

Inhuman sentencing of children in Botswana

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Introduction

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

The legal system comprises both common law and customary law. The main laws governing juvenile justice are the Children's Act 1981, the Penal Code 1964, the Criminal Procedure and Evidence Act 1939, the Magistrates' Courts Act 1974, the Customary Courts Act 1961 and the High Court Act 1976. The Children's Act defines a juvenile court as a magistrates' court or a customary court sitting for the purpose of hearing charges against persons aged between 7 and 18 or exercising any other jurisdiction conferred by the Act.¹ Serious cases are heard by the High Court, which is not bound by the provisions on juvenile courts in the Children's Act.²

The minimum age of criminal responsibility is eight.³ The Children's Act defines a child as under 14, a juvenile as aged 14-17.⁴

The Children's Act 2009 was passed in June 2009, but as at March 2010 was not in force.⁵ The Act repeals the Children's Act 1981 and takes precedence over other laws in cases of conflict.⁶ It defines a child as a person under 18.⁷ It does not specify a minimum age of criminal responsibility but provides for a rebuttable assumption that a child under 14 does not have the capacity to commit a criminal offence.⁸ The Act states that every magistrate's court is a children's court and shall hear and determine charges against children aged between 14 and 16.⁹ It makes no reference to customary courts.

Legality of inhuman sentencing

Death penalty

Child offenders cannot be sentenced to capital punishment. Article 26(2) of the Penal Code states: "Sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of 18 years...."

The Children's Act 2009 states in article 89(2): "A child convicted of murder shall not be sentenced to death."

¹ Article 22

² 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.

³ Penal Code, article 13

⁴ Article 2

⁵ www.africa4womensrights.org/post/2010/03/05/Dossier-of-Claims%3A-Botswana, accessed 29 September 2010. As at 30 September 2010, the new Act was not available on the official website, Laws of Botswana, www.laws.gov.bw/.

⁶ Articles 3 and 118

⁷ Article 2

⁸ Article 82

⁹ Article 36

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.¹⁰ For persons aged 14 and over, corporal punishment can be ordered in addition to or in lieu of imprisonment.¹¹ The Magistrates' Courts Act authorises all magistrates to impose a sentence of whipping.¹² 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.¹³ Females may not be sentenced to corporal punishment.¹⁴ 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.¹⁵

Courts may sentence a male person to corporal punishment up to 12 strokes or, for persons under 18, up to six strokes.¹⁶ 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 must intervene if he considers the person is not fit to continue.¹⁷ Under the Criminal Procedure (Corporal Punishment) Regulations 1969, the implement used must be a rattan cane 1.218m long and 12.7mm in diameter or, for males under 18, 0.914m long and 9.525mm diameter.¹⁸ The punishment should be administered on the bare buttocks.¹⁹ The caning must not be carried out in instalments, and must be inflicted privately in a prison or in a customary court.²⁰ 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.²¹

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.²² 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.²³ A child who does

¹⁰ See articles 25, 28, 29, 142, 143, 146, 147, 148, 149, 155, 218, 225, 229, 247, 292, 293, 300, 301, 302, 303 and 316

¹¹ Penal Code, article 28(4)

¹² 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).

¹³ Article 18. See also articles 22, 42 and 49

¹⁴ Penal Code, article 28(3); Customary Courts Act, article 18(2)

¹⁵ Article 304(1)

¹⁶ Penal Code, article 28

¹⁷ Criminal Procedure and Evidence Act, article 305

¹⁸ Article 2

¹⁹ *Ibid*, article 3

²⁰ 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*).

²¹ Criminal procedure and Evidence Act, article 305

²² Customary Courts (Corporal Punishment) Rules 1972, articles 2 and 3

²³ Article 19

not comply with the order is guilty of an offence and may be sentenced to corporal punishment.²⁴ It is unclear whether this applies only to boys or to boys and girls.²⁵

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."²⁶ The Act provides for a child convicted of an offence by a children's court to be sentenced to corporal punishment.²⁷ 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).²⁸

Life imprisonment

The Government has stated that life imprisonment may not be imposed on children under 18,²⁹ 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,³⁰ 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, murder, causing grievous harm, kidnapping and arson.³¹ Such offences are tried by the High Court and are not subject to the provisions of the Children's Act.³²

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.³³

The Children's Act 2009 provides for a child convicted of an offence by a children's court to be sentenced to imprisonment.³⁴ 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.

²⁴ Article 20

²⁵ 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.

²⁶ Article 61, and cf article 27

²⁷ Article 85(d)

²⁸ Children's Act 2009, article 90

²⁹ CRC/C/51/Add.9, 27 February 2004, *Initial state party report to the Committee on the Rights of the Child*, para. 181

³⁰ Penal Code, article 27

³¹ 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

³² 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.

³³ Article 304(1)

³⁴ Article 85(e)

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.³⁵

Progress towards prohibition and elimination

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.

Law reforms under way

As at 2008, a review of customary laws was under way.³⁶

National campaigns

DITSHWANELO – The Botswana Centre for Human Rights (<http://www.ditshwanelo.org.bw/>) promotes children’s rights in Botswana, including the right to protection from corporal punishment.

National and international law conflicting with inhuman sentencing

The Constitution

A number of provisions in the Constitution (1966) protect the physical integrity of all persons, although exemptions are made for cruel punishments prescribed by law.

Article 7 (Protection from inhuman treatment):

“(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

“(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution.”

³⁵ 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, 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, accessed 30 September 2010

³⁶ CCPR/C/BWA/CO/1, 24 April 2008, Concluding observations of the Human Rights Committee on the initial state party report, para. 10

International human rights treaties

Botswana has ratified or acceded to the following international treaties:

- International Covenant on Civil and Political Rights (in 2000)
Reservation: “The Government of the Republic of Botswana considers itself bound by: a) Article 7 of the Covenant to the extent that ‘torture, cruel, inhuman or degrading treatment’ means torture inhuman or degrading punishment or other treatment prohibited by Section 7 of the Constitution of the Republic of Botswana....”
- International Convention on the Elimination of All Forms of Racial Discrimination (in 1974)
- Convention on the Elimination of All Forms of Discrimination Against Women (in 1996)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (in 2000)
Reservation: “The Government of the Republic of Botswana considers itself bound by Article 1 of the Convention [definition of torture] to the extent that ‘torture’ means the torture and inhuman or degrading punishment or other treatment prohibited by Section 7 of the Constitution of the Republic of Botswana.”
- Convention on the Rights of the Child (in 1995)
Reservation: “The Government of the Republic of Botswana enters a reservation with regard to the provisions of article 1 of the Convention [definition of the child] and does not consider itself bound by the same in so far as such may conflict with the Laws and Statutes of Botswana.”
- African Charter on Human and Peoples’ Rights (in 1986)
- African Charter on the Rights and Welfare of the Child (in 2001)

Botswana has not ratified the International Covenant on Economic, Social and Cultural Rights, the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty or the Convention on the Rights of Persons with Disabilities

Botswana is a party to the following complaints/communications mechanisms:

- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women
- African Charter on Human and Peoples’ Rights
- African Charter on the Rights and Welfare of the Child

Status of treaties

Treaties are not self-executing but must be incorporated into domestic law by an Act of parliament.

In a 1992 judgment, the Court of Appeal stated:³⁷

“Botswana is a member of the community of civilized states which has undertaken to abide by certain standards of conduct and, unless it is impossible to do otherwise, it would be wrong for its Courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken.”

³⁷ J. Amisshah in *Attorney-General v. Unity Dow*, Court of Appeal, 1992 Botswana Law Reports 119, quoted in CRC/C/51/Add.9, 27 February 2004, *Initial state party report to the Committee on the Rights of the Child*, para. 41

The Court further stated that international treaties could be referred to as “an aid to construction of enactments, including the Constitution itself”.³⁸

This ruling was cited in a 2008 High Court judgment, which also stated:³⁹

“The standard of the best interests of the child is in accord with several international and regional instruments, which Botswana as a member of civilized community of nations subscribes to. (See 1998 UN Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of The Child (ACRWC)) ...

“It is indisputable that the provisions of an international treaty such as the UN Convention on the Rights of the Child, of which Botswana is a party, do not form part of Botswana law, unless parliament elects to incorporate its provisions into our domestic law by legislation. But the fact that the Convention has not been incorporated into national law, as is the case with the UN Convention on the Rights of the Child, does not mean that its ratification holds no significance for Botswana law, for its provisions have strong persuasive value on the decisions of this Court. ...

“In my view, the Courts have a duty to develop the common law, especially where it seems inconsistent with constitutional precepts, by using, where appropriate, unincorporated international conventions to develop the law – especially where the law conflicts with the right to equality – which, is not only part of the core values of the constitution but is also part of customary international law, which qualifies it as *ius cogens*.”

Recommendations from human rights treaty monitoring bodies

Committee on the Rights of the Child

(3 November 2004, CRC/C/15/Add.242, Concluding observations on initial report, paras. 36, 37, 60 and 61)

“The Committee notes with deep concern that corporal punishment is permissible under the State party laws and is used as a way of disciplining children at home, as a disciplinary measure by schools as stipulated in the Education Act and as a sanction in the juvenile justice system.

“The Committee strongly recommends that the State party take legislative measures to expressly prohibit corporal punishment in the family, schools and other institutions and to conduct awareness-raising campaigns to ensure that positive, participatory, non-violent forms of discipline are administered in a manner consistent with the child’s human dignity and in conformity with the Convention, especially article 28, paragraph 2, as an alternative to corporal punishment at all levels of society.”

“While recognizing the efforts made by the State party in this domain, including the establishment of the New School of Industry in 2002 for children in conflict with the law, the Committee remains concerned that the juvenile system is not yet compatible with the provisions and principles of the Convention....

“The Committee recommends that the State party:

a) ensure the full implementation of juvenile justice standards and, in particular, articles 37, 39 and 40 of the Convention, as well as the United Nations Standard Minimum Rules for the

³⁸ CEDAW/C/BOT/Q/3/Add.1, 10 November 2009, *Responses to the list of issues and questions with regard to the consideration of the combined initial, second and third periodic reports: Botswana*, page 2

³⁹ *Ndlovu v Macheme (MAHLB-00522-07) [2008] BWHC 293 (6 October 2008)*, paras. 20, 22 and 24

Administration of Juvenile Justice (The Beijing Rules) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), and in the light of the Committee's 1995 discussion day on the administration of juvenile justice;

...

c) ensure that detained children are always separated from adults, and that deprivation of liberty is used as a last resort, for the shortest appropriate time and in appropriate conditions....”

Human Rights Committee

(24 April 2008, CCPR/C/BWA/CO/1, Concluding observations on initial report, para. 19)

“The Committee is concerned about the existence in law and in practice of penal corporal punishment in the State party, in violation of article 7 of the Covenant (art. 7).

The State party should abolish all forms of penal corporal punishment.”

Universal Periodic Review

Botswana was examined under the Universal Periodic Review process in December 2008. A recommendation was made to prohibit corporal punishment⁴⁰; the Government rejected this recommendation and asserted that it had no plans to eliminate the practice.⁴¹

⁴⁰ A/HRC/10/69, 13 January 2009, Report of the Working Group on the Universal Periodic Review: Botswana, para. 92(20)

⁴¹ 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