the Charter or Revised Charter, a state must *prohibit explicitly in its legislation* all forms of violence, wherever it takes place or whoever the perpetrator. The Committee based itself on this principle when assessing whether a state is in breach or not of the Charter. In doing so I find that the requirements demanded by the majority of the Committee were both excessive and insufficient.

It is undeniable that Article 17 of the Charter obliges states to prohibit all forms of violence against children whether within their family or outside, including that inflicted for educational purposes. It would have been opportune for the Committee to indicate precisely what was meant by violence and it would have been expedient to state that it means any act or behaviour likely to affect the physical integrity, dignity development or psychological well being of the child.

There is no doubt that states do not comply with the obligation set out above by relying on overtly general or insufficiently precise provisions which fail to offer a sufficient basis for national judges to evaluate borderline cases in order to repress behaviour which has traditionally been accepted contrary to the principle above. However it does not, having regard to the diversity of national situations, necessarily do justice to this preoccupation by requiring that the prohibition must be explicitly stated in “legislation”. The assessment of several national situations under examination has led to a weakening of this requirement by admitting that a constant interpretation of the higher national courts of the applicable legal provisions satisfies the requirements of the Charter, even when the legal provisions themselves are ambiguous.

Finally the adoption of a prohibitive norm, whatever its nature, is not alone sufficient to comply with the Charter. In addition the state concerned must prove that it is in the process of concretely eliminating prohibited violence, and where it has not yet reached this goal it must show that it is undertaking serious steps and that it is not far from achieving the result.

**Dissenting opinion of Mr Matti MIKKOLA  
(applying to Complaints Nos 19 and 20/2003,  
World Organisation against Torture (“OMCT”)  
v. Italy and Portugal)**

In supervision cycle XV 2001 the Committee made a decision on principle that contracting parties must clearly ban in legislation all forms of violence against children, including corporal punishment. It focused on corporal punishment as many states had not yet prohibited this form of violence against children within the family and corporal punishment has traditionally been, considered acceptable. In light of this case law under Article 17 of the Charter and Revised Charter the Committee concluded, under the reporting procedure, in respect of several countries, that the situation was not in conformity.

The Committee has reiterated this case law on Article 17 in complaint No 17/2003 OMCT v. Greece, No 18/2003 OMCT v. Ireland, No 19/2003 OMCT v. Portugal, No 20/2003 OMCT v. Italy and No 21/OMCT v. Belgium.

I am concerned that the findings of the majority of the Committee in the cases of OMCT v. Portugal, and OMCT v. Italy weaken the requirement that corporal punishment be clearly prohibited in legislation.

The case law of higher courts while to be welcomed is not a sufficient legal basis for a prohibition nor in my opinion a sufficiently effective basis, having regard in particular to the fact that the corporal punishment of children was traditionally considered as lawful and remains so. Therefore I find that the situation in Italy and Portugal to be in breach of the Revised Charter.