

Inhuman sentencing of children in Tonga

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Introduction

Child offenders may lawfully be sentenced to capital punishment, corporal punishment and life imprisonment.

The main laws governing juvenile justice are the Criminal Offences Act 1926 and the Magistrates Court Act 1919. There is no distinct juvenile justice law. The minimum age of criminal responsibility is seven.¹

Legality of inhuman sentencing

Death penalty

Child offenders may be sentenced to capital punishment. The Criminal Offences Act provides for the death penalty for treason and murder.² Execution is by hanging.³ The death sentence may not be pronounced on a pregnant woman.⁴ In the case of murder, article 91(1) of the Act states that “sentence of death shall not be pronounced on or recorded against any person under the age of 15 years”; it is unclear whether this refers to age at the time of the offence or at the time of conviction. No such restriction is specified in the case of treason.

Corporal punishment

Corporal punishment in the form of whipping is lawful as a sentence for males under the Criminal Offences Act.⁵ Boys under 16 may be whipped up to 20 strokes “with a light rod or cane composed of tamarind or other twigs”; older males may be whipped up to 26 strokes “with a cat of a pattern approved by the Cabinet”.⁶ The punishment must be administered in one or two instalments, as specified by the Court; it is inflicted by the gaoler, in the presence of a magistrate, following certification that the offender is medically fit to undergo the punishment.⁷

For a male convicted of certain sexual offences, theft or robbery, the Criminal Offences Act states that whipping may be ordered at the discretion of the court in lieu of or in addition to imprisonment.

⁸ For boys under 16, whipping may be ordered in lieu of imprisonment for certain sexual offences.⁹ The Magistrates’ Courts Act allows a magistrate to impose whipping on a boy aged 7-14 in lieu of

¹ Criminal Offences Act, article 16

² Articles 24, 44 and 91

³ Article 33. See also Criminal Offences (Sentence of Death) Regulations 1955

⁴ Article 40

⁵ Article 24

⁶ Article 31(5)

⁷ Article 31 (4), 31(5), 31(6)

⁸ Article 142

⁹ Article 130

any other punishment, to be inflicted by a constable or police sergeant and administered in one or two instalments, not exceeding 10 strokes each, with “a light rod or cane composed of several tamarind or other twigs”.¹⁰

Life imprisonment

The Criminal Offences Act provides for life imprisonment for offences relating to demolition of buildings, murder, and inciting or assisting suicide.¹¹ No limitations are specified in relation to the age of the offender.

Pregnant women convicted of a capital offence must be sentenced to life imprisonment in lieu of capital punishment.¹² In prohibiting the death penalty for persons under 15 convicted of murder, the Act states that “in lieu of such punishment the Court shall sentence such person to be detained during His Majesty’s pleasure”.¹³

Inhuman sentencing in practice

We have been unable to obtain official statistical information relating to the sentencing of children to life imprisonment, corporal punishment and capital punishment.

In 2010, the Appeal Court overturned sentences of judicial whipping that had been imposed on two 17 year olds and noted that this was the first time sentences of whipping had been handed down in 30 years.¹⁴ The judgment referred to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and stated that “interpreted in the light of international conventions and decisions of this Court ... it might be argued that the whipping provision [in criminal law] is now unconstitutional”. The judgment also questioned the role of a doctor in certifying that an offender is fit for whipping, stating: “It is arguable that for a doctor to provide such certification would be contrary to various Medical Association declarations and codes and principles of medical ethics which taken together would appear to prevent a doctor from participating in the infliction of a whipping sentence.”

No executions have been carried out since 1982.¹⁵ Sentencing for murder was considered by the Supreme Court in 2005, though not specifically in relation to child offenders.¹⁶ The Court concluded that the norm for sentencing should be life imprisonment, with capital punishment reserved for especially heinous crimes. The Court noted that this was the first verdict of murder in Tongatapu for over 20 years.

¹⁰ Article 30

¹¹ Articles 77, 91 and 101

¹² Article 40

¹³ Article 91

¹⁴ *Fangupo v Rex; Fa'aoa v Rex* [2010] TOCA 17; AC 34 of 2009; AC 36 of 2009 (14 7 2010)

¹⁵ A/HRC/8/48, 5 June 2008, *Report of the Working Group on the Universal Periodic Review: Tonga*, para. 34. See also Hood, R. & Hoyle, C. (2008), *The Death Penalty: A Worldwide Perspective*, Oxford: Oxford University Press

¹⁶ *Rex v Vola* [2005] TOSC 31; CR 065 2005 (10 November 2005)

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. Explicit prohibition should be enacted for sentences of capital punishment, corporal punishment and life imprisonment for all persons under 18 at the time of the offence.

Law reforms under way

As at 2007, the Justice Minister was involved in discussions on developing youth justice laws in Tonga similar to New Zealand's model of restorative justice.¹⁷

In February 2010, MP and former Minister for Police Clive Edwards was reportedly preparing a private members bill which would abolish judicial whipping,¹⁸ but we have no further information.

National campaigns

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

National and international law conflicting with inhuman sentencing

The Constitution

The Constitution 1875 does not expressly recognise a right to protection from torture or other cruel, inhuman or degrading treatment or punishment. In 1992, in a case concerning school corporal punishment, the Supreme Court concluded that "there is no constitutional objection or barrier to corporal punishment".¹⁹ However, as noted above, in 2010 the Appeal Court²⁰ stated that whipping could now be seen as unconstitutional, referring to international human rights law, an acceptance that the prohibition against torture is part of customary international law and a *jus cogens* rule binding states regardless of whether or not they have ratified the relevant treaty, and a purposive interpretation of articles 1 and 14 of the Constitution:

Article 1:

Since it appears to be the will of God that man should be free as He has made all men of one blood therefore shall the people of Tonga and all who sojourn or may sojourn in this Kingdom be free for ever. And all men may use their lives and persons and time to acquire and possess property and to dispose of their labour and the fruit of their hands and to use their own property as they will.

Article 14:

No one shall be intimidated into giving evidence against himself nor shall the life or property or liberty of anyone be taken away except according to law.

¹⁷ *Tonga Now*, 1 June 2007, reported in *DCI Juvenile Justice Newsletter 2007*, No. 3, 30 June 2007

¹⁸ *Radio New Zealand International*, 19 February 2010, www.rnzi.com/pages/news.php?op=read&id=52049 (accessed 28 December 2010)

¹⁹ *Uhila v Kingdom of Tonga* [1992] TOSC 4; CC 145 1991 (19 October 1992)

²⁰ *Fangupo v Rex; Fa'aoa v Rex* [2010] TOCA 17; AC 34 of 2009; AC 36 of 2009 (14 7 2010)

International human rights treaties

Tonga has acceded only to the International Covenant on the Elimination of All Forms of Racial Discrimination (in 1972) and the Convention on the Rights of the Child (in 1995). It has signed but not ratified the Convention on the Rights of Persons with Disabilities (in 2007).

Status of treaties

The legal system in Tonga is based on English common law.²¹ Treaties become part of domestic law only when they have been expressly incorporated by legislation.²² According to the Government, necessary amendments to domestic law to comply with international treaties are made before ratification of a treaty, the Tongan policy being not to ratify a treaty unless the Government is satisfied that domestic law and practice enable compliance.²³

In such systems, treaties typically cannot be invoked directly in the courts. However, the courts in Tonga have increasingly turned to international treaties, in recent years citing the Convention on the Rights of the Child,²⁴ the Convention against Torture,²⁵ and the International Covenant on Civil and Political Rights²⁶ in relation to justice issues.

Recommendations from human rights treaty monitoring bodies

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

Universal Periodic Review

Tonga was examined under the Universal Periodic Review process in 2008. A recommendation was made to abolish death penalty, to which the Government responded by noting future opportunities for debate on the issue.²⁷

²¹ A/HRC/WG.6/2/TON/1, 10 April 2008, *National Report on Tonga submitted to the Universal Periodic Review*, para. 13

²² UNICEF (2007), *Law Reform and Implementation of the Convention on the Rights of the Child*, Florence: UNICEF Innocenti Research Centre

²³ A/HRC/WG.6/2/TON/1, 10 April 2008, *National Report on Tonga submitted to the Universal Periodic Review*, para. 39. See also CERD/C/304/Add.96, 19 April 2000, *Concluding observations on fourteenth state party report*, para. 6 and CERD/C/304/Add.63, 10 February 1999, *Concluding observations on eleventh to thirteenth state party reports*, para. 9

²⁴ *Fa'aoso v Paongo* [2006] TOSC 37; CV394-2006 (11 September 2006); *R v Vea* [2006] TOSC 24; CR 231 2005 (28 June 2006) ; *Tone v Police* [2004] TOSC 36; AM 022-025 2004 (28 June 2004)

²⁵ *Fangupo v Rex; Fa'aoa v Rex* [2010] TOCA 17; AC 34 of 2009; AC 36 of 2009 (14 7 2010) ; *Tavake v Kingdom of Tonga* [2008] TOSC 14; CV 296-2007 (19 December 2008)

²⁶ *Rex v Vola* [2005] TOSC 31; CR 065 2005 (10 November 2005)

²⁷ A/HRC/8/48, 5 June 2008, *Report of the Working Group on the Universal Periodic Review: Tonga*, paras. 26, 34 and 66