

INHUMAN SENTENCING OF CHILDREN IN SWAZILAND

Summary

When the Children's Protection and Welfare Act came into force in July 2013,¹ it implemented wide reaching reforms of the juvenile justice system, abolishing corporal punishment as a sentence for children and reinforcing the prohibition on the death penalty for offences committed while under the age of 18. However, detention during His Majesty's pleasure appears to remain a lawful sentence for child offenders.

This report was prepared for the Child Rights International Network (CRIN) in October 2010 and updated in December 2015. For more information about CRIN's inhuman sentencing campaign, visit www.crin.org/home/campaigns/inhuman-sentencing or contact us at info@crin.org.

Introduction

Swaziland has a dual legal system, comprising statutory Roman-Dutch common law and traditional Swazi law and custom.² There is no comprehensive juvenile justice system, though the Child Protection and Welfare Act introduced Children's Courts that generally have jurisdiction over criminal cases involving children. The Criminal Procedure and Evidence Act 1938, the Juvenile Act, the Reformatories Act 1921, the Crimes Act 1889, the Magistrates Courts Act and the Swazi Courts Act 1950 also contain provisions related to children in conflict with the law. Swazi customary law is also applicable, unless it is inconsistent with the Constitution or "repugnant to natural justice or morality or general principles of humanity".³

No child below the age of 12 can be prosecuted for a criminal offence⁴ and children between the ages of 12 and 14 may only be prosecuted if a magistrate is satisfied that "the child possesses the capacity to appreciate the difference between right and wrong and has the ability to act in accordance with that appreciation."⁵ The burden of proof is on the Crown to prove beyond reasonable doubt that a child between 12 and 14 has this capacity and evidence of intellectual, emotional, psychological and social development will be considered relevant in reaching that judgment.⁶ Any evidence on this issue must be supported by "a report from a person with expertise in child development or child psychology" who must testify in person before the magistrate.⁷

The Child Protection and Welfare Act defines a child as a person under the age of 18 years.⁸



¹ Children's Protection and Welfare (date of commencement) Notice 2013. Available at: <http://www.osall.org.za/docs/2011/03/Swaziland-Childrens-Protection-and-Welfare-Act-6-of-2012-date-of-commencement.pdf>.

² See GlobaLex, The Law and Legal Research in Swaziland. Available at: <http://www.nyulawglobal.org/globalex/Swaziland1.html>.

³ Constitution of Swaziland, Article 252. Available at: https://www.constituteproject.org/constitution/Swaziland_2005?lang=en. See also Swazi Courts Act 1950.

⁴ Children's Protection and Welfare Act 2012, Section 79(1). Available at: http://www.osall.org.za/?page_id=396.

⁵ Children's Protection and Welfare Act 2012, Section 79(2).

⁶ Children's Protection and Welfare Act 2012, Section 79(4) and (5).

⁷ Children's Protection and Welfare Act 2012, Section 79(6).

⁸ Children's Protection and Welfare Act 2012, Section 2.

Legality of inhuman sentencing

Life imprisonment

Life imprisonment is explicitly prohibited as a penalty for any offence committed while under the age of 18.⁹ However, detention at Her Majesty's pleasure appears to remain a lawful sentence following the reforms of the Children's Protection and Welfare Act 2012.

Strict limits are placed on the sentencing of children's courts, preventing them from sentencing a child to more than five years' imprisonment for children aged 16 or older.¹⁰ However; while children's courts generally have jurisdiction over offences committed by children, other courts are able to hear these cases when a child is charged with murder or unlawful sexual acts; and:

- the likely sentence will exceed the jurisdiction of the children's court;
- there are multiple charges and a court other than the children's court has jurisdiction in one or more of those charges; or
- the trial of the child has been joined with that of an adult¹¹

Similarly, where a children's court has proved a charge against a child and is of the view that "exceptional circumstances exist which indicate that the appropriate sentence may exceed the sentencing jurisdiction of the Children's Court: the court may refer the case to the High Court for sentencing."¹²

Murder carries a death sentence, but the explicit prohibition on sentencing people to death for offences committed while under the age of 18 requires that in lieu of the death penalty, child offenders are sentenced "to be detained during His Majesty's pleasure".¹³

Death penalty

The death penalty is prohibited for any person who was

under the age of 18 at the time the offence was committed.¹⁴

Corporal punishment

When the Child Welfare Act 2012 came into force in 2013, it abolished corporal punishment as a judicial sentence for children.¹⁵

Prior to this reform, corporal punishment in the form of whipping could be ordered by the courts for males.¹⁶ Article 306 of the Criminal Procedure and Evidence Act stated that: "... where any male child under the age of 18 is convicted of any offence the court may in lieu of any other punishment or in addition to any other punishment except a discharge in terms of s311 ... sentence that person to receive in private a moderate correction of whipping not exceeding fifteen cuts with a light cane. Such correction shall be administered by such a person and in such place as the court may appoint. The parent or guardian of such person shall have the right to be present."¹⁷ Females could not be sentenced to corporal punishment.¹⁸ Swazi Courts, Magistrates Courts and the High Court were able to order whipping.¹⁹

Inhuman sentencing in practice

CRIN has not been able to obtain official statistics relating to the sentencing of children to detention during His Majesty's pleasure.

Progress towards prohibition and elimination

Law reform needed

All provisions permitting the sentencing of children to life imprisonment, including detention during His Majesty's pleasure should be repealed.

Law reforms under way

CRIN is not aware of any juvenile justice reform currently

⁹ Children's Protection and Welfare Act 2012, Section 161(1).

¹⁰ Children's Protection and Welfare Act 2012, Section 156(1).

¹¹ Children's Protection and Welfare Act 2012, Section 133(1). See Section 139 for additional provisions on the joinder of cases involving a child and adult.

¹² Children's Protection and Welfare Act 2012, Section 133(2).

¹³ Criminal Law and Procedure Act, 67/1938, Section 2961(1). Available at: http://www.africanchildforum.org/cr/Legislation%20Per%20Country/swaziland/swaziland_criproevi_1938_en.pdf.

¹⁴ Children's Protection and Welfare Act 2012, Section 161(1).

¹⁵ Children's Protection and Welfare Act 2012, Section 161(2). For more information on the legality of corporal punishment in Swaziland, see Global Initiative to End All Corporal Punishment of Children, Country report for Swaziland. Available at: <http://www.endcorporalpunishment.org/progress/country-reports/swaziland.html>.

¹⁶ Criminal Procedure and Evidence Act, article 196(e)

¹⁷ Quoted in Southern African Network to End Corporal and Humiliating Punishment of Children (2008), Report on the two-day meeting of the Network held on 16 and 17 April 2008 at the offices of RAPCAN, Cape Town, page 8

¹⁸ Article 307; see also CRC/C/SWZ/1, 16 February 2006, Initial state party report to the Committee on the Rights of the Child, para. 462; Southern African Network to End Corporal and Humiliating Punishment of Children (2008), op. cit.

¹⁹ Southern African Network to End Corporal and Humiliating Punishment of Children (2008).

underway.

National campaigns

CRIN is not aware of any national campaigns against inhuman sentencing in Swaziland.

National and international law conflicting with inhuman sentencing

The Constitution

A number of provisions in the Constitution (2005, in force February 2006) protect the physical integrity of all persons, although exemptions are made for cruel punishments prescribed by law. Relevant provisions include:

Article 2:

“(1) This Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void....”

Article 14 (Fundamental rights and freedoms of the individual):

“(1) The fundamental human rights and freedoms of the individual enshrined in this Chapter are hereby declared and guaranteed, namely –

(a) respect for life, liberty, right to fair hearing, equality before the law and equal protection of the law;

...

(e) protection from inhuman or degrading treatment, ...; and
(f) respect for the rights of the family, women, children, workers and persons with disabilities.

(2) The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, the Legislature and the Judiciary and other organs or agencies of Government and, where applicable to them, by all natural and legal persons in Swaziland, and shall be enforceable by the courts as provided in this Constitution.

(3) A person of whatever gender, race, place of origin, political opinion, colour, religion, creed, age or disability shall be entitled to the fundamental rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest.”

Article 15 (Protection of right to life):

“(1) A person shall not be deprived of life intentionally save in the execution of the sentence of a court in respect of a criminal offence under the law of Swaziland of which that person has been convicted.

(2) The death penalty shall not be mandatory.

(3) A sentence of life imprisonment shall not be less than twenty five years....”

Article 18 (Protection from inhuman or degrading treatment):

“(1) The dignity of every person is inviolable.

(2) A person shall not be subjected to torture or to inhuman or degrading treatment or punishment.”

Article 20 (Equality before the law):

“(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

(2) For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability....”

Article 29 (Rights of the child):

“... (2) A child shall not be subjected to abuse or torture or other cruel inhuman and degrading treatment or punishment subject to lawful and moderate chastisement for purposes of correction....”

International human rights treaties

Swaziland has ratified or acceded to the following international human rights treaties:

- Convention on the Rights of the Child (in 1995)
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (in 2012)
- Optional Protocol to the Convention on the Rights of the Child on the Rights of the Child on the sale of children, child prostitution and child pornography (in 2012)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (in 2004)
- International Covenant on Civil and Political Rights (in 2004)
- Convention on the Elimination of All Forms of Discrimination against Women (in 2004)
- Convention on the Elimination of All forms of Racial Discrimination (in 1969)
- International Covenant on Economic, Social and Cultural Rights (in 2004)
- Convention on the Rights of Persons with Disabilities (in 2012)

The State has signed but not ratified the Convention for the Protection of All Persons from Enforced Disappearance.

International communication and complaints mechanisms

Swaziland has accepted the complaints procedure under the Convention on the Rights of Persons with Disabilities and the inquiry procedure under the Convention against Torture.

Status of treaties

Treaties must be incorporated into domestic law through an Act of Parliament. Article 238 (International agreements) of the Constitution states:

“(1) The Government may execute or cause to be executed an international agreement in the name of the Crown.
 (2) An international agreement executed by or under the authority of the Government shall be subject to ratification and become binding on the government by –
 (a) an Act of Parliament; or
 (b) a resolution of at least two-thirds of the members at a joint sitting of the two Chambers of Parliament.
 (3) The provisions of sub-section (2) do not apply where the agreement is of a technical, administrative or executive nature or is an agreement which does not require ratification or accession.
 (4) Unless it is self-executing, an international agreement becomes law in Swaziland only when enacted into law by Parliament.
 (5) Accession to an international agreement shall be done in the same manner as ratification under sub-section (2).
 (6) For the purposes of this section, “international agreement” includes a treaty, convention, protocol, international agreement or arrangement.”

In 2006, the Government stated that since independence in 1968, no human rights treaty, convention or protocol had ever been incorporated into domestic law.²⁰ In 2002, in a case concerning bail, the Court of Appeal stated that “unincorporated international agreements may be used as aids to interpretation but not treated as part of domestic law for purposes of adjudication in a domestic court”.²¹ In a case concerning child custody, the High Court in 2008 referred to the Convention on the Rights of the Child in discussing article 29 (Rights of the child) of the Constitution:

“(8) What are the ‘protections and rights’ referred to in section 29 (4). It seems to me that these ‘protections and rights’ are found in various scattered pieces of legislation such as statutes and International conventions on the rights

of the child that Swaziland is a signatory too. These are also found in the common law. It is these ‘pieces’ of law that have to be brought together and enacted under section 29 (7) of the Constitution which specifically provides for the enactment of laws by Parliament to ensure children’s rights as well as the domestication of the Convention on the Rights of the Child.”²²

Recommendations from human rights treaty monitoring bodies

Committee on the Rights of the Child

(16 October 2006, CRC/C/SWZ/CO/1, Concluding observations on initial report, paras 36, 37, 67 and 68)

“The Committee is deeply concerned that corporal punishment is legal and traditionally accepted and widely practised in the family, in schools and in other settings. The Committee is further concerned that the new Constitution allows the use of ‘moderate chastisement’ of children.

“The Committee recommends that the State party consider, as a matter of priority, amending the Constitution and explicitly prohibiting by law corporal punishment in all settings, including in the family, schools, the penal system and all alternative care settings. It also recommends that the State party conduct awareness-raising and educational campaigns to ensure that alternative forms of discipline are used, in a manner consistent with the child’s human dignity and in conformity with the Convention, especially article 28, paragraph 2, taking into account its general comment No. 8 on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (CRC/C/GC/8).

“While welcoming the establishment of a Children’s Court in 2005, the Committee is nevertheless concerned at the lack of a functioning juvenile justice system throughout the country. In particular, the Committee is concerned at:

- a) the low minimum age for criminal responsibility (7 years);
 - ...
 - e) the use of corporal punishment as a sanction for juveniles.
- “The Committee urges the State party to ensure that juvenile justice standards are fully implemented, in particular articles 37 (b), 40 and 39 of the Convention, as well as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) and the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (the Havana Rules), and in the light of the Committee’s day of general

²⁰ CRC/C/SWZ/1, 16 February 2006, Initial state party report to the Committee on the Rights of the Child, para. 21

²¹ Gwebu Ray Ano v Rex (19/2002, 20/2002) [2002] SZSC 21; [2002] SZCA 22 (1 November 2002)

²² Stapley v Dobson (2240/07) [2008] SZHC 11 (1 February 2008)

discussion on the administration of juvenile justice. In particular the Committee recommends that the State party:

a) raise the age of criminal responsibility as a matter of urgency and ensure that it complies with acceptable international standards;

...

d) ensure that the deprivation of liberty of a juvenile is a matter of last resort and takes place for as short a time as possible and that detained girls are separated from adult women;

...

f) abolish, as a matter of urgency, the use of corporal punishment as a sanction in the juvenile justice system....”

Universal Periodic Review

Second Cycle

Swaziland is scheduled to be reviewed as part of the second cycle of the Universal Periodic Review in May 2016.

First cycle

During the first cycle of the Universal Periodic Review in 2011, Swaziland accepted three recommendations from two States that Swaziland abolish corporal punishment:²³

- Prohibit corporal punishment in all settings (Slovenia)
- Expressly prohibit by law corporal punishments in all areas (Uruguay)
- Carry out educational and awareness raising campaigns to ensure the use of alternative disciplinary measures to corporal punishments in accordance with the human dignity of the child (Uruguay)

²³ See A/HRC/19/6, 12 December 2011, Report of the working group on the Universal Periodic Review: Swaziland, paras. 76.32, 77.31 and 77.38 and A/HRC/19/6/Add.1, 6 March 2012, Report of the Working Group on the Universal Periodic Review: Swaziland (Addendum).

About CRIN (www.crin.org)

Our goal: A world where children's rights are recognised, respected and enforced, and where every rights violation has a remedy.

Our organisation: CRIN is a global research, policy and advocacy organisation. Our work is grounded in the United Nations Convention on the Rights of the Child.

Our work is based on five core values:

- We believe in rights, not charity
- We are stronger when we work together
- Information is power and it should be free and accessible
- Societies, organisations and institutions should be open, transparent and accountable
- We believe in promoting children's rights, not ourselves.

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Illustrations by Miriam Sugranyes Coca

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