



# Inhuman sentencing of child offenders in Botswana

Briefing for the 15th session of the Human Rights Council Universal Periodic Review in January 2013, submitted by the Child Rights International Network - CRIN (www.crin.org, info@crin.org), July 2012

## Legality of inhuman sentencing

Child offenders cannot be sentenced to death but they may lawfully be sentenced to corporal punishment and life imprisonment.

The minimum age of criminal responsibility is eight.<sup>1</sup> The Children's Act defines a child as under 14, a juvenile as aged 14-17.<sup>2</sup>

### *Corporal punishment*

Corporal punishment in the form of whipping is lawful as a sentence for males. The Penal Code punishes a number of crimes with corporal punishment, including sexual offences and offences relating to murder, assault, robbery and travelling by train without a ticket.<sup>3</sup> For persons aged 14 and over, corporal punishment can be ordered in addition to or in lieu of imprisonment.<sup>4</sup> The Magistrates' Courts Act authorises all magistrates to impose a sentence of whipping.<sup>5</sup> The Customary Courts Act authorises customary courts to order a person convicted of an offence to undergo corporal punishment, and they may, at their discretion, order this in addition to or in lieu of any other punishment.<sup>6</sup> Females may not be sentenced to corporal punishment.<sup>7</sup> The Criminal Procedure and Evidence Act states that a court which convicts a person under 18 of an offence may instead of the punishment for the offence order him to be placed in the custody of a suitable person and to receive corporal punishment.<sup>8</sup>

Courts may sentence a male person to corporal punishment up to 12 strokes or, for persons under 18, up to six strokes.<sup>9</sup> The person to be caned must be certified fit to receive the punishment by a medical officer, and the punishment should be inflicted in the presence of a medical officer who

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<sup>1</sup> Penal Code, article 13.

<sup>2</sup> Article 2

<sup>3</sup> See articles 25, 28, 29, 142, 143, 146, 147, 148, 149, 155, 218, 225, 229, 247, 292, 293, 300, 301, 302, 303 and 316

<sup>4</sup> Penal Code, article 28(4)

<sup>5</sup> Article 60. Magistrates courts also try prisoners accused of major prison offences, for which they may order corporal punishment (Prisons Act, articles 109, 114 and 115).

<sup>6</sup> Article 18. See also articles 22, 42 and 49

<sup>7</sup> Penal Code, article 28(3); Customary Courts Act, article 18(2)

<sup>8</sup> Article 304(1)

<sup>9</sup> Penal Code, article 28

must intervene if he considers the person is not fit to continue.<sup>10</sup> The punishment should be administered on the bare buttocks.<sup>11</sup> The caning must not be carried out in instalments, and must be inflicted privately in a prison or in a customary court.<sup>12</sup> For a person under 18, the court may direct where the punishment should take place and who should administer it, and the parent/guardian has a right to be present.<sup>13</sup>

In a customary court, the law states that corporal punishment should be inflicted with a cane or a thupa and on the buttocks only, with protection placed over the kidneys.<sup>14</sup> However, as the Criminal Procedure (Corporal Punishment) Regulations 1969 would also seem to apply to customary courts, provisions concerning the infliction of corporal punishment in customary courts appear to be contradictory.

Under the Children's Act 1981, a child in need of care may be returned to his parent/guardian, placed in foster care, sent to a children's home or sent to a school of industry.<sup>15</sup> A child who does not comply with the order is guilty of an offence and may be sentenced to corporal punishment.<sup>16</sup> It is unclear whether this applies only to boys or to boys and girls.<sup>17</sup>

The Children's Act 2009 states that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment, but also states that this "shall not be construed as prohibiting the corporal punishment of children in such circumstances or manner as may be set out in this Act or any other law."<sup>18</sup> The Act provides for a child convicted of an offence by a children's court to be sentenced to corporal punishment.<sup>19</sup> The punishment must be a maximum of six strokes and must be inflicted as specified in the Criminal Procedure and Evidence Act and the Penal Code (see above).<sup>20</sup>

### ***Life imprisonment***

The Government has stated that life imprisonment may not be imposed on children under 18,<sup>21</sup> but there appears to be no clear prohibition of the sentence. The Penal Code states that a person under 14 may not be sentenced to imprisonment, and a person convicted of an offence punishable with life imprisonment may be sentenced to a shorter term,<sup>22</sup> but there is no explicit prohibition of life imprisonment for all child offenders. The Code punishes a number of offences with life imprisonment, including those relating to mutiny, piracy, hijacking, rioting, incest, manslaughter,

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<sup>10</sup> Criminal Procedure and Evidence Act, article 305

<sup>11</sup> *Ibid*, article 3

<sup>12</sup> Criminal procedure and Evidence Act, article 305; Corporal Punishment (Designation of Places for Administering) Order 1982, article 2. The Court of Appeal in 1984 found that to administer corporal punishment in instalments is inhuman and degrading, but corporal punishment *per se* is constitutional (*Clover Petrus and Another vs The State*).

<sup>13</sup> Criminal procedure and Evidence Act, article 305

<sup>14</sup> Customary Courts (Corporal Punishment) Rules 1972, articles 2 and 3

<sup>15</sup> Article 19

<sup>16</sup> Article 20

<sup>17</sup> Article 20 of the Children's Act states that in such cases "any child" may be sentenced to corporal punishment, which must be in accordance with article 305 of the Criminal Procedure and Evidence Act. This latter does not prohibit corporal punishment of females.

<sup>18</sup> Article 61, and cf article 27

<sup>19</sup> Article 85(d)

<sup>20</sup> Children's Act 2009, article 90

<sup>21</sup> CRC/C/51/Add.9, 27 February 2004, *Initial state party report to the Committee on the Rights of the Child*, para. 181

<sup>22</sup> Penal Code, article 27

murder, causing grievous harm, kidnapping and arson.<sup>23</sup> Such offences are tried by the High Court and are not subject to the provisions of the Children's Act.<sup>24</sup>

In prohibiting the imposition of the death penalty on child offenders, article 26(2) of the Penal Code states that "in lieu thereof the court shall sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody". The Criminal Procedure and Evidence Act states that, subject to this provision, any court which convicts a person under 18 of any offence may, instead of imposing the punishment for that offence order that he be placed in the custody of a suitable person for a specific period.<sup>25</sup>

The Children's Act 2009 provides for a child convicted of an offence by a children's court to be sentenced to imprisonment.<sup>26</sup> It states in article 89(3): "A child charged with a capital offence other than murder shall, subject to the provisions of the Penal Code, be sentenced to imprisonment for such term as the court considers appropriate." It does not prohibit imprisonment for life, and does not specify the sentence in relation to murder.

## **Inhuman sentencing in practice**

We have not been able to obtain official statistics relating to sentencing of child offenders to corporal punishment, life imprisonment or imprisonment "during the President's pleasure".

According to the US Bureau of Democracy, Human Rights and Labor, customary courts in 2004 and 2005 continued to impose corporal punishment against young male offenders for crimes such as vandalism, theft and delinquency.<sup>27</sup>

## **Law reform needed**

Legislation should be enacted to explicitly prohibit sentencing child offenders (under 18 at the time of the offence) to corporal punishment and life imprisonment, including under customary law. Legal provisions which specifically provide for sentencing persons under 18 to corporal punishment should be repealed, including the relevant articles in the Penal Code, the Criminal Procedure and Evidence Act and the Children's Act.

## **Recommendations from human rights treaty monitoring bodies**

Botswana's initial report to the Committee on the Rights of the Child was examined in 2004. The committee expressed serious concern about the legality of corporal punishment and recommended the state to take legislative measures to expressly prohibit punishment in the family, schools and

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<sup>23</sup> See articles 42, 45, 53, 63, 65, 79, 80, 81, 124, 168, 201, 217, 218, 219, 222, 224, 225, 226, 227, 228, 229, 254, 326, 333, 337, 360 and 361

<sup>24</sup> See CRC/C/51/Add.9, 27 February 2004, *Initial state party report to the Committee on the Rights of the Child*, paras. 30, 32 and 327; Customary Courts Act, article 13; Magistrates' Courts Act, article 60. Relevant offences include treason, rioting, bribery, extortion, rape, and other sentences punishable by death or long prison sentences.

<sup>25</sup> Article 304(1)

<sup>26</sup> Article 85(e)

<sup>27</sup> U.S. Bureau of Democracy, Human Rights, and Labor (2005), *2004 Country report on human rights practices: Botswana*, [www.state.gov/g/drl/rls/hrrpt/2004/41589.htm](http://www.state.gov/g/drl/rls/hrrpt/2004/41589.htm), accessed 30 September 2010; U.S. Bureau of Democracy, Human Rights, and Labor (2006), *2005 Country report on human rights practices: Botswana*, [www.state.gov/g/drl/rls/hrrpt/2005/61555.htm](http://www.state.gov/g/drl/rls/hrrpt/2005/61555.htm), accessed 30 September 2010

other institutions and to ensure that deprivation of liberty is used as a last resort, for the shortest appropriate time and in appropriate conditions.<sup>28</sup>

Botswana's initial report to the human rights committee was reviewed in 2008. The committee recommended Botswana to abolish all forms of penal corporal punishment.<sup>29</sup>

## **Universal Periodic Review**

Botswana was examined under the Universal Periodic Review process in December 2008. A recommendation was made to prohibit corporal punishment<sup>30</sup>; the Government rejected this recommendation and asserted that it had no plans to eliminate the practice.<sup>31</sup>

## **The Review of Botswana by the Human Rights Council**

In light of the clear international human rights consensus against the imposition of capital punishment, life imprisonment and corporal punishment on child offenders, the specific recommendations to Botswana made by the Committee on the Rights of the Child and Human Rights Committee, and the current legality of life imprisonment and corporal punishment in the state, we hope that members of the Human Rights Council will make the following recommendations to the Government of Botswana during its Universal Periodic Review:

- 1. Repeal all legal provisions authorising corporal punishment as a sentence of the courts for persons under 18 years of age at the time of the offence.**
- 2. Explicitly prohibit life imprisonment and indeterminate detention (“during the President’s pleasure”) of child offenders, including when such imprisonment is in lieu of the death penalty, and legislate for the detention of children to be imposed only as a last resort and for the shortest possible duration.**
- 3. Withdraw its reservations to article 7 of the Covenant on Civil and Political Rights, article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and article 1 of the Convention on the Rights of the Child.**
- 4. Raise the minimum age of criminal responsibility.**

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<sup>28</sup> CRC/C/15/Add.242, 3 November 2004, Concluding observations on initial report: Botswana, paras. 36, 37, 60 and 61.

<sup>29</sup> CCPR/C/BWA/CO/1, 24 April 2008, Concluding observations on initial report: Botswana, para. 19.

<sup>30</sup> A/HRC/10/69, 13 January 2009, Report of the Working Group on the Universal Periodic Review: Botswana, para. 92(20)

<sup>31</sup> A/HRC/10/69/Add.1, 17 March 2009, Report of the Working Group on the Universal Periodic Review: Botswana, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, page 7