

## Exploring the Influence of Legal and Non-Legal Variables on Sentencing in the Context of the Dual Legal System in Botswana

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### ABSTRACT

*This study explores the influence of certain offence and offender-related factors or variables, here identified as legal and non-legal variables, on sentencing in the context of the dual legal system in Botswana. Differences in procedures and practices of customary and general courts have fostered the notion that Botswana operates parallel systems of criminal justice characterised by wildly different standards of justice. As a result many believe that similarly situated offenders appearing before the two types of court would be likely to suffer or be at risk of suffering significantly different punishments for similar offences simply because their cases have been sent to different types of courts for trial. However, despite animated debate around the subject, hardly any empirical research has been done on it. Accordingly, the present study attempts to measure inter-court variations in sentencing outcomes using multivariate analysis. It was postulated that there would be likely to be significant variations in sentencing outcomes of magistrate and customary courts regardless of whether the cases involved were of a similar type and/or whether the offenders were similarly situated or had similar attributes. Data used in this investigation was intended as complementary data for a large scale study on sentencing patterns in customary and general courts spanning a period of ten years. However, being more detailed, the latter covered a much shorter period. Despite limitations imposed by thinness of data, results of the study suggest that further research in this area has the potential to provide interesting insights into the nature and extent of variations in intra-system and inter-system sentencing that could inform the debate on the comparability of justice rendered by customary and general courts.*

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## 1. INTRODUCTION

One of the most effective ways of measuring disparities and inconsistencies in intra-court and inter-court sentencing is through multivariate analyses of certain offence and offender-related factors, usually defined as legal and non-legal variables<sup>1</sup>. Numerous studies in the United States of America have shown that legal variables are reliable predictors of the sentences likely to be passed by the courts<sup>2</sup>. The same variables have also been identified in other jurisdictions as being amongst factors likely to have an influence on the decision-making process at the sentencing stage<sup>3</sup>.

In view of this it was thought a study exploring the influence of legal and non-legal variables on sentencing within the context of the dual legal system in Botswana would be illuminating.

Differences that exist between the customary and general courts in terms of procedures and practices encourage the view that Botswana operates parallel systems of criminal justice system characterised by wildly different standards of justice<sup>4</sup>. A corollary to that is the assumption that similarly situated offenders appearing before the two types of court would be likely to suffer or be at risk of suffering significantly different punishments for similar offences simply because their cases have been sent to different types of courts for trial<sup>5</sup>.

<sup>1</sup> See J. Hagan, "Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint" 8(3) *Law and Society Review* (1974), pp. 481-515; C. Spohn and S. Welch "The Effect of Prior Record on Sentencing Research: An Examination That Any Measure Is Adequate", 4 *Justice Quarterly* (1987), pp. 286-304; and C. Spohn, *How Do Judges Decide: The Quest for Fairness and Justice in Punishment*, A Thousand Oaks, SAGE Publications (2009).

<sup>2</sup> M. E. Martin and M. Stimpson, "Women, Race and Sentencing in Oklahoma: A Preliminary Analysis", 4 *Journal of Oklahoma Criminal Justice Consortium*, (1997/1998).

<sup>3</sup> A. J. Ashworth, *Sentencing and Penal Policy London*, Weidenfield and Nicolson, (1983), pp. 46-55.

<sup>4</sup> See, e.g., D. G. Boko, "Trial and Customary Courts in Botswana: The Question of Legal Representation" 11(4) *Criminal Law Forum* (2000), pp.445-460; J. H. Barton (Jnr.), J. L. Gibbs, V. H. Li and J. H. Merryman, *Law in Radically Different Cultures*, St. Paul, West Publishing Co.(1983), p. 99; Women and the Law in Southern Africa, *Chasing the Mirage: Women and the Administration of Justice*, Gaborone, Women and the Law Trust (1999); and C. M. Fombad, "Customary Courts and Traditional Justice: Present Challenges and Future Perspectives", 1 *Stellenbosch Law Review*, pp. 166-192.

<sup>5</sup> I. S. Malila, "Severity of Multiple Punishments Deployed by Magistrate and Customary Courts against Common Offences: A Comparative Analysis" 7(2) *IJCJS* (2012), pp. 618-634. One newspaper has described customary courts as "a joke" and "... a government-sponsored court of injustice that is putting innocent men behind bars", "Zim Aliens Get Cane for Christmas", *Midweek-Sun*, January 7, 2004).

In that context much has been made of the fact that aggregate data shows that the majority of offenders in prison were sent there by customary courts<sup>6</sup>. Such trends may be seen as suggesting that customary courts are more likely than general courts to sentence offenders to a prison term. Superficially, this may seem like a reasonable inference to make especially given customary courts' poor reputation for adherence to procedure rules<sup>7</sup> and penchant for conviction<sup>8</sup>. However, such a conclusion would be unwarranted for two reasons. First, it should be remembered that customary courts being more numerous than general courts handle more cases in real terms and as proportion of all cases going through the courts<sup>9</sup>. Second, aggregate data on which such claims are based is usually not broken down further to determine whether customary courts and general courts do, in fact, tend to punish similarly situated offenders who have committed similar offences differently. There has not been much research exploring this dimension of punishment<sup>10</sup>. The present study is an attempt to help close that gap.

## 2. THE DUAL LEGAL SYSTEM AND SENTENCING DISPARITIES: BACKGROUND AND CONTEXT

The dual legal system appears to be designed to allow or accommodate tolerable differences in sentencing outcomes between the received and indigenous legal systems emanating from value-based

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<sup>6</sup> See Fombad, Note 4, *supra*, p. 167; B. Othogile, "Criminal Justice and the Problems of the Dual Legal System in Botswana", 4(3) *Criminal Law Forum* (1993), pp. 521-533, at p. 530; and C. Love and R. S. Love, "Some Observations on Crime in Botswana 1980-1992", 11(2) *Journal of Social Development in Africa* (1996), pp. 33-42, p. 41.

<sup>7</sup> A. N. Ballie, "Report of a Territorial Survey Made of the Customary Courts," (1969), Gaborone; and I. S. Kirby, 1985, "The Criminal Justice System -A Motswana's Perspective", in K. Frimpong (ed.), *The Law, the Convict and the Prisons, Proceedings for the Second Botswana Prisons Service Workshop*, University of Botswana, Gaborone, May 27 to June 5, (1985), p. 32.

<sup>8</sup> See Boko, Note 4, *supra*, at p. 458; and Fombad, Note 4, *supra*, at p. 188.

<sup>9</sup> See C. Love and R. S. Love, Note 6, *supra*; B. Osei-Hwedie, "Botswana: Indigenous Institutions, Civil Society and Government in Peace Building in Southern Africa" 16(2) *Journal of International Development and Co-operation* (2010), pp. 115-127, p. 120; and Fombad, *supra*, Note 4, p. 181.

<sup>10</sup> E.g., I. S. Malila, "Severity of Multiple Punishments Deployed by Magistrates and Customary Courts against Common Offences: A Comparative Analysis", 7(2) *IJCJS* (2012), pp. 618-634.

<sup>11</sup> We are referring here to ordinal or relative proportionality. According to von Hirsch, relative pro

differences without, presumably, undermining the ranking of offences<sup>11</sup> in the systems as a whole. The structural arrangement of the courts and the statutory<sup>12</sup> and constitutional framework allow for and presume differences in the way received and indigenous courts approach criminal cases while ensuring a certain degree of comparability<sup>13</sup>. Thus, it can be inferred from this that the differences in outcomes in criminal cases were not really intended to exceed tolerable limits.

A number of factors would appear to argue strongly in favour of the notion that some form of comparable justice was intended to be the goal of the dual legal system in Botswana, especially after independence<sup>14</sup>. First, it is implausible that comparable justice was not the desired end when it was the lack of comparability between the two legal systems during the colonial era that triggered the shift towards universalisation of criminal law in Botswana<sup>15</sup>

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portionality means that "Persons convicted of offences of comparable seriousness should receive punishments of comparable severity (special circumstances altering harm or culpability of conduct in a particular case being taken into account). Persons convicted of crimes of differing gravity should suffer punishments correspondingly graded in their onerousness. These requirements of comparative proportionality are not mere limits, and they are infringed when equally reprehensible conduct is punished unequally..." A. von Hirsch, "Proportionality in the Philosophy of Punishment", in M. Tonry (ed.), Vol. 16, *Crime and Justice*, Chicago, Chicago University Press (1992), p. 6.

<sup>12</sup> For example, customary courts enjoy greater flexibility than the general courts regarding punishments or combinations of punishments that they may impose in respect of most offences triable before them. According to Section S.18 (1) of the Customary Court Act, "a customary court may sentence a convicted person to a fine, imprisonment, corporal punishment or any combination of such punishment." A High Court Judge seemed to confirm this in *Mphodi v The State 2009* (3) BLR 799 HC, p. 813, when he noted that as far as customary courts are concerned, "There is no general requirement to impose sentences prescribed in the penal code. A customary court has wider discretion than any other court to impose a sentence it considers appropriate under customary law." At the same time, a customary court must exercise the power to punish within certain parameters; e.g., Section 18 (4) prohibits a customary court from imposing on "any punishment which is not in proportion to the nature and circumstances of the offence and the circumstances of the offender." For a detailed discussion of sentencing discretion in Botswana, see I. S. Malila, "Emerging Trends and the General Sentencing Framework in Botswana", 6 *African Journal of Legal Studies* (2013), pp. 171-188, at pp. 174-176.

<sup>13</sup> Section 10(8) and Section 7(1) of the Constitution of Botswana are two examples of provisions of that nature. The former prohibits the courts from convicting any person of "a criminal offence unless the offence is defined and the penalty therefor is prescribed in written law" while the latter prohibits, *inter alia*, the infliction of punishment which is degrading, cruel or unusual.

<sup>14</sup> One commentator observed in regard to amendment pertaining to punishment and the adoption of Customary Procedure Rule following the promulgation of the Customary Courts (Amendment) Act that "It is interesting to note that these rules bring procedure of customary courts very much into line with the civil and criminal procedure used in subordinate courts". I. G. Brewer, "A Note on the Botswana Customary Courts (Amendment) Act 1972", 6 CILSA (1973), pp. 282-286, at p. 284.

<sup>15</sup> A. Aguda, "Legal Developments in Botswana 1885-1966", 5 *Botswana Notes and Records*, pp. 52-63; and Barton, *et al*, Note 1, *supra*, at p. 990.

and elsewhere in Anglophone Africa<sup>16</sup>. During the colonial period, it was accepted on an official level that no presumption could be made that the type of justice dispensed by the customary courts was or ought to be similar or comparable to that dispensed by the general courts. In contrast, post-colonial justice, especially in the area of criminal law, was based on a radically different premise: trials must be conducted by separate courts applying one basic law according to roughly comparable standards<sup>17</sup>.

Second, the direction of reforms in the area of criminal law since the closing days of colonial rule points in the direction of convergence of practices and standards. These include the promulgation of the Penal Code in 1964 and adjustments of the Customary Courts Act<sup>18</sup> which were intended, according to the Memorandum of the Customary Courts Bill (1971), to, among other things, impose restrictions on the use of corporal punishment by customary courts.<sup>19</sup>

Third, the desire for convergence is evident from the steps that were taken when criminal law was universalised in 1972 to ensure that, broadly speaking, important rights enshrined in the Constitution were observed in the system as a whole, thus ensuring the constitution served as the *grundnorm*<sup>20</sup> for both legal systems<sup>21</sup>. Fourth, the dominance of and priority accorded to the common law system together with notions of justice based on the principles associated with that system over those associated with the customary legal system suggest that it was expected that over time the latter would assimilate the values and principles of the former<sup>22</sup>.

<sup>16</sup> A. N. Allot, "What is to be done with African Customary Law?" 28 (1&2) *JAL* 1 (1984), pp. 56-71; and T. W. Bennett and T. Vermeulen, "Codification of Customary Law" 24(2) *JAL* (1980), pp. 206-219.

<sup>17</sup> Barton, *et al*, Note 15, *supra*. See, generally, Aguda, Note 11, *supra*.

<sup>18</sup> It was formerly known as the African Courts Act.

<sup>19</sup> See, also, Brewer, Note 14, *supra*, at p. 282.

<sup>20</sup> In that context The Guide (n1) at p2 advised customary court personnel that the Constitution was essentially a collection of "the basic principles according to which Botswana is governed" and that it was meant to "secure the protection of the law for every person".

<sup>21</sup> The Customary Court (Amendment) Act of 1972 carried a provision (Section 4) with a similar effect to the written law requirement in Section 10(8) of the Constitution. According to Brewer (1973), Note 14, *supra*, at p. 285, "it seems that the theoretical effect of Section 4 is to eliminate any customary offence of a nature not included in the Penal Code or other written law".

<sup>22</sup> I. G. Brewer, "Sources of Criminal Law of Botswana" 18(1) *JAL* (1974), p. 36.

The basic thrust of the reforms implied: (a) continuing evolution of the customary principles presumably in the direction of and in accordance with modern principles of justice; and (b) that where the customary system comes into conflict with the received system or where it (i.e., customary system) appears to fall short of the ideals of justice, the presumption is that it should follow the lead of the received system, if possible, as the received system is the dominant system.

If we accept the foregoing, it cannot be justifiably contended that similarly situated offenders should suffer or be at risk of suffering significantly different punishments for similar offences simply because their cases have been sent to different types of courts for trial<sup>23</sup>.

If, for instance, a penalty imposed by one type of court for a minor offence like Common Nuisance exceeds that of fairly serious offences like Assault Occasioning Actual Bodily Harm, then that would offend the ordinary person's sense of justice<sup>24</sup> and would also tend to undermine the offence ranking system that underpins the Penal Code. It, therefore, stands to reason that the legislature never intended to authorise such a degree of difference in sentencing outcomes nor would it have contemplated that any part of the system could, in the normal course of events, punish beyond what is necessary to curb unwanted behaviour<sup>25</sup>.

Disparities are not, in themselves, unacceptable. In fact, the basic model that Botswana follows allows judges very wide discretion indeed. Judges in Botswana

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<sup>23</sup> Research shows that when they apply multiple punishments senior customary courts tend to punish more harshly than Magistrate Courts as they, *inter alia*, deploy these punishments to broaden the combination of punishments while staying within the limits of their warrants in respect of each individual punishment. In that way, they use this flexibility to make up for the perceived deficit in the sentencing powers in respect of individual punishments rather than to reduce the severity of the overall punishment as such. See Malila, Note 5, *supra*.

<sup>24</sup> It is easy to imagine that the appeals process and review mechanisms would be sufficient to address problems of this nature but that is far from being the case. For a start, few cases from customary courts are appealed (Boko) and review mechanisms such as the district administrators do not appear to be using their mandate effectively as the court observed in *Mogatwe v The State* 2004(1) BLR 389 (HC), at p. 390.

<sup>25</sup> In any case Section 18(4) of the Customary Court Act prohibits customary courts from imposing punishment on any person which is "not in proportion to the nature and circumstances of the offence and circumstances of the offender". The same (proportionality) principle is expressed in different ways in case law. See, e.g., *Mudangule v State* 1986 BLR 265 (CA); *Mojagi v The State* 1985 B.L.R 560 (HC); and the Constitution (see specifically Section 7(1)).

have, on the whole, very substantial powers in relation to sentencing matters<sup>26</sup>.

The restraints on their powers are few and, where they exist, fairly loose. This, in effect, means that disparities are a normal feature of the system. Furthermore, having customary and received courts operating alongside one another suggests that framers of the Constitution and legislation governing trials in both systems contemplated or expected that value-based differences between the two legal systems would result in different sentencing outcome patterns. To that extent both intra- system and inter-system disparities in sentencing are to be expected.

However, it must be noted that not all types or magnitudes of disparities, whether intra-system or inter-system, are acceptable. As a rule, it is disparities that are regarded as capable of offending the ordinary person's sense of justice or those that the court<sup>27</sup> would find offensive to justice normally which are referred to as "unjustified" or "unwarranted." Still, there is no consensus regarding the kind of disparities that ordinary people would regard as "unwarranted." The term "disparity" cannot be meaningfully employed without reference to context<sup>28</sup>. Notwithstanding this observation, Tonry has proffered a generic notion of "unwarranted" disparities. He observed that "... 'Unwarranted' disparities exist when sentences in general are disproportionate to the relative severities of offences for which they are imposed."<sup>29</sup>

Even where consensus exists as to what sort of disparities in a given context constitute unwarranted disparities, the question of degree of difference between sentences as well as the severity of sentences form an important part of the evaluation. Legal systems use a variety of strategies to reduce disparities and increase consistency in sentencing<sup>30</sup>.

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<sup>26</sup> I. S. Malila, "Emerging Trends and the General Sentencing Framework in Botswana", 6 *AJLS* (2013), pp. 176-188, at p. 188.

<sup>27</sup> In *Mojagi*, Note 25, *supra*, at p. 565, the court described such punishment as punishment "so manifestly excessive that a reasonable man would not have awarded it, taking into account the circumstances of the case."

<sup>28</sup> M. Tonry, *Sentencing Matters*, Oxford, Oxford University Press, (1996), p. 186.

<sup>29</sup> Tonry, *ibid*, at p. 187.

<sup>30</sup> See, e.g., A. J. Ashworth, "Four Techniques for Reducing Sentence Disparity," in A. von Hirsh and A. Ashworth (eds.), *Principled Sentencing: Readings and Theory and Policy* (2nd ed.), Oxford and Portland, Hart Publishing. (2004).

Such strategies often include approaches that tamper with judicial discretion to varying degrees<sup>31</sup>. Examples include guideline judgements, statutory sentencing principles, mandatory minimum penalties and numerical sentencing guidelines systems<sup>32</sup>. It is common to use variables, here identified as legal and non-legal variables, to influence sentencing patterns.

### **3. THE STUDY**

#### **3.1 Hypothesis**

The type and /or severity of punishment imposed by a customary or a magistrate court is likely to vary significantly according to the type of court regardless of whether or not offender characteristics and circumstances of the offence are similar.

#### **3.2 Methodology**

As indicated earlier, data for this study was gathered to compliment data from a large study on customary and magistrate courts. Data for the main study was gathered at Mochudi and Kanye and was intended to compare sentencing patterns of senior customary courts and magistrate courts at the identified sites over the period 1991-2001. The present study was meant to gather further information relating to the following variables: type of offence, type of punishment, prior record/previous conviction, mitigation factors, aggravating factors, gender, and age and employment status. Data for the study was extracted from court records of the senior customary (chief's) court and the magistrate court at Mochudi and involved 1014 cases. The selected cases consisted of offences triable before magistrate and customary courts.

#### **3.3 Limitations of study**

A major limitation of the study is that not all sentence-

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<sup>31</sup> M. Tonry has suggested that there is evidence that modification of structure of discretion could increase consistency, reduce disparity and change sentencing outcomes substantially. See M. Tonry, "Structuring Sentencing", in M. Tonry and N. Morris (eds.), *Crime and Justice: A Review Research*, Chicago, Chicago University Press, (1988), p. 269.

<sup>32</sup> See Ashworth, Note 30, *supra*.



relevant factors lend themselves easily to measurement<sup>33</sup>. A further complicating factor is that courts are not required to list all factors that they may have considered to arrive at a decision<sup>34</sup>. Even though the original intention was to measure and compare the effects of legal and non-legal variables on all primary offence types, this was ultimately not possible due to thinness of data on strokes, fines and compensation. This was not altogether surprising as the distribution of these punishments was highly skewed. In addition, the period covered by the study, 1996 – 2000, was rather short. Some data sets did not have the relevant information or values regarding dependent and independent variables of interest. This made it difficult to use logistic regression to analyse the differences between the courts in respect of these variables. I encountered this problem when I tried to analyse the relationship between type of court and type of punishment. For example, in regard to compensation, magistrate courts did not order compensation at all during the period in question but customary courts awarded it in ten cases.

#### 4. DEFINING LEGAL AND NON-LEGAL VARIABLES

One of the central themes and founding assumptions of this study is the idea that cases can be and are classifiable into categories “similar” or “different.” It may be asked what criteria was used to determine the boundaries or parameters of each case or class of cases so as to make it different or similar to the mother group or the opposite group as the case may be. Elements used for differentia-

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<sup>33</sup> For example, there is no guidance as regards the weight that should be assigned to previous convictions of a similar kind. Previous convictions for offences that belong to the same category of offences may be of entirely different value in terms of seriousness; yet, that is not generally reflected when a sentence is passed. Suppose offender A has just been convicted for the offence of Assault Common and records show that he has a previous conviction for Grievous Bodily Harm. Offender B has, similarly, been convicted for Assault Common but has previously been convicted of a minor assault (e.g., Affray). All other things being equal, is it fair that B should receive the same punishment as A? Furthermore, as things stand, it does not appear that a considerable crime-free period would earn the offender a discount on her/his sentence.

<sup>34</sup> While we have, thus far, considered how customary and magistrate courts punish similar offences, we have not considered how they punish these where offenders involved are broadly similar in terms of characteristics and background. To do that we need to look at the case factors involved. We need not look at all case factors as the range of these could be potentially enormous. In this study I have restricted these factors to a number of factors I have termed “legal and non-legal variables”.

tion were selected based on the following:

- (a) That such elements were common to all cases e.g., age;
- (b) That such elements were reasonably discrete and therefore measurable; and
- (c) That such elements were known to or believed to be good predictors of sentencing outcomes.

Below are variables or elements identified for the purposes of this study as the criteria for determining and measuring similarities or differences between cases or classes of cases:

- (a) Legal variables: These consist of variables that constitute a particular offence category and those elements of non-demographic nature<sup>35</sup> that must be considered at sentencing stage as a matter of law. The latter category encompasses such elements as prior conviction and mitigating or aggravating factors. The former refers to offence type. Aggravating factors could easily form part of the definition or grading of the offence. Aggravating factors may also be considered separately from the offence. This may vary between jurisdictions. I have adopted and modified a classification system by Martin and Simpson<sup>36</sup>. The definition provided above is my own.
- (b) Non-legal variables: These include those variables that Ashworth<sup>37</sup> describes as “demographic features of sentence.” However, our class of selected variables under this label is less extensive than his. In the context of this study the demographic variables considered were age, employment status and sex.

It is, strictly speaking, unwise to assume a watertight separation between legal and non-legal variables as such because some of the latter

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<sup>35</sup> Martin and Stimpson, Note 2, *supra*.

<sup>36</sup> *Ibid.*

<sup>37</sup> A. J. Ashworth, *Sentencing and Penal Policy* London, Weidenfield and Nicolson, (1983), p. 47.

may be included in the factors to be considered at sentencing as a matter of law (i.e., it may be mandatory to take them into account). In Botswana context sex and age may come into play as legal variables in relation to some punishments but not others. For example, the law prohibits the courts from passing corporal punishment on women and men over the age of 40 years<sup>38</sup>.

Thus, judges are sometimes required by law to take into account factors that I have here classified as non-legal variables and treat them, to all intents and purposes, as legal variables. This somehow blurs the boundaries that are assumed under this classification to separate the two groups of factors. Therefore, it is important to remain alive to the fluidity of the boundaries between these boundaries at all times.

## 5. RESULTS

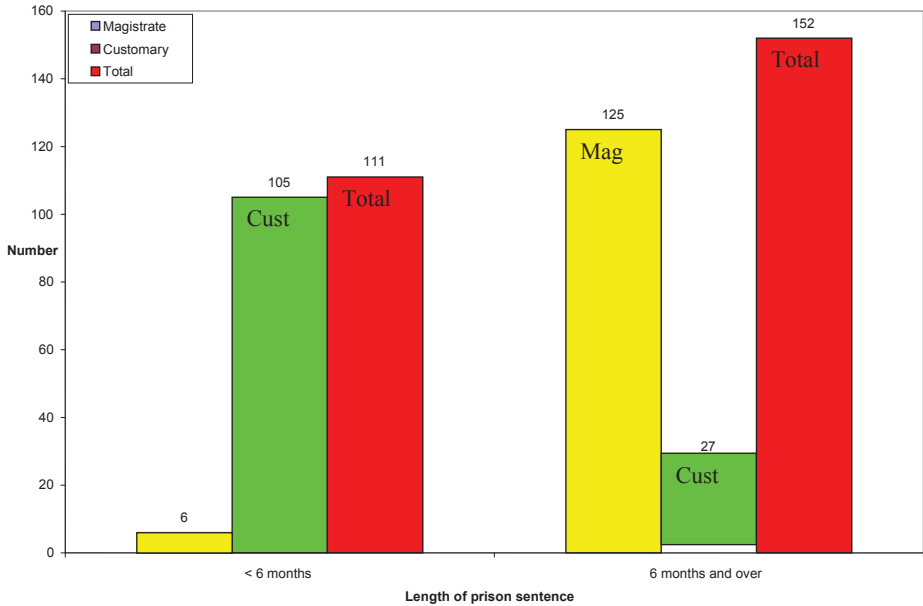
Figure 1 and Table 1 summarise and compare the effects of the various statistical variables described in this section as legal and non-legal variables on imprisonment. I sought to establish whether magistrate courts are more or less likely to award heavier prison sentences than the customary courts by using binary logistic regression where our dependent variable is prison term (thus, length of imprisonment) and our independent variables are legal variables (such as previous conviction, mitigation, and aggravation) and the non-legal variables (which include sex of the offender, age, and employment status). Type of court was used as a selection variable and the variable on plea was dropped since it was constant. However, it was established in the preliminary analysis that the number of cases with a prison term of more than six (6) months for the customary courts was very small; whilst for the magistrate courts the number of cases with a prison term of less than six (6) months was not sufficient to make any meaningful analysis. Some of the cases were not classified due to either missing values pertaining to the independent variables or categorical variables.

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<sup>38</sup> E.g., Section 18(2) Customary Courts Act.

Therefore, estimation could not be performed due to the fact that there were not enough cases. Figure 1 below presents a distribution of cases with a prison sentence for us to appreciate the inadequacies in the data set.

**Figure 1: Length of prison terms: customary and magistrate courts**



Unfortunately, the other data sets did not provide information on the dependent and independent variables of interest as indicated earlier. However, this data was used to ascertain whether the type of court had any directional influence on the type of sentencing. A bivariate analysis was undertaken using binary logistic regression on the following sentencing outcomes as dependent variables: imprisonment, strokes and fine. In this regard, type of court was deployed as the independent variable.

**Table 1**

			95.0% C.I. for EXP(B)		
		Sig.	Exp(B)	Lower	Upper
Imprisonment	Magistrate court	0.0000	1.9704	1.6784	2.3133
	Constant	0.0000	0.0600		
Strokes	Magistrate court	0.0000	0.0440	0.0309	0.0628
	Constant	0.0000	0.2179		
Fine	Magistrate	0.0000	0.6728	0.6048	0.7484
	Constant	0.0000	0.3420		

The results show that the magistrate court was twice as likely to impose a prison term as opposed to the customary court and this was significant with a p value < 0.001. Even though a number of studies have shown that most convicted persons in prison are sent by customary courts, yet according to our data magistrate courts are more likely to send offenders to prison than customary courts.<sup>39</sup> However, this may be explained by the fact that on a country-wide basis customary courts handle a far greater volume of criminal cases than the general courts. The former's reach extend even to small rural settlements. By contrast magistrate courts, which occupy the lowest rung in the hierarchy of general courts, are found in peri-urban centres and larger settlements.

Data was analyzed further to find out whether the magistrate court is more or less likely to award strokes for a given offence. The results show that the magistrate court was 22 times less likely to award strokes as opposed to the customary court. This was significant with a p value < 0.001. This result was consistent with what general literature suggests regarding the popularity of

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When considering imprisonment we must not forget the large variations in conviction rates of the two types of court. It must also be remembered that customary courts not only have high conviction rates but are more likely to try minor offences for which they may impose prison terms or suspended prison terms.

corporal punishment with customary courts. Corporal punishment is regarded as a staple punishment in the customary courts<sup>40</sup> and popular with the general public, notably the more conservative rural segment of the population<sup>41</sup>. In that context, it is not surprising that when government embarked on reforms intended to bring about convergence of the customary and received courts it sought to do so by restricting offences for which the former could impose the penalty of corporal punishment.<sup>42</sup>

As regard fines, the data shows that the magistrate court was 1.5 less likely to impose fines than did the customary court. The result was significant with a p value < 0.001. A customary court may punish any offence with a fine.<sup>43</sup> A fine or any part of a fine may be used to compensate the victim of a crime providing she or he agrees not to pursue a suit for damage or injury suffered for the same offence.<sup>44</sup> In practice, courts prefer to keep fines and compensation awards separate.<sup>45</sup>

## 6. CONCLUSION

The overall analysis of the paper provided some useful, if limited insights. Unfortunately, thinness of data prevented that part of the exercise from being executed fully or to yield more conclusive results. A breakdown of various elements of data shows that in the context of the study, non-legal variables could only explain 11% and 9% of the variations in prison terms imposed in the magistrate and customary court respectively. Legal variables accounted for 17% of the variations in prison terms imposed by magistrate court while in respect of customary courts they explained only 9% of the variations in prison

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<sup>40</sup> I. Schapera, *The Handbook on Tswana Law and Custom*, London, Oxford University Press, (1938); R Leslie, "Lesotho, Botswana and Swaziland", in A. Milner, *African Penal Systems* (1969), New York, Praeger.

<sup>41</sup> A. Shumba and F. Moorad, A Note on the Laws against Child Abuse in Botswana, 14 (2) *Botswana Journal of African Studies* (2000), pp. 172 – 177; and K. Frimpong, *Criminal Law of Botswana: Cases and Materials* (3rd ed.), 2000, Gaborone.

<sup>42</sup> Brewer, Note 19, *supra*.

Section 18(1); the exception is where mandatory penalties apply.

<sup>44</sup> Section 26, Customary Courts Act.

<sup>45</sup> Malila, Note 5, *supra*.

terms. For magistrate courts legal and non-legal variables together accounted for 28% of the variations in prison terms. In comparison, they accounted for 18% of the variation in the context of the customary court. As shown above, the significance test yielded some interesting results. It showed that magistrate courts were significantly more likely ( $p$  value  $< 0.001$ ) than customary courts to use the most severe of penalties, namely imprisonment. At the same time, magistrate courts were significantly less likely to award the strokes ( $p$  value  $< 0.001$ ) and fine ( $p$  value  $< 0.001$ ) compared to customary courts.

But for the thinness of data the present study had the potential of a new vista regarding cross-system study of justice. As already noted, remarkably little empirical research has been done on the comparative aspects of the criminal process in ordinary and customary courts in Botswana despite the topicality of the subject. Lack of disaggregated data on sentencing has meant that debate on the issue of comparative justice has remained on the same level for a long time. Notwithstanding limitations, the results of the present study suggest that one of the ways in which research and debate in this area could be advanced is for future research efforts to focus on the influence legal and non-legal variables have on sentencing. The results of such endeavours could well have far-reaching policy implications.