

INHUMAN SENTENCING OF CHILDREN IN BRUNEI DARUSSALAM

Summary

Brunei enacted the Syariah Penal Code Order in October 2013 that, when fully in force, will radically alter the juvenile justice system and expand the forms of inhuman sentencing to which people may be sentenced for offences committed while under the age of 18.

This report was initially drafted for CRIN in October 2010, but was updated in May 2014. 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

Phase one of the reforms brought in by the Syariah Penal Code Order came into force on 1 May 2014 and will permit fines and imprisonment for a number of offences under Syariah law. Announcing the entry into force of the reforms, the Sultan and Yang Di-Pertuan of Brunei Darussalam announced that penalties including whipping and amputation would be brought in during the second phase of the reforms and the death penalty in a third and final phase.¹

For offences under the Syariah Penal Code Order, no child can be held criminally responsible unless he or she is mumaiyiz - "able to differentiate".² Hadd and qisas punishments cannot be imposed on a child where he or she is not able to differentiate and has not reached puberty, though other penalties can be applied.³

The new Syariah Penal Code Order will coexist alongside the 1951 Penal Code. Under the Penal Code, the minimum age of criminal responsibility is seven.⁴ The Children and Young Persons Order defines a child as under 14, a juvenile as aged 7-17 and a young person as 14-17.⁵ The Criminal Procedure Code defines a youthful offender as 8-17.⁶ Persons under 18 at the time of trial must generally be tried by a juvenile court, except for certain offences – including those punishable by the death penalty and life imprisonment – which must be tried in the High Court.⁷



1 The Brunei Times, "Phase one of Syariah Penal Code Order to be enforced tomorrow, May 1" 30 April 2014.

2 Syariah Penal Code Order 2013, Section 12

3 Syariah Penal Code Order 2013, Section 13. The provision uses the term baligh to indicate puberty.

4 Penal Code, Section 82.

5 Children and Young Persons Order, Section 2.

6 Criminal Procedure Code, Section 2.

7 Syariah Courts Act, Sections 15 and 16.

Legality of inhuman sentencing

Death penalty

The Syariah Penal Code Order contains a large number of provisions that would allow courts to apply sentences of death for offences committed while under the age of 18. As of the time of writing, the relevant provisions had not entered into force, so the death penalty remained unlawful as a penalty for child offenders. Article 238(1) of the Criminal Procedure Code states: “Sentence[s] of death shall not be pronounced on or recorded against a 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”.

Syariah Penal Code Order 2013

The Syariah Penal Code Order authorises capital punishment for a large number of offences and would permit courts to sentence a child offender to be stoned to death for committing zina (adultery), hirabah during which qatl is committed (robbery in which murder is committed), Zina bil-jabr (rape), liwat (anal intercourse between a man and another man or a man and a woman who is not his wife) while aged 15 or older.⁸

For several forms of the offence of irtidad (apostasy), the death penalty is a lawful offence without limit of age, which would appear to permit children to be sentenced to death if a child is “able to differentiate”.⁹ The Court must overturn such sentence and acquit the convicted person, however, where the court is satisfied that he or she has repented.¹⁰ Death is also a lawful penalty for a number of qisas (retaliation) offences, including various forms of Qatl (murder).¹¹

More detailed guidance indicates that the provisions in Chapters I, II and III of Part IV - which includes the offences mentioned in this section - will come into force in the third or fourth quarters of 2015. However, the same publication reports that the death penalty provisions will not enter into force until the end of 2016.¹²

Corporal punishment

The Penal Code Order provides for whipping as a sentence for a wide range of offences.¹³ Other laws providing for punishment of whipping include the Children Order 2000, the Intoxicating Substances Act 1992, the Arms and Explosives Act 1927 and Rules 1928, the Misuse of Drugs Act 1978, the Public Order Act 1983, the Kidnapping Act 1992 and the Women and Girls Protection Act 1972.

The Common Gaming Houses Act 1920 makes specific provision for the whipping of young boys, stating in Section 22: “Any male person appearing to be of such tender years as to require punishment rather in the way of school discipline than of ordinary criminal justice convicted of an offence under this Act may in lieu of any other punishment hereby provided be sentenced to corporal punishment with a light rattan or cane not exceeding 10 strokes on the bare buttocks.” The Unlawful Carnal Knowledge Act 1938 punishes extra-marital carnal knowledge of a girl under 16 by whipping up to 12 strokes of the rattan for a youthful offender.¹⁴

The Criminal Procedure Code governs the administration of corporal punishment. Persons aged 8-17 may be whipped up to 18 strokes.¹⁵ The whipping must be inflicted on the part of the body directed by the Permanent Secretary, Office of the Prime Minister, and, for a youthful offender, with a light rattan “in the way of school discipline”.¹⁶ Whipping should not be imposed on females.¹⁷ A medical officer or hospital assistant must be present and must certify that the offender is fit to receive the punishment.¹⁸

Syariah Penal Code Order 2013

The new Syariah Penal Code 2013 prescribes corporal punishment for males and females, including children, for Syariah and related offences. At the time of writing these provisions had not yet entered into force. In a statement made on 30 April 2014, the Sultan of Brunei announced that the corporal punishment provisions of this Code would enter into force as part of a “second phase” of implementation, though he did not set a date for when this would happen.¹⁹

⁸ Syariah Penal Code Order 2013, Sections 69(1), 70, 63, 76(1), 82.

⁹ Syariah Penal Code Order 2013, Sections 108(1), 209, 110, 111, 112.

¹⁰ Syariah Penal Code Order 2013, Section 117

¹¹ Syariah Penal Code Order, Sections 126(1), 128, 151, 152 and 155(1).

¹² Guidance produced by Brunei Shell Petroleum: https://www.bsp.com.bn/main/commercial/files/General_Information/Syariah_Penal_Code_Order_Summary_Final.pdf.

¹³ Penal Code, Sections 53, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, , 344, 347, 348, 354, 355, 356, 357, 365, 366, 366A, 366B, 367, 369, 370, 371, 372, 373, 376, 382, 384, 385, 386, 387, 388, 389, 392, 393, 394, 395, 397, 398, 399, 400, 401, 402, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 437, 439, 440, 450, 452, 453, 454, 455, 456, 457, 458, 459, 461, 462 and 511

¹⁴ Unlawful Carnal Knowledge Act 1938, Section 2.

¹⁵ Criminal Procedure Code, Section 257(1).

¹⁶ Section 257(4).

¹⁷ Section 258.

¹⁸ Section 259.

¹⁹ See BBC, “Tough Islamic Penal Code Introduced” 30 April 2014

When the Syariah Penal Code enters into force, amputation of right hand will be a lawful penalty for sariqah (theft) and amputation of the left foot will be lawful for a second conviction for theft.²⁰ These penalties are prohibited for offenders under the age of 15.²¹ Amputation is also a lawful penalty for hirabah (piracy / robbery), including for children from the age of 15. Whipping is permitted for a large number of offences, including for children under the age of 15.²² Zina (sexual intercourse outside marriage) is punishable by stoning, but children under the age of 15 or those who have not reached puberty are punished with whipping and detention in a rehabilitation centre.²³

The majority of these provisions relating to corporal punishment are due to enter into force in the third of fourth quarter of 2015, during the second phase of the implementation of the Syariah Penal Code.²⁴

For more information on corporal punishment in Brunei Darussalam, see the Global Initiative to End All Corporal Punishment of Children (<http://www.endcorporalpunishment.org/>).

Life imprisonment

There is no explicit prohibition on life imprisonment for persons under the age of 18 in Brunei Darussalam and children can be sentenced to detention at the pleasure of His Majesty the Sultan and Yang di-Pertuan, an indeterminate sentence that may extend for the rest of a person's life.

A child may only be imprisoned where “he is of so unruly a character that he cannot be detained in a place of detention or an approved school”.²⁵ Where a person under the age of 18 is convicted of an offence punishable by imprisonment, he or she may be subject to other measures, including discharge, probation and/or custody in a place of detention for up to five years.²⁶ Substitution of imprisonment for other penal measures is not, however, compulsory.

Where a child or young person is convicted of murder, culpable homicide not amounting to murder, attempted murder or of voluntarily causing grievous hurt, and the court considers that none of the other measures by which the case may legally be dealt with is suitable, it may sentence him or

her to detention “in such place and on such conditions as His Majesty the Sultan and Yang Di-Pertuan may direct”.²⁷ Such sentences must be reviewed at least once a year, when “His Majesty the Sultan and Yang Di-Pertuan may thereupon order him to be released or further detained, as the case may be”.²⁸

In prohibiting the death penalty for all persons under the age of 18 at the time an offence was committed, the Criminal Procedure Code requires courts to sentence children to be detained during the Pleasure of His Majesty where they have been convicted of an offence that would otherwise carry the death penalty.²⁹ A person detained in this way may at any time be discharged on licence by His Majesty.³⁰

Syariah Penal Code Order 2013

The Syariah Penal Code does not provide for life imprisonment, though lengthy prison sentences are lawful for a number of offences, including up to 30 years' imprisonment for abetting the commission of zina bil-jabar (rape) while aged over 15.³¹

Inhuman sentencing in practice

We have been unable to obtain any information regarding the sentencing of child offenders to corporal punishment and life imprisonment.

Progress towards prohibition and elimination

Law reform needed

All legal provisions authorising the death penalty, whipping, flogging or life imprisonment should be repealed and explicit prohibitions should be enacted to prevent children being sentenced to any of these penalties.

Law reforms underway

The Syariah Penal Code Order 2013 was enacted in October 2013 and some of its provisions entered into force on 1 May 2014. Rather than restricting or prohibiting inhuman sentencing of children these reforms would, if fully implemented, introduce the death penalty for child offenders and extend the forms of corporal punishment to which child offenders could be sentenced to include amputation. See above for full details of the reforms.

20 Syariah Penal Code, Section 55(1).

21 Syariah Penal Code, Section 56(b).

22 Syariah Penal Code, Sections 63, 65, 66 and 69.

23 Syariah Penal Code, Sections 70, 72, 74 and 79.

24 Guidance produced by Brunei Shell Petroleum: https://www.bsp.com.bn/main/commercial/files/General_Information/Syariah_Penal_Code_Order_Summary_Final.pdf.

25 Children and Young Persons Order, Section 44.

26 Criminal Procedure Code, Section 262.

27 Children and Young Persons Order, Section 45(2).

28 Children and Young Persons Order, Section 45(5).

29 Criminal Procedure Code, Section 238(1).

30 Criminal Procedure Code, Section 238(1).

31 Syariah Penal Code, Section 80(1).

National campaigns

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

As part of CRIN's work on the inhuman sentencing campaign, we have submitted reports and alternative reports to the international human rights mechanisms as they have reviewed States involved in the campaign, with the aim of ensuring that the practices are recognised as illegal under international law and of exerting pressure on States to reform their laws.

In January 2014, CRIN submitted a report to the UPR highlighting the forms of inhuman sentencing that are still legal in Brunei Darussalam. The submission is available here: www.crin.org/node/32328. Brunei Darussalam will be reviewed as part of the 19th Session of the UPR between 28 April and 9 May 2014.

National and international law conflicting with inhuman sentencing

General Assembly Resolutions

In November 2012, the UN General Assembly passed a resolution calling on states to "ensure that, under their legislation and practice, neither capital punishment nor life imprisonment without the possibility of release, nor corporal punishment is imposed for offences committed by persons under 18 years of age" and encouraged states "to consider repealing all other forms of life imprisonment for offences committed by persons under 18".³²

Human Rights Council Resolutions

The UN Human Rights Council Resolution on children's access to justice (2014) includes a paragraph reaffirming the duty of states to ensure that their legislation and practices do not permit life imprisonment for offences committed by persons under 18 years of age.³³

The UN Human Rights Council Resolution on human rights in the administration of justice, including juvenile justice (2013) urged States to ensure that, under their legislation and practice, neither capital punishment nor life imprisonment is imposed for offences committed by persons under 18 years of age.³⁴

The UN Human Rights Council Resolution on human rights in the administration of justice, in particular Juvenile Justice (2011) urged States to ensure that, under legislation and practice, neither capital punishment nor life without the possibility of release is imposed for offences committed by persons under 18 years of age.³⁵

International Human Rights Treaties

Brunei Darussalam has ratified or acceded to the following international treaties:

- Convention on the Elimination of All Forms of Discrimination against Women (in 2006)
Reservations: "The Government of Brunei Darussalam expresses its reservations regarding those provisions of the said Convention that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the official religion of Brunei Darussalam and, without prejudice to the generality of the said reservations, expresses its reservations regarding paragraph 2 of Article 9 [nationality of children] and paragraph 1 of Article 29 [disputes between states parties] of the Convention."
- Convention on the Rights of the Child (in 1995)
Reservation: "[The Government of Brunei Darussalam] expresses its reservations on the provisions of the said Convention which may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the State, religion, and without prejudice to the generality of the said reservations, in particular expresses its reservation on articles 14 [freedom of thought, conscience and religion], 20 [alternative care] and 21 [adoption] of the Convention."
- Brunei Darussalam has signed but not ratified the Convention on the Rights of Persons with Disabilities (in 2007).

The State has neither signed nor ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights or its Second Optional Protocol aiming at the abolition of the death penalty, the International Convention on the Elimination of All Forms of Racial Discrimination, and the International Covenant on Economic, Social and Cultural Rights.

Brunei Darussalam is not a party to any complaints or communications mechanisms.

³² UN General Assembly, Sixty-seventh session, Resolution A/c.3/67/L.34, 9 November 2012.

³³ A/HRC/25/L.10.

³⁴ A/HRC/24/L.28, para. 22.

³⁵ A/HRC/18/L.9, para. 13

Status of treaties

The legal system is based on common law and religious law. Common law systems typically require an act of parliament to make the rights guaranteed by the treaty enforceable in domestic law.³⁶

Recommendations from human rights treaty monitoring bodies

UN Committee on the Rights of the Child

(27 October 2003, CRC/C/15/Add.219, Concluding observations on initial report, paras. 37, 38, 43, 44, 55 and 56.)

“The Committee is concerned that corporal punishment is not prohibited at home, in schools or institutions and remains acceptable in the society. The Committee also notes that the new book of discipline for schools does not specifically prohibit corporal punishment nor does it even refer to it as a form of discipline.

“The Committee strongly recommends that the State party prohibit corporal punishment at home, in schools and institutions and undertake education campaigns to educate families on alternative forms of discipline.

“The Committee notes the adoption of the Children’s Order 2000 and welcomes the special unit of the police established in 1997 to deal with child victims of abuse and violence, but remains concerned that there is insufficient information and awareness in the State party of the ill-treatment and abuse of children within the family and institutions.

“The Committee recommends that the State party:

b) take legislative measures to prohibit all forms of physical and mental violence, including corporal punishment and sexual abuse of children, in the family and in institutions;
c) carry out public education campaigns about the negative consequences of ill-treatment of children, and promote positive, non-violent forms of discipline as an alternative to corporal punishment....

“The Committee is concerned that the minimum age of criminal responsibility is set at 7 years, which is far too low. The Committee is further concerned that there is no juvenile justice system although it is foreseen in law, that children are detained with adults and that whipping is used as a form of punishment for boys.

“The Committee recommends that the State party:

g) abolish the sentence of whipping for boys....”

Universal Periodic Review

Second Cycle

Brunei Darussalam was reviewed during the 19th Session of the UPR on 2 May 2014. At the time of writing, the report of the working group had not been published and recommendations were not available.

Noted recommendations:

- Enact legislation to prohibit explicit corporal punishment of children in all settings, including the home, schools and alternative care facilities (Montenegro)
- Postpone the implementation of the Sharia Penal Code Order, 2013, pending a comprehensive review ensuring the Order’s compliance with international human rights standards, and put in place a formal moratorium on the use of the death penalty, with a view to its abolition (Ireland)
- Ensure that the provisions and the application of the Sharia Penal Code Order remain in strict compliance with human rights law, which includes the ban of any inhuman or degrading treatment or punishment (Italy)
- Withdraw the amendments to the Penal Code that introduce the death penalty and maintain the current de facto moratorium (Netherlands)
- Delay the entry into force of the revised Penal Code and conduct a comprehensive review to ensure its compliance with international human rights standards (Sweden)
- Ensure that implementation of the Sharia Penal Code Order 2013 is compliant with international human rights standards and does not lead to the imposition of the death penalty or torture or other inhuman or degrading punishment (United Kingdom)
- Implement the Sharia Penal Code in a manner consistent with international human rights standards (Australia)
- Reconsider the use of corporal and capital punishment under the Sharia Penal Code (Australia)
- Review the Islamic Penal Code in order to meet minimum human rights standards and clarify its application to foreigners and non-Muslims (Spain)
- Reconstitute its suspension of implementation of the Sharia Penal Code. Conduct a comprehensive review of the new Penal Code in relation to obligations under international law (Canada)
- Repeal or amend those sections of the Penal Code that prevent LGBT persons from having equal rights (Netherlands)
- Increase the age of criminal responsibility, which is now set at 7 years, to conform to international standards

³⁶ UNICEF (2007), Law Reform and Implementation of the Convention on the Rights of the Child. NY: UNICEF.

(Sierra Leone)

- Raise the minimum age of criminal responsibility and prohibit sentences of corporal punishment and life imprisonment for children under the age of 18 (Czech Republic)
- Continue its efforts to raise the minimum age of criminal responsibility (Uruguay)
- Raise the minimum age of criminal responsibility and explicitly prohibit life imprisonment for persons under the age of 18 (Germany)
- Bring into line the definition of minor in all legal domains, especially the penal, and prohibit life sentences and corporal punishment for crimes committed by minors (Mexico)
- Maintain the moratorium on executions with a view to abolishing the death penalty and provide statistics, including sex and age, on persons sentenced to the death penalty or executed (France)
- Maintain the moratorium and ultimately move to abolish the death penalty in law (Australia)
- Uphold Brunei's long-lasting moratorium on the death penalty (Czech Republic)
- Refrain from any steps to extend the application of the death penalty or otherwise alter the legal system in a manner that would violate human rights (Germany)
- Abolish the death penalty for all crimes (Montenegro)
- If Brunei continues to use the death penalty, it should meet at least the minimum international standards on death penalty (ECOSOC resolution 1984/50) and the relevant provisions of the International Covenant on Civil and Political Rights (articles 6 and 14) and the Convention on the Rights of the Child (article 37) (Belgium)
- Establish a formal moratorium on the death penalty and work towards its abolition (Sweden)
- Prohibiting corporal punishment in all settings, including in the home (Uruguay)
- Ban corporal punishment sentences and life sentences, in particular for children (Costa Rica)

Accepted recommendations

- Enhance efforts to promote understanding of the Sharia Penal Code through awareness programmes and other relevant activities (Iran)
- Continue to promote just and fair implementation of the Sharia Penal Code through adequate training and capacity building (Pakistan)

First Cycle

Brunei Darussalam was examined in the first cycle of the UPR in December 2009 (Session 6). During the review, states made recommendations that specifically called on Brunei Darussalam to abolish sentences of corporal punishment. The State accepted recommendations to abolish corporal punishment at home and in schools, but rejected recommendations to prohibit physical punishment as a judicial sentence.

Accepted recommendations:

- Specifically prohibit corporal punishment at home and in schools and undertake appropriate campaigns to educate families on alternative forms of discipline (Germany);
- Prohibit corporal punishment at home and in schools and sensitize families in this respect (Italy);

Rejected recommendations:

- "Abolish the death penalty definitively and commute all such sentences to periods of imprisonment; and put an end to caning and flogging (Spain)..."
- Specifically prohibit corporal punishment in institutions (Germany); prohibit corporal punishment in other public institutions and abolish whipping as a form of punishment (Italy); abolish the practice of corporal punishment (France); legally prohibit any form of corporal punishment of children and adolescents (Chile);

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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