

## **Inhuman sentencing of children in Malaysia**

**Briefing for the 17<sup>th</sup> session of the Human Rights Council Universal Periodic Review in October 2013, submitted by the Child Rights International Network ([www.crin.org](http://www.crin.org)), March 2013**

### **Inhuman sentencing of children in Malaysia**

Persons convicted of an offence committed under the age of 18 may lawfully be sentenced to capital punishment, corporal punishment and life imprisonment.

Malaysia has a dual system of secular and Islamic law. The main laws governing juvenile justice are the Child Act 2001, the Penal Code, and the Criminal Procedure Code 1976. For Muslim children, Islamic laws are also applicable – the Syariah Courts (Criminal Jurisdiction) Act 1965, the Syariah Criminal Offences (Federal Territories) Act 1997 and the Syariah Criminal Procedure (Federal Territories) Act 1997.

The Penal Code sets the minimum age of criminal responsibility at 10,<sup>1</sup> but the Internal Security Act applies “regardless” of age,<sup>2</sup> the Syariah Criminal Offences (Federal Territories) Act 1997 refers to the attainment of puberty,<sup>3</sup> and the Syariah Criminal Procedure (Federal Territories) Act 1997 defines a “youthful offender” as between 10 and 16.<sup>4</sup>

### **Legality of inhuman sentencing**

#### ***Death penalty***

The death penalty is lawful for persons under 18 at the time of the offence for certain offences.

Article 97 of the Child Act states: “(1) A sentence of death shall not be pronounced 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 a child.” Article 2(1) defines a child as under 18 years. But a child may be sentenced to capital punishment under the Essential (Security Cases) Regulations 1975, which state in article 3: “(3) Where a person is accused of or charged with a security offence, he shall, regardless of his age, be dealt with and tried in accordance with the provisions of these Regulations and the Juvenile Courts Act, 1948, shall not apply to such cases.”<sup>5</sup> This applies to offences under the Internal Security Act 1960,<sup>6</sup> which prescribes the death penalty for offences relating to firearms, ammunition and explosives and to the disruption of public security, public order and terrorism.<sup>7</sup>

#### ***Corporal punishment***

Corporal punishment is lawful as a sentence. Article 91(g) of the Child Act authorises the court for children to “order the child, if a male, to be whipped with not more than ten strokes of a light cane – (i) within the Court premises; and (ii) in the presence, if he desires to be present, of the parent or guardian of the child”.

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<sup>1</sup> Article 82 – see also Child Act article 2

<sup>2</sup> Essential (Security Cases) Regulations 1975, article 3

<sup>3</sup> Articles 2 and 51

<sup>4</sup> Article 2

<sup>5</sup> The Juvenile Courts Act was repealed by the Child Act 2001

<sup>6</sup> Essential (Security Cases) Regulations 1975, article 2

<sup>7</sup> Articles 57, 58 and 59

Corporal punishment is also lawful as a sentence under Islamic law, and there is no exemption for females. The Syariah Courts (Criminal Jurisdiction) Act, which applies to Muslims in all the States of Peninsular Malaysia<sup>8</sup> provides for Islamic courts to order whipping up to six strokes.<sup>9</sup> The Syariah Criminal Offences (Federal Territories) Act applies to Muslims in the Federal Territories of Kuala Lumpur and Labuan,<sup>10</sup> and provides for the punishment of whipping up to six strokes for the offences of false doctrine, incest, prostitution, homosexual acts and other sex offences.<sup>11</sup> The Act applies to children who have attained the age of puberty according to Islamic law.<sup>12</sup> The Syariah Criminal Procedure (Federal Territories) Act, specifies how whipping should be carried out.<sup>13</sup>

### ***Life imprisonment***

Persons convicted of crimes committed under the age of 18 may be sentenced to life imprisonment.

In prohibiting the death penalty for persons under 18, article 97(2) of the Child Act prescribes in lieu detention “in a prison during the pleasure of (a) the Yang di-Pertuan Agong if the offence was committed in the Federal Territory of Kuala Lumpur or the Federal Territory of Labuan, or (b) the Ruler or the Yang di-Pertua Negeri, if the offence was committed in the State”. Paragraph 3 states that the person’s case must be reviewed annually and recommendations can be made for release or further detention, but there is no prohibition of life imprisonment. The Act states that no child under 14 shall be imprisoned.<sup>14</sup>

These restrictions do not apply in the case of security offences under the Internal Security Act. Under the Essential (Security Cases) Regulations, a person is punished according to the Act “regardless of his age”.<sup>15</sup> Life imprisonment is the prescribed punishment for offences relating to consorting with persons possessing arms or explosives, and to the disruption of public security, public order and terrorism.<sup>16</sup>

### **Inhuman sentencing in practice**

#### ***Corporal punishment***

Statistics produced by the Malaysian Prison Department indicate that between April 2002 and April 2012, 31 boys were sentenced to whipping under Section 91(g) of the Child Act of 2001 and 19 girls and boys were sentenced to whipping under Sharia law. The same statistics show that 31 sentences of whipping were carried out under Section 91(g) of the Child Act of 2001 and 19 were carried out under Sharia law across the same period.<sup>17</sup>

Figures published by the Malaysian Department for Social Welfare indicate that in 2011, 4482 boys and 191 girls were convicted of crimes for which whipping would have been a lawful sentence and in 2010, 3511 boys and 195 girls were convicted of the same offences. It is not known how many of children were actually sentenced to whipping.<sup>18</sup>

### **Recommendations from human rights treaty monitoring bodies**

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<sup>8</sup> Articles 1 and 2

<sup>9</sup> Article 2

<sup>10</sup> Article 2

<sup>11</sup> Articles 4, 20, 21, 22, 23, 25 and 26

<sup>12</sup> Articles 2 and 51

<sup>13</sup> Articles 125 and 126

<sup>14</sup> Article 96

<sup>15</sup> Article 3

<sup>16</sup> Articles 58 and 59

<sup>17</sup> Global Initiative to End All Corporal Punishment of Children, “Malaysia Country Report” last updated August 2012

<sup>18</sup> Figures from the Department for Social Welfare, see here for more information ()

### ***Committee on the Rights of the Child***

(25 June 2007, CRC/C/MYS/CO/1, Concluding observations on initial report, paras. 38, 39, 48, 49, 103 and 104)

“The Committee recommends that the State party, as a matter of priority, expedite its measures to amend the Essential (Security Cases) Regulations of 1975 to abolish the imposition of capital punishment on children.

“The Committee urges the State party to immediately abolish all forms of cruel, inhuman or degrading punishments, including caning and other forms of corporal punishment imposed on persons having committed a crime when under the age of 18 and as a disciplinary measure in penal institutions, taking into account the Committee’s General Comment No. 8 (2006) on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (CRC/C/GC/8).

“[The Committee] recommends that the State party:

a) urgently raise the minimum age of criminal responsibility at least to the age of 12 and continue to increase it to a higher age level and carry out a study on the discrepancies between the minimum age standards in the Penal Code, the interpretation of the Muslim jurists in the *Syariah* Court and the *Syariah* Criminal Procedure (Federal Territories) Act 1984 to prevent different standards being imposed on children upon entering the criminal justice system;

b) develop and implement a comprehensive system of alternative measures to deprivation of liberty, such as probation, community service orders and suspended sentences, in order to ensure that deprivation of liberty is used only as a measure of last resort;

c) amend the existing laws, including the Child Act 2001 (Act 611), in order to ensure that the deprivation of liberty is in full conformity with articles 37 and 40, paragraph 1, of the Convention and take the necessary measures, for example suspended sentencing and early release, to ensure that deprivation of liberty is limited to the shortest time possible....”

### **The review of Malaysia by the members of the Human Rights Council**

Malaysia was examined under the Universal Periodic Review process in 2009. During the review the Government stated that abolition of judicial caning and capital punishment for persons under 18 at the time of the offence was an “immediate concern”.<sup>19</sup> The Government did not support recommendations to abolish all capital punishment.<sup>20</sup>

In light of the clear international human rights consensus against imposition of capital punishment, life imprisonment and corporal punishment of child offenders, and specific recommendations to Malaysia made by the Committee on the Rights of the Child, we hope that the members of the Human Rights Council will urge the government of Malaysia to:

- Explicitly prohibit sentences of death, corporal punishment and life imprisonment in Malaysia, under all systems of justice and without exception to ensure full compliance with international standards.
- Raise the minimum age of criminal responsibility.
- Provide disaggregated data about sentences handed down to children - including those who have been sentenced to death - by offence committed and date, as well as information the about children in detention, including gender, age and length of time spent in pre-trial detention in each case.

To read CRIN’s detailed report on human sentencing of children in Malaysia, visit:

<http://www.crin.org/violence/search/closeup.asp?infoID=23452>

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<sup>19</sup> A/HRC/11/30, 5 October 2009, Report of the Working Group on the Universal Periodic Review: Malaysia, para. 56

<sup>20</sup> are A/HRC/11/30, 5 October 2009, Report of the Working Group on the Universal Periodic Review: Malaysia, paras. 105, 106(10) and 106(15)