



Enforcing Children's Rights

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First of all I feel obliged to express my appreciation and thanks to the organizers and to all who made possible to speak at this eminent event on the role of the European Social Charter in the protection of children's rights and its contribution to the strategic goals of the Council of Europe in this area.

1. European Social Charter: the European convention providing for comprehensive and holistic protection of the rights of children.

The 1961 European Social Charter and its 1996 revised version the Revised Social Charter (the Charter further on) are Council of Europe treaties complementing the European Convention on Human Rights. The fundamental economic and social rights and freedoms laid down in the Social Charter have growing importance in the wake of the global financial and economic crisis. The implementation of the Charter is judged by the European Committee of Social Rights (ECSR) a quasi-judicial body of independent experts that makes legal assessment on the compliance of the law and practices of the State Parties with their undertakings under the Charter. The ECSR carries out its activity in a two-track way: through the collective complaint procedure and the periodic States' reports.

The collective complaint system comes gradually to dominant role in the supervisory system in spite of the relatively low number of ratifications, and this dominant role is particularly manifest when looking at the development of the case law protecting the rights of children.

While specific, selected rights of children are protected through a number of progressive conventions, the Charter is the European convention guaranteeing comprehensive protection of the rights of the children. The holistic protection of this treaty covers children from birth (and, by maternal health protection even before) throughout their childhood and young age up to reaching full age – covering the various segments of family, economic relations, education and cultural life, and legal, institutional and social relations equally.

The provisions of the Charter guarantee this holistic protection through multiple layers of its interconnected norms: 1. provisions directly and exclusively aimed at children's rights, 2. provisions covering children together with adults, 3. provisions directly and exclusively on the rights of adults, having nonetheless an effect to the status, situation and rights of children.

First, Articles 7 and 17 are exclusively about the protection of children. Article 7 prohibits child labour (with narrow exceptions of light work, without any risk to their physical and moral

development as well as to their full benefitting from education). It also protects juvenile workers in various situations of work and occupation, their rights to adequate working conditions, remuneration and other terms at work. An unconditional and strict prohibition protects children and young persons against any exposition to dangers, primarily but not exclusively those connected to work.

Article 17 guarantees the right of children and young persons to social, legal and economic protection, their right to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, including the protection against violence, the right to special aid from the state when deprived of family protection, as well as their right to free primary and secondary education, and encouragement of regular attendance.

As a second layer of protection there are a number of provisions that are not aimed directly or exclusively at children, but have specific relevance for them, as a part of the protected group, together with adults. We should mention for example Article 11 on the right to protection of health, Article 12 on social security (including family allowance, health insurance for family members, survivors' pension), Article 15 on the rights of persons with disability to independence and integration, among others to access to mainstream education. Article 16 on the social, legal and economic protection of the family as well as Article 19 on the protection of immigrants and their family must also be mentioned as provisions indirectly targeting children as protected group.

In the third layer of the protection, provisions aim exclusively at the rights of adults, typically working adults, with an impact to the rights of children. This layer is rather diffuse and, in the final analysis, almost all provisions of the Charter have a place in it. However, some of them have stronger and more evident connection to the status and situation of children. Article 8 on the right of employed women to special protection in case of maternity is obviously protecting the fetus and the newborn as well as the health of the mother. The rights guaranteed in Article 2 on fair working conditions such as the limitation on working hours, provision of public holidays and annual vacation together with Article 4 on fair remuneration sufficient for a decent standard of living for the workers and their families are also indispensable pre-conditions for providing children with a decent environment for their healthy growth and development. Article 27 on the equal treatment of workers with family responsibilities and the duty to facilitate the reconciliation of workplace and family duties is also undeniably promoting children's rights. Further provisions could be mentioned (Article 14 on the right to social services, Article 31 on the right to social housing) in an expanding and increasingly diffuse circle.

This presentation briefly addresses issues connected to two of the four main strategic objectives of the 2012-2015 Council of Europe Strategy for the Rights of the Child: first, eliminating all forms of violence against children (objective no. 2) and guaranteeing the rights of children in vulnerable situations (objective no. 3), in particular children with disability, children of Roma origin and immigrant children.

Together with presenting the contribution of the European Social Charter to these two main strategic objectives of the Council of Europe the presentation has a further aim: to demonstrate the importance of the collective complaint procedure to the effective protection of the human rights guaranteed by the Charter in general and to the achievement of the mentioned two objectives in particular.

2. Corporal punishment.

Corporal punishment is a form of violence against children. However, while violence in its harsh and brutal forms is able to generate social condemnation and there are legal efforts to prevent and sanction it, corporal punishment of children is looked upon differently in a number of European countries. It is considered by a significant portion of the society as perhaps exceptional, nonetheless acceptable way of disciplining children, and at any rate, as being an issue of parental privacy.

Before 2003 the Committee has not found any of the States Parties in violation of Article 17 of the Charter for the lack of clear prohibition of corporal punishment. At the same time it started to request information about legislation and practice in order to re-examine the implementation of Article 17, in the light of national legislation and international conventions, primarily the UN Convention on the Rights of Children and the case law of the UN Committee of the Rights of the Children. From 2003 and afterwards it has adopted an increasing number of conclusions finding that the countries under examination were not in conformity with their obligations under Article 17 for failing to establish that corporal punishment was clearly and consistently prohibited.

The progress of the case law, more specifically, the stricter enquiry of the law and practice of the Contracting Parties resulted from the combined effect of a number of factors. Besides the above mentioned development of international human rights law the role of international non-governmental organizations has to be mentioned.

In 2003 the World Organization Against Torture (OMCT) submitted collective complaints against five countries alleging that the law of those countries had not effectively prohibited corporal punishment of children, nor other forms of degrading treatment of them. (Revealingly, even the admissibility of the complaints was disputed by the States Parties questioning the competence of the anti-torture organization on parental rights and claiming that the complaint went beyond the scope of the Charter).

In the wake of these developments the ECSR has set its case law on Article 17, declaring that it prohibits all forms of violence against children, both physical and emotional. Corporal punishment is violence, no matter how light or for what purposes it is inflicted (educational or disciplinary, etc), and irrespective of the identity of the perpetrator.

Thus, now Article 17 requires the explicit prohibition in law (including the removal of any defence or justification) of corporal punishment, no matter where it occurs, in the home, in school, in institutions or elsewhere. As an achievement of the first five collective complaints, Greece has changed its law in order to bring it in compliance with the Charter, and, upon another collective complaint (34/2006, OMCT v Portugal), by the 2011 conclusion cycle, the ECSR could establish that by a 2007 amendment of the Penal Code the violation was remedied and the situation in Portugal was brought in compliance with article 17 of the Charter.

Nonetheless of positive changes in some countries, the clear prohibition should be in place across Europe. This is, regrettably, not the case yet. The future examination of seven new (admitted and not yet decided) collective complaints will, at high probability, bring new clarifications and further specification of the interpretation of the Charter contributing to the achievement of the strategic objective of the Council of Europe: eliminating violence against children in all area of their life – be that family, education, training or work.

3. Children with disabilities.

Guaranteeing the rights of children in vulnerable situations – this is another strategic objective (no. 3) of the Council of Europe strategy for children.

The human rights approach infiltrating the international instruments on the rights of vulnerable groups has been gradually replacing the formerly dominant protective approach by targeting freedom, autonomy and equality. The shift in values has influenced also the treaties guaranteeing the rights of persons with disability and got particular expression the change of the text and even the title of article 15 of the Charter. It now guarantees “the right of persons with disabilities to independence, social integration and participation” shifting from the right to sheltered work and education to the right to integration into mainstream education and work by adequately accommodating the disability of the person. The new text targets full and equal citizenship affecting the whole community and with an increased role of education in achieving that target.

On the basis of the revised Article 15 the Committee of Social Rights has built up a new and strong case law, starting with its milestone decision in collective complaint 13/2002, *Autism Europe v. France*. Importantly, it established, that although disability was not explicitly listed as a prohibited ground of discrimination under Article E of the Charter (practically identical with Article 14 of the ECHR), the Committee considers that it is covered by the reference to “other status”. Relying on the renowned *Thlimmenos* case of the European Court of Human Rights, it also established, that Article E not only prohibits direct discrimination but also all forms of indirect discrimination. Such indirect discrimination may arise by failing, without objective and reasonable justification, to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all, are genuinely accessible by and to all.

Recently, in its decision of 11 September 2013 on the merits of the Complaint No. 81/2012 *European Action of the Disabled (AEH) v. France*, the Committee held that France – by the inadequacy of mainstream schooling (lack of provision of the necessary staff, assistance for the accommodation of the special needs of the children and adolescents with autism in the school system) - violated Article 15§1 on the right to be educated primarily in mainstream schools. The violation is deriving, in part also from the fact, that the work done in specialized medico-social and health institutions caring for children and adolescents with autism was not predominantly educational in nature. While Parties obviously have a margin of appreciation in their progress to achieving the undertaken result, this would not relieve them from the duty of the maximum use of available resources. According to the decision spending the available finances for supporting the schooling of children with autism in specialised classes run by trained professionals in Belgium forced these disadvantaged children to undertake further disadvantage of changing place, being detached from their community, instead of establishing specialized institutions of adequate standards in France. This shows clear lack of equal respect of the rights of the children with autism and those without disability and clear difference in treatment. Therefore this measure amounts to direct discrimination.

4. Children of Roma origin.

The most vulnerable situation of Roma children brings their protection into the forefront of the Council of Europe Strategy in tandem with the UN Convention on the Rights of the Child (CRC). The discrimination and intolerance brings the rights and even the life of children at risk at all

stages of life – from inception to adulthood. The concerted action against this massive human rights' violation targeted by objective no. 3 of the Strategy is indispensable for bringing more justice and coherence to Europe. The prejudice and racism in the European societies deeply roots in the egregious poverty and social exclusion Roma families have been exposed to throughout history and in the present – giving priority to economic and social integration, starting with equal rights to education and training.

The right to education guaranteed by both paragraph 1 and paragraph 2 of Article 17 regulating the rights of children to economic, legal and social protection establishes the obligation of the state to guarantee equal access to all children, if necessary, through special measures. In the case of Roma children a main problem is their segregation within or their exclusion from mainstream education.

In its Conclusions 2011 the Committee held that despite the absence of discriminatory treatment in the legislation, the practice in the Slovak Republic showed that Roma children were disproportionately represented in special classes. Therefore the Committee considered that this situation amounted to a breach of Article 17§2 of the Charter. The Committee also found that Hungary was not in conformity with Article 17§2 of the Charter on the ground that Roma children were subject to segregation in the educational field.

The right to education of Roma children came into the limelight by collective complaint 67/2011 Médecins du Monde – International v. France. The subject matter of the complaint concerned migrant Roma mainly from Romania and Bulgaria, whose destitute situation has established multiple violation of the Social Charter. Among others Article 17§2 on free primary and secondary education and regular attendance at school. In its decision on the merits the Committee underlined that the Government did not take special measures, which should be taken for the benefit of members of a vulnerable group in order to ensure equal access to education for Roma children of Romanian and Bulgarian origin. The Committee considered that the French education system was not sufficiently accessible to these children and therefore France violated Article E taken in conjunction with Article 17§2 of the Charter.

It has been multiply emphasized that children belonging to minority groups, especially of Roma origin must be integrated into mainstream educational facilities and ordinary educational schemes. Where necessary, special measures should be taken to ensure equal access to education for these children. However, special measures for Roma children should not involve the establishment of separate schools or classes reserved for this group.

5. Migrant Children

A 2004 decision by the ECSR extending the personal scope of the Charter – one of its most significant step in designing the case law - was prompted among others by the excessively vulnerable situation of children of illegal immigrants and unaccompanied children.

Paragraph 1§1 of the Appendix to the Charter states that its provisions apply to foreigners "only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned". Refugees and stateless persons are also provided with protection, if they are covered by the relevant conventions and they are lawfully staying in the country.

In 2004, the Committee recalled the possibility of extending Charter protection to foreign nationals of non-party states. Based on the words of the Appendix, permitting that parties can extend the Charter's application to persons other than those covered and interpreting the personal scope in the light of the CRC – ratified by all Council of Europe members - in its decision on collective complaint 14/2003 - International Federation of Human Rights Leagues (FIDH) v. France – the Committee held that the exclusion of children of illegal immigrants and unaccompanied minors from the universal medical coverage scheme was in breach of Article 17§1 in conjunction with Article E.

This interpretation was confirmed in its decision on the merits of the Complaint No 69/2011 - Defence for Children International (DCI) v. Belgium. The Committee held that the persistent failure to accommodate unlawfully present and unaccompanied minors in reception centers, posed a serious threat to the enjoyment of their most basic rights, such as the rights to life, to psychological and physical integrity and to respect for human dignity. Therefore, the Committee held that Belgium breached Article 17§1 of the Charter. In addition, the failure to guarantee these minors the special protection against physical and moral hazards was a violation of Article 7§10 of the Charter.

In its Statement of Interpretation of 2011 on Article 17§2 the Committee held that access to education is crucial for every child's life and development. The denial of access to education will exacerbate the vulnerability of an unlawfully present child. Therefore, the States are required, under Article 17§2 of the Charter, to ensure that all children, whatever their residence status, have effective access to education. In its Conclusions 2011 the Committee found that Sweden failed to guarantee effective access to education to unlawfully present children, thus amounting to a violation of Article 17§2. It also observed that the Turkish legislation limited the access to education only to holders of residence permit or to Turkish nationals belonging to minority groups, and therefore, it was contrary to Article 17§2 of the Charter.

6. Closing ideas on “visibility”

Visibility - of violations, of good practices, within the legal framework – is attributed high value in the combat against violation of the rights of the children. The implementation report of the Council of Europe Strategy underlines the importance of the visibility of the decisions of the ECtHR and the ECSR decisions and the report indicates that initiatives are foreseen to provide more visibility to the case law. These planned actions bring about the hope that visibility and consistence in this area might contribute also to the stronger protection by the “enforced” interplay between these two regional treaties and the CRC.

The efforts to prevent and sanction violence, abuse, trafficking and other serious violations of children rights are of the highest importance. At the same time we must be aware of the fact that these human rights violations are frequently symptoms and the causes, the “disease” causing them is hiding deep, below visibility.

Parents in destitution, insecurity, unemployed or overworked, coping hard with issues of everyday survival cannot provide the necessary care and save their children from precarious life. Thus, the measurable progress in all aspects of civil, political, economic and social life has to be a goal not only under the Social Charter but also in respect of the implementation of the strategic goals of the Council of Europe Strategy for the Rights of the Child 2012-2015.