Corporal punishment in Ireland and the European Committee on Social Rights

This note examines the recent decision of the European Committee on Social Rights (ECSR) which found that Irish law was in breach of Art. 17 of the European Social Charter as it does not prohibit and penalise all forms of violence against children within the family, in certain types of care or certain types of pre-school settings. While the Committee’s decision received considerable media attention in Ireland, the European Social Charter (ESC) is not, of course, binding in Irish law and the legal implications of the decision appear rather limited.

Corporal punishment in Ireland
Corporal punishment within the family
Within the family setting, some element of corporal punishment is still lawful as the common law defence of ‘reasonable chastisement’ remains in place. This was described by Chief Justice Cockburn as follows:

... a parent or a schoolmaster (who for this purpose represents the parent and has the parental authority delegated to him), may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable. If it be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature or degree, or if it be protracted beyond the child’s powers of endurance, or with an instrument unfitted for the purpose and calculated to produce danger to life or limb; in all such cases the punishment is excessive, the violence is unlawful, and if evil consequences to life or limb ensue, then the person inflicting it is answerable to the law, and if death ensues it will be manslaughter.

However, in A. v. United Kingdom the European Court of Human Rights ruled that the then interpretation of the defence of reasonable chastisement was in breach of Article 3 of the European Convention on Human Rights. Article 3 provides that ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’ In that case, a step-father has beaten his nine year old stepson with a garden cane on several occasions causing bruising. He has been charged with assault occasioning actually bodily harm but had been acquitted on the basis that this involved ‘reasonable correction.

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1 Association for the Protection of All Children (APPROACH) Ltd. v. Ireland, Complaint No. 93/2013, 27 May 2015.
2 See, for example, Irish Times, 27 May 2015.
The Court of Human Rights recalled that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 and found that the treatment in this case reached the level of severity prohibited by Article 3. The Court held that Article 3 required States to take measures to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. The Court held that

Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.5

The Court ruled that English law including the defence of ‘reasonable chastisement’ (as interpreted in this case)

did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3.6

Subsequently the English Court of Appeal gave guidance to the criminal courts on the implications of this ruling.7 In that case, the trial judge raised a question as to whether and, if so, how the scope or definition of the defence of reasonable chastisement needed to be modified having regard to the Human Rights Act 1998 and decisions of the European Court of Human Rights in cases such as A. v. United Kingdom. The Court of Appeal ruled that

the [trial] judge should direct the jury that, when they are considering the reasonableness or otherwise of the chastisement, they must consider the nature and context of the defendant's behaviour, its duration, its physical and mental consequences in relation to the child, the age and personal characteristics of the child and the reasons given by the defendant for administering punishment.8

The Court derived a number of propositions from the European case law:

First, for punishment to be degrading and in breach of Article 3 it must attain a particular level of severity. Secondly, the degree of severity is to be judged according to the facts of each case, in particular, the nature and context of the punishment. Thirdly, ... not every case of corporal punishment will necessarily involve a breach of Article 3.9

There does not seem to be any analogous ruling in Irish law but it is clear that a similar approach would apply. The European Convention on Human Rights is given force in Irish law by the European Convention on Human Rights Act, 2003. Section 2(1) of the Act provides that:

In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and

5 Ibid at [22].
6 At [24]. Indeed, the UK Government accepted that the law failed to provide adequate protection to children.
8 At [32].
application, do so in a manner compatible with the State's obligations under the Convention provisions.  

In addition, section 4 provides that a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by any declaration, decision, advisory opinion or judgment of the European Court of Human Rights. The Irish courts have adopted a limited approach to the incorporation of the Convention into Irish law and the Supreme Court has emphasised that the 2003 Act does not give direct effect to the ECHR in Irish law and that section 2 is an interpretative provision only. However, as the English court of appeal pointed out in *R v. H.*, the common law is ‘evolutionary’ and it would seem that an Irish court interpreting the common law defence of ‘reasonable chastisement’ should do so in line with the ECHR as interpreted in *A.* and similar rulings.

**Corporal punishment in other settings**

Section 24 of the Non-Fatal Offences Against the Person Act 1997 abolished the rule of law under which teachers were immune from criminal liability in respect of physical chastisement. Section 201 of the Children Act, 2001 prohibits ‘corporal punishment or any other form of physical violence’ in children detention schools. Similarly the Child Care (Special Care) Regulations 2004 prohibits corporal punishment for children within its remit. Finally, the Child Care (Pre-School Services) (No 2) Regulations 2006 provides that

A person carrying on a pre-school service shall ensure that no corporal punishment is inflicted on a pre-school child attending the service.

However, as discussed in the decision of the European Committee of Social Rights (see below), there is no legislative prohibition on corporal punishment in a number of other settings, such as children in foster care.

**The European Social Charter**

The European Social Charter is a Council of Europe treaty which guarantees social and economic human rights. It was adopted in 1961 and revised in 1996. The role of the European Committee of Social Rights is to judge whether States are in conformity in law and in practice with the provisions of the Charter. The ECSR operates by way of both a ‘reporting procedure’ (where the Committee examines national reports and decides

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10 Emphasis added.


12 *R v H* [2001] EWCA Crim 1024 at [35].

13 Perhaps strangely the term ‘teachers’ is not defined in the Act. On the scope of teachers’ authority (pre-1997) see Law Reform Commission, Report on *Non-Fatal Offences against the Person*, 1994, at [1.79]-[1.80]. The Commission recommended that the law should be clarified so as to remove any existing immunity of teachers from criminal prosecution for assaults on children which was done in the 1997 Act.

14 Article 15(2) of the 2004 Regulations.

15 Article 9(1) of the 2006 Regulations.

16 The revised Charter has been both signed and ratified by Ireland but not implemented in national law.
whether or not the countries concerned are in conformity with the Charter) and by way of a ‘complaints procedure’ (where the Committee considers specific complaints by organisations authorised to bring such complaints).

This is not the first occasion on which the European Committee of Social Rights has ruled against Ireland in relation to corporal punishment. Indeed, in 2004, the Committee ruled as follows:

... the corporal punishment of children within the home is permitted in Ireland by virtue of the existence of the common law defence of reasonable chastisement. Although the criminal law will protect children from very serious violence within the home, it remains the fact that certain forms of violence are permitted. The Committee therefore holds that the situation is in violation of Art.17 of the Revised Charter.

As regards the situation of children in foster care, residential care and certain childminding settings, the Committee takes note of the fact that there exist guidelines, standards, registration schemes and inspections. However it notes that these do not have the force of law and do not alter the existence of the common law defence which remains prima facie applicable. It therefore finds that children in these situations are not adequately protected against corporal punishment. It therefore holds that the situation constitutes a breach of Art.17 of the Revised Charter.17

It is not immediately obvious that this decision had any major impact on Irish law or policy.18 In the recent complaint, the Association for the Protection of All Children (APPROACH) argued that Ireland is in violation of Article 17 of the Revised European Social Charter as there is still no explicit and effective prohibition of all corporal punishment of children in the family, schools and other settings.

Article 17 (which is titled ‘The right of children and young persons to social, legal and economic protection’) provides (in relevant part) that

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; ... .

Article 17 does not specifically refer to corporal punishment but in 2001 the Committee concluded that Article 17 required ‘a prohibition in legislation against any form of violence against children, whether at school, in other institutions, in their home or elsewhere’.\(^{19}\) This formed the basis for its 2004 decision that Ireland was in breach of Article 17. Ireland had also been found to be in breach of Article 17 under the reporting procedure by way of which the Committee monitors the implementation of the Charter (most recently in Conclusions 2011).

Little has changed by the time of the more recent decision. APPROACH argued that the Government had taken insufficient action to remedy the violation of Article 17 and that the continued existence of the common law defence of reasonable chastisement allowed parents and other carers to continue to inflict corporal punishment on children in violation of Article 17. In particular, APPROACH highlighted the fact, although there are national guidelines, there is no legislative prohibition of corporal punishment for children placed in foster care, children in child residential centres and children cared for by child-minders excluded from the Child Care (Pre-School Services) Regulations. APPROACH also pointed out that research indicated that 25.1\% of parents used physical punishment of their children in the past year.\(^{20}\)

The Government highlighted the fact that Section 246 of Children Act 2001 and Section 176 of the Criminal Justice Act 2006 create offences of cruelty to and reckless endangerment of children, in addition to the specific prohibitions on corporal punishment in specific settings.

The Committee noted

> a wide consensus at both the European and international level among human rights bodies that the corporal punishment of children should be expressly and comprehensively prohibited in law.

It referred to its most recent interpretation of Article 17 of the Charter as regards the corporal punishment of children

> To comply with Article 17, states' domestic law must prohibit and penalize 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.

\(^{19}\) General Introduction to Conclusions XV-2 at pp. 26-29 (Vol.1, 2001). In the \textit{OMCT} decision the Government had complained that that Art.17 of the Revised Charter was never intended to prohibit all forms of corporal punishment and that it was inappropriate for the Committee to interpret it as doing so, that the Committee erred in having regard to other international human rights treaties (in particular the UN Convention on the Rights of the Child), the jurisprudence of other international human rights bodies and developments in the domestic legal systems of other states parties. The Committee shortly rejected these points holding that it fell to it to give a legal interpretation of the provisions of the Charter and to rule on whether states are in conformity with the Charter (\textit{OMCT} at [59]).

Moreover, states must act with due diligence to ensure that such violence is eliminated in practice.\(^{21}\)

It noted that, as regards the protection of children from corporal punishment within the family, there have been no developments in Ireland since its previous (2004) decision. As regards children in foster care or residential care, the Committee found there was no general statutory prohibition on corporal punishment and the Government had not referred to any decisions of the domestic courts which would indicate that they would restrict the common law defence of reasonable chastisement. In addition, in the case of pre-school care, there were significant exemptions to the Regulations which prohibited such punishment.\(^{22}\)

The Committee concluded that Irish law did not prohibit and penalise all forms of violence against children within the family, in certain types of care or certain types of pre-school settings, that is acts or behaviour likely to affect their physical integrity, dignity, development or psychological development or wellbeing.\(^{23}\)

It noted that it had repeatedly found the situation to be in violation of Article 17 under the reporting procedure (Conclusions 2003, 2005 and 2011). It therefore concluded that there is a violation of Article 17§1 of the Charter.

The status of the European Social Charter in Irish law

The Irish legal system adopts a ‘dualist’ approach in terms of international conventions. In other words such conventions do not form part of national law unless and until they have been incorporated into national law.\(^{24}\) This applied to the European Convention on Human Rights until it was (in a certain way) incorporated into national law in the European Convention on Human Rights Act of 2003. Thus, other international conventions ratified by Ireland (such as, for example, the European Social Charter or the UN Convention on the Rights of the Child) are not binding in Irish law. At best, such agreements may be taken into account as an aid to interpretation if and when there is an ambiguity in the Irish law, e.g. where the law is reasonably capable of more than one meaning. Therefore, even if the Irish provision happens to be in breach of agreements such as the ESC, this has no legal effect in Irish law. Similarly, the conclusions and decisions of the ECSR do not constitute a legally binding decision.\(^{25}\)

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\(^{22}\) APPROACH at [51]-[52]. Childminders who are caring for the children of relatives, children of the same family or not more than three children of different families are outwith the Regulations.

\(^{23}\) At [53].

\(^{24}\) Article 29.6 of the Irish Constitution states that ‘No international agreement shall be part of the domestic law save as may be determined by the Oireachtas’. See Kavanagh v. Governor of Mountjoy Prison [2002] IESC 13.

\(^{25}\) As the High Court ruled in relation to the views of the Human Rights Committee which performs a somewhat analogous function under the International Covenant on Civil and Political Rights: Kavanagh v. Governor of Mountjoy Prison [2001] IEHC 77 at [12]. See also the discussion of the Supreme Court in this case: [2002] IESC 77 at [36] and [42].
However, it is arguable that, in a limited way, such agreements might be incorporated into Irish law by way of the European Convention on Human Rights. In *Demir v Turkey* the Grand Chamber of the European Court of Human Rights stated that

> The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values.\textsuperscript{26}

In *Demir* this meant that the Court had regard to the European Social Charter (even though the specific provisions had not been ratified by Turkey).\textsuperscript{27}

Under the ECHR it is arguable that Article 17 of the European Social Charter might be taken into account in the application of Articles 3 and/or 8 (respect for private and family life) of the Convention. This approach has been applied by the Irish courts in relation to the UN Convention on the Rights of the Child (Art 3 of which requires the best interests of the child must be a primary consideration in all actions concerning children) in the in the context of deportation/extradition proceedings.\textsuperscript{28} In *Minister for Justice and Equality v. R.P.T.*, Edwards J. stated that

> ... in any case in which the Article 8 rights of a child are engaged, the best interests of a child will fall for consideration and that it is important that due regard be had to them in the balancing exercise that must be conducted.\textsuperscript{29}

However, he went on to say that it was not intended to indicate that ‘any specific weight should be attributed’ to these interests which must be done on a case specific basis.

The issue has yet to be considered by the Irish courts in any detail in relation to the provisions of the ESC and the Supreme Court has taken a very restrictive approach to the incorporation of the ECHR into Irish law.\textsuperscript{30} Overall, it would be very surprising if the Irish courts were to interpret Article 3 of the ECHR in the light of the ESC so as to require a legal prohibition on all forms of corporal punishment where the European Court of Human Rights has specifically not (yet) come to that conclusion (as in the A. case). Thus it seems likely that any effect of the recent decision of the ESC will be in the field of moral suasion rather than law.

\textsuperscript{26} *Demir and Baykara v. Turkey*, 34503/97, 12 November 2008 (2008) 48 EHRR 1272. See also *Opuz v Turkey* (2010) 50 EHRR 28.

\textsuperscript{27} See also *Weller v Hungary*, 44399/05, 31 March 2009 in which Judge Tulkens (in a ‘concurring’ judgment) suggested that Article 14 should be construed in the light of Article 12.4 of the European Social Charter, which provides that domestic law cannot reserve social security rights to their own nationals (although this was strictly obiter).

\textsuperscript{28} *Minister for Justice and Equality v. T.E.* [2013] IEHC 323. See the discussion in *Dos Santos v Minister for Justice* [2013] IEHC 237.

\textsuperscript{29} [2013] IEHC 54.

\textsuperscript{30} *McD. v L.*, [2009] IESC 81. In that case the Court stated that the national courts should not go beyond what had been established by the ECtHR (at [99]-[102]).
Conclusion

There has been considerable national criticism of the failure of the Irish state to ban corporal punishment and the European Social Rights has now twice ruled against Ireland in relation to complaints on this issue (and has also come to the same conclusion under the reporting procedure). However, there have been relatively few changes in the law in the period from the first such ruling in 2004 to the most recent decision in 2015.

This note has pointed out that the decisions of the ESC are not legally binding and that while the ESC might be taken into account in interpreting the provisions of the ECHR, it is (very) unlikely that the Irish courts would consider it appropriate to follow the approach of the ESC on corporal punishment when the European Court on Human Rights has yet to do so. Of course, this is not an argument for the status quo.

The immediate response to the ESC decision has been to promise regulations to outlaw corporal punishment in foster care and residential care. However, in relation to corporal punishment in a family setting, the Minister for Children, James Reilly TD, stated that

The established position has been that to remove the common law defence would, in principle, expose the family extensively to the intrusion of the criminal law. However, my Department has commenced work, including consultation with the Department of Justice and Equality, on examining the possibility within the Irish legal framework for removing the common law defence.31

This does not sound very different to similar commitments given after the 2004 decision. One starting point might be to clarify the current status of the ‘reasonable chastisement’ defence. As outlined above, the previous (broad) approach to this defence has been significantly narrowed by the rulings of the European Court of Human Rights but it is very difficult to point to any clear acknowledgement of this in Irish law.32 However, one point of agreement is that – in addition to legal change – considerable information and policy work is required to reduce the level of corporal punishment in Irish society.

31 Dáil Éireann Debate, Wednesday, 27 May 2015. Perhaps ironically, a 2014 survey by the Irish Society for the Prevention of cruelty to Children and Children’s Rights Alliance found that 62% of adults surveyed believed that it is currently illegal to slap a child. Fifty seven percent of those surveyed supported a ban.

32 See also the position in Canada where the Canadian Supreme Court upheld the compatibility with the Canadian Charter of Rights of a provision allowing the use of reasonable force by parents and teachers by way of correction of a child or pupil by giving it a narrow reading: Canadian Foundation for Children, Youth and the Law v Canada, 2004 SCC 4.