

Inhuman sentencing of children in Tuvalu

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Introduction

There is no death penalty in Tuvalu, but child offenders may lawfully be sentenced to corporal punishment and life imprisonment.

The main laws relevant to the issue are the Constitution 1978, the Penal Code 1965 and the Island Courts Act 1965. The minimum age of criminal responsibility is 10.¹

Legality of inhuman sentencing

Corporal punishment

Corporal punishment is not available as a sentence for crime under the Penal Code, the Criminal Procedure Code, the Magistrates Court Act or the Superior Courts Act. However, the Island Courts Act states that in lieu of any other sentence which may lawfully be imposed on a male child (under 14) or male young person (aged 14-16), the court “may order his parent or guardian to cane him with a specific number of strokes of a cane not exceeding, in the case of child, 6 strokes, and in the case of a young person, 10 strokes”.² Any parent who fails to carry out the caning commits an offence and is liable to a fine of \$10.³ The Penal Code prohibits assault of children under 16 but states that this does not affect “the right of any parent, teacher, or other person, having the lawful control of a child or young person to administer reasonable punishment to him”.⁴

Life imprisonment

Imprisonment for life is specified in the Penal Code as the punishment for a large number of offences, including murder, piracy, treason, mutiny, genocide, rape, incest, manslaughter, causing grievous harm, embezzlement, robbery, burglary, arson and forgery.⁵ No limitations are stated in relation to persons under 18. The Code states that a person liable to imprisonment for life or any other period may be sentenced for a shorter term, with the exception of the offences of treason, instigating invasion, piracy and murder, for which life imprisonment is mandatory.⁶

Under the Constitution, any sentence of imprisonment may be remitted in whole or in part by the Governor General, suggesting that any person sentenced to life imprisonment has the possibility of release, but there is no automatic process of review.⁷

¹ Penal Code, article 14

² Article 8(8)

³ Article 8(9)

⁴ Article 226(4)

⁵ See articles 63, 193, 48, 49, 50, 52, 55, 57, 62, 116, 129, 134, 138, 151, 156, 192, 208, 214, 216, 217, 218, 219, 255, 260, 278, 286, 287, 292, 312, 319, 329, 330, 335, 345, 346, 348, etc.

⁶ Article 25

⁷ Constitution, article 80; see *Anderson v R* [2003] TVHC 27, HC Crim Case No 5 of 2003 (26 September 2003)

Inhuman sentencing in practice

We have no official information on the sentencing of child offenders to corporal punishment or life imprisonment (but see case law discussed below).

Progress towards prohibition and elimination

Law reform needed

All legal provisions authorising corporal punishment for persons under 18 at the time of the offence should be repealed, and explicit prohibition should be enacted for these sentences and sentences of life imprisonment for all persons under 18 at the time of the offence.

Law reforms under way

The Government plans to carry out a progressive review of its laws as part of the Te Kakeega II The National Development Plan for Tuvalu 2005-2015.⁸ During the Universal Periodic Review of Tuvalu in 2008, the Government stated that the issue of corporal punishment of children was being addressed as part of efforts to harmonise domestic laws with international human rights standards.⁹

In 2003, the High Court urged the Government to review as a matter of priority the issue of sentencing child offenders to life imprisonment to ensure the possibility of release in light of article 37 of the Convention on the Rights of the Child (see below).¹⁰

National campaigns

We are not aware of any national campaigns on the issue.

National and international law conflicting with inhuman sentencing

The Constitution

The following provisions in the Constitution 1978 are relevant to the inhuman sentencing of children:

The Principles of the Constitution:

1. The principles set out in the Preamble to the Independence Constitution are re-affirmed and re-adopted.
2. The right of the people of Tuvalu, both present and future, to a full, free and happy life, and to moral, spiritual, personal and material welfare, is affirmed as one given to them by God.

⁸ 3 September 2008, CEDAW/C/TUV/2, *Initial/second report of the Committee on the Elimination of Discrimination Against Women*, para. 2.14

⁹ 9 January 2009, A/HRC/10/84, *Report of the Working Group on the Universal Periodic Review: Tuvalu*, para. 41

¹⁰ *Anderson v R* [2003] TVHC 27, HC Crim Case No 5 of 2003 (26 September 2003)

3. While believing that Tuvalu must take its rightful place amongst the community of nations in search of peace and the general welfare, nevertheless the people of Tuvalu recognize and affirm, with gratitude to God, that the stability of Tuvaluan society and the happiness and welfare of the people of Tuvalu, both present and future, depend very largely on the maintenance of Tuvaluan values, culture and tradition, including the vitality and the sense of identity of island communities and attitudes of co-operation, self-help and unity within and amongst those communities.

4. Amongst the values that the people of Tuvalu seek to maintain are their traditional forms of communities, the strength and support of the family and family discipline.

5. In government and in social affairs generally the guiding principles of Tuvalu are agreement, courtesy and the search for consensus, in accordance with traditional Tuvaluan procedures, rather than alien ideas of confrontation and divisiveness; the need for mutual respect and co-operation between the different kinds of authorities concerned, including the central Government, the traditional authorities, local governments and authorities, and the religious authorities.

6. The life and the laws of Tuvalu should therefore be based on respect for human dignity, and on the acceptance of Tuvaluan values and culture, and on respect for them.

7. Nevertheless, the people of Tuvalu recognize that in a changing world, and with changing needs, these principles and values, and the manner and form of their expression (especially in legal and administrative matters), will gradually change, and the Constitution not only must recognize their fundamental importance to the life of Tuvalu but also must not unnecessarily hamper their expression and their development.

THESE PRINCIPLES, under the guidance of God, are solemnly adopted and affirmed as the basis of this Constitution, and as the guiding principles to be observed in its interpretation and application at all levels of government and organized life.

Article 3 (The Constitution as supreme law):

(1) This Constitution is the supreme law of Tuvalu and, subject to subsection (2), any act (whether legislative, executive or judicial) that is inconsistent with it is, to the extent of the inconsistency, void.

(2) All other laws shall be interpreted and applied subject to this Constitution, and, as far as is practicable, in such a way as to conform with it.

Article 11 (The fundamental human rights and freedoms):

(1) Every person in Tuvalu is entitled, whatever his race, place of origin, political opinions, colour, religious beliefs or lack of religious beliefs, or sex, to the following fundamental rights and freedoms:-

- (a) the right not to be deprived of life (*see* section 16); and
- (b) personal liberty (*see* sections 17 and 18); and
- (c) security for his person (*see* sections 18 and 19); and
- (d) the protection of the law (*see* section 22); ...

and to other rights and freedoms set out in this Part or otherwise by law.

(2) The rights and freedoms referred to in subsection (1) can, in Tuvaluan society, be exercised only-

(a) with respect for the rights and freedoms of others and for the national interest;
and

(b) in acceptance of Tuvaluan values and culture, and with respect for them.

(3) The purpose of this Part is to protect those rights and freedoms, subject to limitations on them that are designed primarily to give effect to subsection (2).

Article 12 (Application of Part II):

(1) Each provision of this Part applies, as far as may be-

(a) between individuals as well as between governmental bodies and individuals; and

(b) to and in relation to corporations and associations (other than governmental bodies) in the same way as it applies to and in relation to individuals,

except where, or to the extent that, the context requires otherwise.

(2) Notwithstanding anything to the contrary in any other law, any act that is done under a valid law but that in the particular case-

(a) is harsh or oppressive; or

(b) is not reasonable in the circumstances; or

(c) is otherwise not reasonably justifiable in a democratic society having a proper respect for human rights and dignity,

is an unlawful act.

(3) The burden of showing that subsection (2) applies in respect of an act is on the party claiming that it does apply.

(4) Nothing in this section affects the operation of any other law under which an act may be held to be unlawful.

Article 15 (“Reasonable justifiable in a democratic society”)

(1) Notwithstanding anything to the contrary in this Part, other than-

(a) section 33 (hostile disciplined forces); and

(b) section 36 (restrictions on certain rights and freedoms during public emergencies),

all laws, and all acts done under a law, must be reasonably justifiable in a democratic society that has a proper respect for human rights and dignity.

(2) Any question whether a law is reasonably justifiable in a democratic society that has a proper respect for human rights and dignity is to be determined in the light of the circumstances existing at the time when the decision on the question is made.

(3) Subsection (2) does not affect any question whether an act done under a law was reasonably justifiable in a democratic society that has a proper respect for human rights and dignity.

(4) A law may be declared not to be reasonably justifiable in a democratic society that has a proper respect for human rights and dignity only by the High Court or some other court prescribed for the purpose by or under an Act of Parliament.

(5) In determining whether a law or act is reasonably justifiable in a democratic society that has a proper respect for human rights and dignity, a court may have regard to-

- (a) traditional standards, values and practices, as well as previous laws and judicial decisions, of Tuvalu; and
- (b) law, practices and judicial decisions of other countries that the court reasonably regards as democratic; and
- (c) international conventions, declarations, recommendations and judicial decisions concerning human rights; and
- (d) any other matters that the court thinks relevant.

Article 17 (Personal liberty)

- (1) Subject to the provisions of this Part, ... no-one shall be detained except ...
 - (g) as authorized by law in the cases set out in subsection (2).

(2) Subsection (1) (g) applies in the following cases:-

- (a) in the case of a person under the age of 18 years - in the reasonable exercise of the authority of a parent, teacher or guardian, or under the order of a court for the purpose of his education, welfare or proper discipline; or
- (b) under a warrant or order of a court; or
- (c) for the purposes of extradition; or
- (d) in order to bring the person before a court to be dealt with in accordance with law; or
- (e) in the case of detention of a person on reasonable suspicion of his having committed, or being about to commit, an offence....

Article 19 (Inhuman treatment)

Subject to the provisions of this Part ... , no-one shall-

- ...
- (c) be tortured; or
- (d) given inhuman or degrading punishment or treatment.

International human rights treaties

Tuvalu has acceded only to the Convention on the Rights of the Child (in 1995) and the Convention on the Elimination of All Forms of Discrimination Against Women (in 1999). The Government has stated its commitment to ratifying other instruments once the perceived necessary resources are available.¹¹

Status of treaties

¹¹ 9 January 2009, A/HRC/10/84, *Report of the Working Group on the Universal Periodic Review: Tuvalu*, para.

Article 15(5) of the Constitution states that a court “may have regard to ... (c) international conventions, declarations, recommendations and judicial decisions concerning human rights” (see above for article in full). Article 17 of the Interpretation and General Provisions Act 1988 states:

A construction of a written law which is consistent with the international obligations of Tuvalu is to be preferred to a construction which is not.

Treaties are not automatically incorporated into domestic law but must be implemented through an Act of Parliament.¹² The Government has stated its intention to conduct a national consultation on CEDAW and the CRC, when funds are available, before incorporating them into domestic legislation.¹³

International treaties have been invoked in the courts on a number of occasions. In some, the High Court has emphasised that the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) are not directly applicable.¹⁴ In others, judgments have referred to the CRC in reaching their decisions.

Anderson v R (2003)¹⁵ concerned a juvenile convicted of murder and sentenced to a mandatory life imprisonment (aged 16 at the time of the offence, 17 at the time of conviction). The applicant sought the following declarations from the High Court:

1. that as the applicant was under 18 years of age at the date of the offence, that should have been taken into consideration before he was sentenced to a mandatory life sentence;
2. that section 53(3) of the English Children and Young Persons Act, 1933, is applicable in Tuvalu as an applied law and therefore applies in this case;
3. that the above is supported by Article 37 of the Convention on the Rights of the Child which provides that no person under the age of 18 shall be imprisoned for life;
4. that guidelines be given by the Chief Justice for similar cases where a person under the age of 18 is convicted of murder and the length of time that he must serve, if he feels it appropriate to do so.

The court refused the application on grounds that it had no power to review an earlier decision made by the same court. However, the court noted that under the CRC Tuvalu is required to review its laws in relation to children: the court urged the Government to give priority to such a review.

Other cases have concerned the procedural rights of persons under 18. The case of *Regina v Setaga* (2008)¹⁶ alleged that the delay in bringing an alleged juvenile offender to trial breached the defendant’s rights under article 22(2) of the Constitution (the right to be given a fair hearing within a reasonable time) and article 40 of the CRC (including the right to have the matter dealt with without delay). The judgment stated:

The Convention was ratified by Tuvalu in 1995 and, whilst it is clear that Tuvalu has not yet taken the legislative steps required by article 4 to implement the rights recognised by the

¹² See, for example, 7 August 2009, CEDAW/C/TUV/CO/2, *Concluding observations of the Committee on the Elimination of Discrimination Against Women on initial/second state party report of Tuvalu*, paras. 11 and 12

¹³ 14 July 2009, CEDAW/C/TUV/Q/2/Add.1, *Responses to the list of issues and questions with regard to the consideration of the combined initial and second periodic reports: Tuvalu*, Response to question 1

¹⁴ *Tepulolo v Pou* [2005] TVHC 1; Case No 17 of 2003 (24 January 2005); *Anderson v R* [2003] TVHC 27; HC Crim Case No 5 of 2003 (26 September 2003)

¹⁵ *Anderson v R* [2003] TVHC 27; HC Crim Case No 5 of 2003 (26 September 2003)

¹⁶ *Regina v Setaga* [2008] TVHC 10; Criminal Case 02 of 2008 (26 May 2008)

Convention, the terms of article 40 must be considered to give some guidance of the way the rights of a child are considered by the courts here.

Another case concerned the right of an alleged child offender to have contact with his parent/guardian and to consult a guardian.¹⁷ The court commented:

I am satisfied that the Constitution read in accordance with the terms of the Convention gives any child in the custody of the police the right to have a parent or guardian present unless that is impractical. The perception that a child needs special protection arises from the immaturity and vulnerability of children. That is the foundation upon which the Convention was constructed.

In the hostile and stressful situation of an accusation of a criminal offence, it is accepted a child needs the mature guidance and reassurance of someone who clearly has its interests at heart. To suggest that it should know that it has such a right and would have the courage or maturity to demand it runs counter to the fundamental philosophy of the Convention. I consider it a logical and proper conclusion that the police are obliged to advise any child of the right to have a parent, guardian or legal adviser present and to take any reasonable steps to secure such attendance before taking any step that could result in the child making a statement against its interests.

Recommendations from human rights treaty monitoring bodies

Tuvalu has not yet submitted a report to the Committee on the Rights of the Child.

Universal Periodic Review

Tuvalu was examined under the Universal Periodic Review process in 2008. A recommendation was made to eliminate corporal punishment of children.¹⁸ The Government accepted the recommendation.¹⁹

¹⁷ *Simona v The Crown* [2002] TVHC 1; Case No 01 of 2002 (12 August 2002)

¹⁸ 9 January 2009, A/HRC/10/84, *Report of the Working Group on the Universal Periodic Review: Tuvalu*, paras. 29 and 68(6)

¹⁹ 9 November 2009, A/HRC/10/29, *Report of the Human Rights Council on its tenth session*, para. 701