

MICHIGAN STATE UNIVERSITY

The African e-Journals Project has digitized full text of articles of eleven social science and humanities journals. This item is from the digital archive maintained by Michigan State University Library. Find more at:

<http://digital.lib.msu.edu/projects/africanjournals/>

Available through a partnership with



Scroll down to read the article.

A note on the laws against child abuse in Botswana

Almon Shumba & Fazlur Moorad

University of Botswana, Educational Foundations

Child abuse is now a global problem that needs to be addressed so that children are made aware of their rights in society and grow up free of such abuses. There is some urgency, therefore, that national laws that protect children against all forms of child abuse should be compatible with international laws as enshrined in the United Nations Convention on the Rights of the Child. This note outlines and critiques the laws that protect children against sexual, physical and emotional abuse in Botswana. The note also compares these local laws with the international laws, namely, the United Nations Convention on the Rights of the Child. The findings of this note show that while the Children's Act of Botswana (1981) is clear about what is and is not sexual and emotional abuse of children by adults in Botswana, it appears to be in conflict with the pieces of legislation when it comes to physical abuse. An outline, critique and implications of these laws on child abuse in Botswana have been examined in this note.

Introduction

This note outlines and critiques the laws that protect children against child abuse in Botswana and compares them with the international laws that protect the rights of children the world over. Children's rights were adopted by the United Nations General Assembly in 1989 and are enshrined in the United Nations Convention on the Rights of the Child. According to Van Bueren (1995), the Convention on the Rights of the Child is concerned with four 'P's:

- *Participation of children in decisions affecting their own destiny.* This implies that children not just be passive recipients of decisions made about their future.
- *Protection of children against discrimination and all forms of neglect and exploitation.* This implies that children should be aware of their rights when neglected or exploited by adults or caregivers. Besides, children need to know where to report such abuses against them so that appropriate action could be taken against the perpetrators.
- *Prevention of harm to children.* Since children are not able to protect themselves against any form of abuses perpetrated on them by adults or care-givers, it is necessary for them to be fully protected against such harm.
- *Provision of assistance for their basic needs.* It is the responsibility of adults or caregivers to provide children with food, shelter and clothing.

The rationale behind the setting of this Convention is that children the world over do not have the ability to protect themselves against forms of abuses perpetrated on them by adults or caregivers (Detrick, Doek & Cantwell, 1992; Van Bueren, 1995) and hence, need protection. The United Nations Convention on the Rights of the Child is a set of principles and standards which states how children all over the world should be treated by adults or caregivers (Melton, 1991 & 1996). The Convention emphasizes respect for the dignity of children and recognizes the child as a person and not as property (Cohen and Naimark, 1991; Levesque, 1996; Murphy-Berman, Levesque and Barman, 1996). Underlying the Convention is that children's dignity should be respected and their views heard within the limits of their ability to express themselves (Melton, 1991 & 1996). Tremper (1988, in Melton, 1996) argues in his analysis of children's rights that protection of dignity and legal protection of individual rights are fundamental.

Similarly, Melton (1996) recognizes that children are in a relatively powerless position because of their dependency on adults or caregivers in society. This implies that all children need care and protection against any form of abuse by adults and caregivers in society. On the contrary, the concept that children possess rights is viewed by some people as a radical notion. This is based on the fact that in some cultures children are treated as the property or possession of parents rather than holders of specific rights (Detrick, Doek & Cantwell, 1992; Newell, 1993; Van Bueren, 1995).

Botswana is no exception to the United Nations Convention on the Rights of the Child, despite the fact that the country has not yet signed and ratified this Convention (Dow & Mogwe, 1992). However, this does not mean that the Botswana government does not care for its children's rights and protection against child abuse by adults or caregivers. Such concern is reflected in Section 11 (1) of the Children's Act, 1981 which says:

Any person or guardian of a child or any person having the custody of a child who neglects, ill-treats or exploits the child or allows or causes him to be neglected, ill-treated or exploited shall be guilty of an offence.

This means that every child has a right to be given support and protection by their parents or caregivers.

Section 2 of the Children's Act defines a child as 'any person who is under the age of 14 years'. On the other hand, the United Nations Convention on the Rights of the Child defines a child as 'every human being under 18 years of the age'. Both definitions are quite similar except for the difference in age range of what a child is. The main provision in the Children's Act which protects children against neglect and ill-treatment is Section 11 which states:

(1) Any parent or guardian of a child or any person having the custody of a child who neglects, ill-treats or exploits the child or allows or causes him to be neglected, ill-treated or exploited shall be guilty of an offence.

(2) For the purposes of this section a child shall be deemed to have been neglected if the parent or guardian or any person having the custody of the child:

- (a) unreasonably fails to provide or pay for adequate food, clothing or housing for the child;
- (b) unreasonably fails to make adequate provision for the proper health and care of the child;
- (c) unreasonably leaves the child in the care of any person or institution without showing any further interest in the child; or
- (d) exposes the child to conditions or circumstances which are likely to cause him physical, mental or psychological distress or damage.

What is clear from the Children's Act is that it protects children against all forms of child abuse (sexual, physical and emotional abuse) that could be perpetrated on them by adults or caregivers.

According to Kibria (1987) 'a vast majority of the Botswana population are not fully aware of the rights of children and the legislation pertaining to these rights' (p. 7). It could be speculated that because what is and is not child abuse varies from culture to culture some people believe that giving children rights would cause conflicts in some families because of the different cultural practices (Van Bueren, 1995). It is traditional within the African culture that children are expected to adhere to the cultural beliefs and norms of the society (Chavunduka, 1995; Chinyangarara, 1995a; Khan & Nyanungo, 1995; Pillay, 1992; Sebongo, 1994). This implies that although the Children's Act expands on existing human rights and norms and focuses exclusively on children, it is viewed by some people as a radical notion that violates the African culture and tradition which is further supported by an equally strong cultural value of the respect to be accorded to the extended family.

Schapera (1938) in his study of child abuse in Botswana, found that

children are slapped with bare hands or lightly beaten, mainly on the buttocks, with a small wooden switch or broom. Bigger girls are generally beaten with switches on the body or shoulders. Bigger boys are made to lie face downwards at full length, and are whipped on the bare body with a cane (p. 118).

Similarly, Sebonego (1994) in a study of child abuse and neglect in Botswana found that corporal punishment is a universal form of punishment employed by parents and is enshrined in the Tswana customs and tradition. From the number of children interviewed in Sebonego's (1994) study, 47 % were thrashed sometimes; 17 % were rarely beaten; 13 % were always beaten; 10 % were never beaten and 13 % of them were unclassified. Both studies clearly show that beating of children is culturally and traditionally accepted in Botswana as part of the child-rearing practices. However, such practices will not condone the beating up of a child to the extent of being paralyzed, for example.

In Botswana, both the Penal Code, 1964 (Section 26) and the Customary Law Act, 1969 (Section 21(2)) allow for the infliction of corporal punishment on child offenders. The Penal Code (Section 26) allows for the infliction of corporal punishment on child offenders under 18 years of age as long as the punishment does not exceed six strokes. Similarly, the Customary Law Act (Section 21(2)) allows for the infliction of corporal punishment of not more than four strokes to be carried out on child offenders. It is clear from these Acts that corporal punishment by adults is legal and also restricted in Botswana. On the other hand, the United Nations Convention on the Rights of the Child views such treatment of children as inhuman and as physical abuse of children (Detrick et al., 1992; Melton, 1996; Van Bueren, 1995).

Implications of the laws on child abuse

It is well documented in the literature that what is and is not child abuse varies from culture to culture (O'Brien and Lau, 1995; Sebonego, 1994; Shakeshaft & Cohen, 1995; Zindi and Shumba, 1999). For example, O'Brien and Lau (1995) in their study of a Chinese sample of children found that shaming and physical punishment are accepted as part of the child rearing practices in the Chinese culture. Similarly, Payne (1989) in her study of the use and abuse of corporal punishment using a sample of 499 Barbadian adults of African descent found that approximately 70 % of the respondents generally approved of corporal punishment and three quarters of the remainder considered it as occasionally appropriate.

This section of the note considers the implications of the Botswana laws on what is and is not child abuse. Most studies view child abuse as sexual, physical or emotional abuse of children by adults or caregivers (Finkelhor, 1984; Hart, 1987; Levett, 1989; Payne, 1989). What is and is not sexual, physical and emotional abuse in Botswana is defined and analyzed below.

Sexual abuse. Sexual abuse of children is defined in the Children's Act (Section 13), and Penal Codes 147 and 166. According to Section 13 of the Children's Act, a child under 12 years is 'presumed to be incapable of having sexual intercourse' with a male adult and such a relationship is considered as sexual abuse because the child is too young to understand what is going on during such a relationship. This implies that such a relationship between an adult or caregiver is a crime under the law.

Similarly, the Children's Act (Section 166) states that a child 12 years old but below 14 years of age is incapable of consenting to sexual activity. This implies that sexual activity with a child of such an age is a crime. Although this legislation clearly stipulates that such a sexual relationship is child abuse, however, it does not indicate whether this is rape or statutory rape. In other countries such as Zimbabwe and South Africa, just to mention a few, a relationship of this nature is regarded as statutory rape (having sexual intercourse

with a girl below 16 years of age with or without her consent) (Chinyangarara, 1995a; 1995b).

Section 147 of the Children's Act provides that a child under 16 years of age is incapable of consenting to sexual intercourse. This implies that sexual intercourse between an adult and such a child is a crime. Furthermore, with or without the consent of the child, such a sexual relationship is considered as a violation of the child's rights because the child does not understand what is going on in such a relationship.

However, the Botswana law is silent about whether a sexual relationship between a child 16 years old but below 21 years and an adult is considered as child abuse or not because such a child has not yet reached the age of majority. In Botswana, a child is only an adult on attaining 21 years of age (Dow & Mogwe, 1992).

Physical abuse. Besides sexual abuse, another form of child abuse that is clearly defined under the Children's Act (Section 37) is physical punishment by adults or caregivers. This Section prohibits the subjection of any child to torture or other cruel, inhuman or degrading treatment or punishment. Such a right is also enshrined in the Botswana Constitution (Section 7). This implies that children have a right to be protected against physical abuse by adults or caregivers in Botswana.

Unlike the Children's Act (Section 37), the Penal Code (Section 26) allows for the infliction of corporal punishment on child offenders under the age 18 years and such punishment should not exceed six strokes. The Customary Law Act (Section 7) is another statute which provides for the infliction of corporal punishment on child offenders under 18 years of age. The Customary Law Act recommends corporal punishment of not more than four strokes to be carried out on child offenders and that such a sentence should be confirmed by an administrative officer. It is clear that both the Penal Code (Section 26) and the Customary Law Act (Section 7) are not consistent with the international laws (the United Nations Convention on the Rights of the Child, 1992) that advocate for the humane treatment of children the world over.

Emotional abuse. Emotional abuse is another form of child abuse that is clearly defined under the Children's Act (Section 37). This Section prohibits the subjection of any child to torture or other cruel, inhuman or degrading treatment or punishment. In fact, research shows that emotional abuse is now believed to be the most devastating form of child abuse than sexual abuse and physical abuse because the effects of such abuse are not visible since they involve emotions (Hart, 1987).

All these actions stated in Section 37 imply emotional abuse because the child is subjected to psychological and emotional trauma that may lead to the destruction of the self-concept and the social development of the child. Any forms of such violent acts dehumanize and degrade the child. Clearly, psychological effects are longer than physical ones.

Conclusion

This paper examined the nature of international laws and laws in Botswana that protect children against child abuse (sexual, physical and emotional abuse) by adults or caregivers. The international laws that protect children against child abuse are stated in the United Nations Convention on the Rights of the Child (Detrick et al., 1992; Van Bueren, 1995). The Convention on the Rights of the Child advocates for the participation of children in decisions that affect their own destiny; the protection of children against discrimination and all forms of neglect and exploitation; the prevention of harm to children; and the provision of assistance for their basic needs. In Botswana, children are protected against child abuse by the Children's Act. Despite the fact that international laws state that it is inhumane to use corporal punishment on children (Newell, 1993), both the Penal Code (Section 26) and

the Customary Law Act (Section 7) of Botswana provide for the infliction of corporal punishment on child offenders under 18 years of age and such punishment should not exceed six strokes. What is also clear from the above discussions is that corporal punishment by adults is legal but restricted under both the Children's Act (Section 26) and the Customary Law Act (Section 7).

However, it would appear that most people are not aware of the laws against child abuse in Botswana (Keeletsang, 1994; Kibria, 1987; Letshwenyo, 1993; Sebonego, 1994). Only recently, UNICEF (Botswana) has embarked on a project to have the United Nations Convention on the Rights of the Child translated into Setswana for accessibility by Batswana. Therefore, it is imperative that seminars, workshops and conferences in which parents, children, the relevant government Ministries, NGO's and all other interested organisations involved with children be organized throughout the country.

References

- Botswana, Laws of. *Children's Act* (1981).
- Botswana, Laws of. *Customary Law Act* (1969).
- Chavunduka, G. (1995) 'Key Note address at the Workshop on Traditional Law and Culture on Sexual Abuse of Children'. Child Law Project Zimbabwe, Harare, 29–30 January.
- Chinyangarara, I. (1995a) *Review of Press Reports on Child Sexual Abuse: January to December 1995*, Child and Law Project, Harare, Zimbabwe.
- Chinyangarara, I. (1995b) 'General law and customary law on child sexual abuse and marriage', Paper presented at a Workshop on Traditional Law and Culture on Sexual Abuse of Children, Harare, Zimbabwe.
- Cohen, C.P. & Naimark, H. (1991) 'United Nations Convention on the Rights of the Child: individual rights concepts and their significance for social scientist', *American Psychologist*, 46, 60–65.
- Detrick, S., Doeck, J. & Cantwell, N. (1992) *The United Nations Convention on the Rights of the Child*, London, Martinus Nijhoff Publishers.
- Dow, U. & Mogwe, A. (1992) *The Convention on the Rights of the Child and the Legal Status of Children in Botswana*. A Consultancy Report for UNICEF Botswana. Women and Law in Southern Africa Research Project (WLSA) Botswana.
- Finkelhor, D. (1984) *Child Sexual Abuse: New Theory and Research*. New York, Free Press.
- Hart, S.N. (1987) 'Psychological maltreatment in schooling', *School Psychology Review*, 16 (2), 169–180.
- Keeletsang, L.K. (1994) 'The effects of interaction of traditional and modern culture in mediating for adoption of neglected, abandoned and abused children in Botswana'. Bachelor of Social Work dissertation, Department of Social Work, University of Botswana.
- Khan, N. & Nyanungo, K.L. (1995) 'Issues in management of Child Sexual Abuse' Paper presented at an International Conference on: Mental Health in Africa a Multidisciplinary Approach, Harare, Zimbabwe, 3–7 April.
- Kibria, G.K.F.M. (Ed.) (1987) *Rights of Children in a Changing Society: The Case of Botswana*. UNICEF, Gaborone.
- Letshwenyo, S.B. (1993) 'Child dumping: views and reasons given by women' Unpublished B.Ed. Nursing degree dissertation, Department of Nursing Education, University of Botswana.
- Levesque, R.J.R. (1996) International children's rights: can they make a difference in American family policy? *American Psychologist*, 51, 1251–1256.
- Levet, A. (1989) 'Problems of cross-cultural study of child sexual abuse'. Paper presented at the 4th International Workshop on the Ethnography of the Child, Victoria Falls, Zimbabwe.
- Melton, G.B. (1991) Socialization in the global community: respect for dignity of children, *American Psychologist*, 46, 66–67.
- Melton, G.B. (1996) The child's right to a family environment: why children's rights and family values are compatible, *American Psychologist*, 51, 1234–1238.
- Melton, G.B. & Corson, J. (1987) Psychological maltreatment and schools: problems of the law and professional responsibility, *School Psychology Review*, 16 (2), 188–194.
- Murphy-Berman, V., Levesque, H.L. & Berman, J.J. (1996) U.N. Convention on the Rights of the Child: A cross-cultural view. *American Psychologist*, 51 (12), 1257–1261.

- Murphy-Berman, V. & Weisz, V. (1996) U.N. Convention on the Rights of the Child: Current challenges, *American Psychologist*, 51 (12), 1231-1233.
- Newell, P. (1993) 'Protecting African children from all forms of violence: the United Nations Convention on the Rights of the Child', Paper presented at the Second African Conference on Child Abuse and Neglect, Cape Town, SASPCAN, September.
- O'Brien, C. & Lau, L.S.W. (1995) Defining Child Abuse in Hong Kong. *Child Abuse Review*, 4, 38-46.
- Payne, M.A. (1989) Use and abuse of corporal punishment: a Caribbean View, *Child Abuse and Neglect*, 13, 389-401.
- Pillay, D. (1992) 'Pupil Sexual Abuse by teachers in the greater Durban area' Paper presented at the SASPCAN Conference, Cape Town, September.
- Schapera, I. (1938) *A Handbook of Tswana Law and Custom*. London: Oxford University Press (for International African Institute & Bechuanaland Protectorate Government)
- Sebonego, M.M. (1994) 'Report of a study: child abuse and neglect', B.Ed. dissertation, Department of Sociology, University of Botswana.
- Shakeshaft, C. and Cohen, A. (1995) Sexual Abuse of Students by School Personnel, *Phi Delta Kappan*, 76 (7), 512-520, March.
- Van Bueren, G. (1995) *The International Law on the Rights of the Child*, London, Martinus Nijhoff Publishers.
- Zindi, F. & Shumba, A. (1999) The Epidemiology and Aetiology of Child Sexual Abuse in Zimbabwe's Secondary Schools. *African Journal of Social Work*, 1 (1), 3-50.