Justice and Fairness in Criminal Procedure: Assessment of the Criminal Jurisdiction of Customary Courts in Botswana

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ABSTRACT

Justice and fair process are the basic values underpinning constitutional democracy. This article defines them in the context of criminal proceedings in Customary Court in Botswana. The Customary Courts Act excludes legal representation. For purposes of this article, the right to legal representation shall only be discussed in the context of criminal proceedings. It argues that unfairness and injustice are inherent in Botswana's dual legal system. Two-thirds majority of inmates in Botswana prisons are convicts emanating from Customary Courts. It argues that the question whether one goes to prison or not can be dependant which court tried him/her. The paper argues that the prohibition of legal representation is not justifiable. This article further argues that prohibiting legal representation in Customary Courts is ultra vires unconstitutional. Finally, this article makes a case for the abolition of the criminal jurisdiction of Customary Courts in Botswana.

1. INTRODUCTION

1.1 Overview of the Botswana's economic and political development

Independent Botswana began in 1966 through agreement among the colonial and indigenous elites.[1] The country was unfavourable structural setting for democratisation, in geographic, economic and political terms.[2] It was one of the

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1 K. Good and I. Taylor, "Unpacking the "model": Presidential succession in Botswana" in R. South all and H. Melber (eds), *Legacies of Power. Leadership Change and Former Presidents in African Politics,* Cape Town, HSRC Press, (2006), p. 51.

2 K. Good and I. Taylor "Botswana: A minimalist democracy", 15(4) *Democratization* (2008), pp. 750- 765, at p. 750.

poorest countries,[3] however, the economy boomed following the discovery of diamonds.[4]

Botswana's economic growth, political stability, and regular elections often eclipse issues like human rights, which remain on the periphery of scrutiny.[5] However, human rights issues such as the right to legal representation present a significant threat to Botswana's good reputation.[6]

Section 10 the Constitution of Botswana (the Constitution) guarantees the right to free trial which one of its main ingredients is the right to legal representation if the accused person afford to retain a lawyer.[7] The right to legal representation is a fundamental right through which the accused other procedural rights will ultimately be protected.[8] It is the umbrella right which other rights fall under, "it is *the right* of all rights".[9] Legal representation is vital under the adversarial system of justice, in which parties to court proceedings are left on their own to fight it out; the judge rarely intervenes in the combat.[10] When applied to criminal proceedings adversarial systems may result in inestimable prejudice to the accused whose liberty or life and limb may be at stake.[11]

The discussion in this article is divided in four main parts being; (i) the legal system from pre-independence era to modern Botswana; (ii) retention of and the place of the Customary Court system in Botswana's constitutional framework; (iii) the problems brought about the criminal jurisdiction of Customary Courts; (iv) the nature and content of the right to a fair trial. In the ultimate, the article will make proposals for law reform in Botswana.

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3 Op cit, note 1 above.

4 M. Marobela, "The Political Economy of Botswana's Public Sector Management Reforms: Im perialism; Diamond Dependence and Vulnerability", available at http://globalization.icaap.org/content/v7.1/Marobela.html (accessed 17 May, 2015).

5 A. Cook and J. Sarkin, "Is Botswana the Miracle of Africa? Democracy, the Rule of Law, and Human Rights Versus Economic Development", 19 *Transnational Law & Contemporary Problems* (2010), p. 453.

6 *Ibid.*

7 Constitution of Botswana.

8 R.J.V. Cole, "Between judicial enabling and adversarialism: The role of the judicial officer in protecting the unrepresented accused in Botswana in a comparative perspective", 11 *University of Botswana Law Journal* (2010), p. 9.

9 *Ibid*.

10 D.D.N. Nsereko, "The Right to Legal Representation before the International Criminal Tribunal for the Former Yugoslavia". Available at http://www.isrcl.org/Papers/2004/Nsereko.pdf (accessed on the 18 May, 2015), p. 5

11 *Ibid.*

2. THE LEGAL ARCHICTECTURE AND REGIME APPLICABLE IN BOTSWANA: FROM PRE-INDEPENDENCECE TO DATE

2.1 Reception of the Common Law in Bechuanaland Protectorate

Botswana's legal system as in many other African countries is dual in nature. It is made up of Roman-Dutch common law as modified by statute, and customary laws of various tribes found and living in different parts of Botswana. Nhlapho distinguishes between the "received" or "imported" component of the legal system being the *general law* to refer to the *written law* (common law and statute) as differentiated from the customary law.[12] The received law was originally not intended to apply to indigenous African population but European settlers and other non-African residents in the country.[13] Customary law had been defined by the legislature as "the rules of law which by custom are applicable to any particular tribe or tribal community in Botswana, not being rules which are inconsistent with the provisions of any enactment or contrary to morality, humanity or natural justice".[14]

As in other former British territories in Africa, the means of introducing a system of common-law rules into Botswana (then Bechuanaland Protectorate) was the so called "reception statute", a statutory device whereby at a particular date the laws of one country were "received" wholesale by a colonial territory subject to the provisions of the reception statute itself.[15] The administration of justice in Bechuanaland Protectorate as Botswana was known during the colonial times was created through an Order-in-Council of 9th May 1891 by Her Majesty Queen Victoria of the Great British Empire. In fact the territory known as Bechuanaland Protectorate which was declared a British Protectorate in 1885 was on the same day of 9th May 1891 handed to the High Commissioner for his administration by the British Queen by Foreign Jurisdictions Act of 1890.[16]

12 T. Nhlapho, "Marriage and Divorce in Swazi Law and Custom", (1992), Mbabane, Websters, p. 6.

13 A.L. Molokomme, "Disseminating Family Law Reforms: Some Lessons from Botswana" 30-31 *Journal of Legal Pluralism and Unofficial Law* (1990-1991), p. 307.

14 Section 4 of the Common Law and Customary Law Act [Cap.16:01] Laws of Botswana.

15 C.M.G. Himsworth, "Effects of Matrimonial Causes Legislation in Botswana", 18 (2) *Journal of African Law* (1974), pp. 173-179.

16 See generally C.M. Fombad, "Botswana Introductory Notes". Available at http://www.icla.up.ac.za/images/country_reports/botswana_country_report.pdf (accessed on the 01 June 2015).

The 1891 Order-in-Council, provided that the law applicable in Bechuanaland Protectorate shall be "....the law as for the time being in force in the Colony of the Cape of Good Hope". [17] The law applicable in the Cape Colony was not English law which is the legal system of the colonial master presiding over Bechuanaland instead it was Roman-Dutch law. It has been observed that the strategic decision not to apply English law to Bechuanaland Protectorate and other High Commissioner Territories[18] was based in the future ease facilitation of expected incorporation of these territories into a future Union of South Africa.[19]

Section 19 of the Order-in-Council aforementioned was repealed through the 1909 Proclamation that specified that the "the law in force in the colony of the Cape of Good Hope on the 10th day of June 1891 should *mutatis mutandis* and so far as not applicable be the law in force and to be observed in the Protectorate".[20]

Fombad and Quansah note that there is no explicit mention of Roman-Dutch law in the reception clauses of both the 1891 and 1909 Proclamations.[21] Chief Justice Aguda (as then he was) took a strong exception to the reception of the so called "Roman-Dutch law" in Botswana when he stated as follows:

> "In the first place, the so-called Roman-Dutch Law is now neither Roman nor Dutch. Secondly, that system of law as at 1891 is, in the eyes of modern jurists, primitive, and it is that law that is regarded as the common law, not that law as subsequently developed in other countries. No doubt it has since been developed by South Africa but in the eyes of modern jurists it must, clearly, be regarded as a primitive system of law in 1891; and there were no professional judges in this country to develop it..."[22]

17 Section 19 thereof.

18 Others High Commission Territories were the Swaziland Protectorate and Basutoland Protectorate now Swaziland and Lesotho respectively.

19 B. Otlhogile, "Criminal Justice and the Problems of a Dual Legal System in Botswana" 4(3) *Criminal Law Forum* (1993), p. 522.

20 I.G. Brewer, "Source of the Criminal Law in Botswana" 18(11) *Journal of African Law* (1974), p.25.

21 C.M. Fombad, and E.K. Quansah, "The Botswana Legal System", Durban, Lexis Nexis Butterworths, (2006), p. 41.

22 A. Aguda, "Legal Development in Botswana from 1885 to 1966" 5 *Botswana Notes and*

In that regard it is worth noting that Botswana did not receive the Roman-Dutch law from South Africa in its pure form but rather in the form in which it had already been penetrated by English law, thus the received law of Botswana is neither "pure" English law nor "pure" Roman-Dutch law, nor is it even South African law.

There has been an ongoing academic debate as to whether or not the reception of Roman-Dutch common law in Botswana and other former British protectorates in Southern Africa was timeless or subject to cut-off.[23] However, for purposes of this article that issue is not subjected to scrutiny. The following section discusses the substance of this article, which is the place of the Customary Courts in the wider system of courts in Botswana.

2.2 Retention of the customary court system and its place in a constitutional democracy

The development of contemporary judicial system in Botswana post-independence is in no way any difference from the colonial era. Frimpong observes that the judicial system is made up of two sets of courts: the regular courts and the customary law courts, the regular courts are modeled along the received European system of courts and consist of superior courts and inferior courts.[24] The superior courts have unlimited jurisdiction and are made up of the Court of Appeal and the High Court, the inferior courts are limited by jurisdiction and comprise mainly the magistrate courts and the other set of courts is made up of Customary Courts, established under the Customary Courts Act hereinafter "the Act".[25]

Despite its considerable progress towards unification of its legislation, Botswana has been slow to unify its court system.[26]The "modern" courts in

Records (1973), p. 57.

23 See generally J.H. Pain, "The reception of English and Roman-Dutch law in Africa with reference to Botswana, Lesotho and Swaziland" 11(2) *Comparative and International Law Journal of Southern Africa,* (1978) pp. 137-167; A.G.J.M. Sanders, "Legal Dualism in Botswana, Lesotho and Swaziland", 1 *Lesotho Law Journal* (1985), pp. 47-67.

24 See K. Frimpong, "The Death Penalty in Botswana", available at http://www.biicl.org/files/2193_country_report_botswana_frimpong.pdf (accessed: 16 June 2015), p .1.

25 Ibid.

26 L. Berat, "Customary Law in a New South Africa: A proposal", 15(1) *Fordham International Law Journal* (1991), p. 108.

the Bechuanaland Protectorate were enjoined to enforce Roman-Dutch law and statutory law where applicable and to respect customary law subject to the repugnancy clause.[27] Customary legal system was left to co-exist with received system of courts and laws creating the dual legal system. This position in the general African context which is equally applicable to Botswana was summed by Makunga as follows:

> "During the British colonial era, African Customary law and the Roman-Dutch co-existed. The "received" law was individualistic and was put in-place to govern the colonial settlers. The customary law governed the indigenous African communities. This co-existence hinged on the "repugnancy clause", i.e. for as long as the Customary Law was not an offence to the colonial administration it was allowed to exist."[28]

Co-existence of laws necessarily meant that there were two legal systems which their application largely depended on the race of the residents. Customary law was only applicable to the black African population, whereas the received law was intended for the European settler community. Boko posits that part of the reason in the case of Bechuanaland that the British left the Customary Court system in place was the realisation of the native structures to be closely similar and highly sophisticated judicial systems, the higher levels of which could be incorporated in the official structure without modification.[29]

It is submitted that besides the comparable sophistication of the native courts, the real reason that the British left the native courts to settle the disputes within and between the local populations had everything to do with their indirect rule policy. Due to the relative underdevelopment with little natural resources in Bechuanaland, the British were unwilling to actively engage themselves in the governance and administration of the protectorate.

Even with the adoption of a Constitution in preparing of the delivery

27 Otlhogile (note 19) p.522.

28 B. Makunga, "The Improvement of the Treatment of Offenders Through the Enhancement of Community-Based Alternatives to Incarceration, available at http://www.unafei.or.jp/english/pdf/RS_No79/No79_29PA_Makunga.pdf (accessed: 16th June 2015), p. 235.

29 D.G. Boko, "Fair Trial and the Customary Court in Botswana: Questions on Legal Representation" (11) 3 *Criminal Law Forum* (2000), p. 455.

of the republican state in the mid-1960s, the Customary Court was retained as part of the judicial system. The question that arises is whether these native courts have a place in the modern judicial system of a constitutional democracy. It is in that context that the following section investigates the role and position of customary law and Customary Courts system in modern day democratic Botswana fifty years post-independence.

3. PLACE OF CUSTOMARY COURTS IN A CONSTITUTIONAL DEMOCRACY

3.1 Brief features of a constitutional democracy

The democratic constitutional state is a multi-faceted complexity of ideas with developed over centuries.[30] Constitutional democracy is that form of a popular government which its powers, shape and form are set out and/or stipulated in a constitution.[31] In this form of governance, the constitution is the foundation for a system of government where authority is shared among a set of different branches.[32] The rule of law is a cornerstone of constitutional democracy, in the absence of the rule of law, constitutional democracy would be impossible.[33]

In essence, constitutional democracy presupposes constitutional supremacy. Every act, decision or law have to conform to the constitutional value, norms and/or principles in a given state. The line of inquiry that this article adopts seeks to investigate whether the Customary Courts system or specifically their criminal jurisdiction conforms to the constitutional precepts as laid down in the Constitution of Botswana.

30 M. Rhonheimer, "The Political Ethos of Constitutional Democracy and the Place of Natural Law in Public Reason: Rawl's 'Political Liberalism' Revisited" 50(1) *American Journal of Jurisprudence* (2005), p. 1.

31 M. Manan, "Constitutional Democracy for Divided Societies: The Indonesian Case" 3(1) *Journal of Politics and Law* (2010), p. 126.

32 M.K. Mbodenyi & T. Ojienda, "Introduction to and Overview of Constitutionalism and Democratic Governance in Africa" in M.K. Mbodenyi & T. Ojienda, (eds), *Constitutionalism and democratic governance in Africa: Contemporary perspectives from Sub-Saharan Africa*, Cape town, Pretoria University Law Press, (2013), p. 3.

33 M. Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy" 74 *Southern California Law Review* (2001), p. 1307.

3.2 Jurisdiction of Customary Courts in Botswana

Customary Courts have both civil and criminal jurisdiction. However, for purposes of this paper the focus shall be on the criminal jurisdiction of Customary Courts the fairness of the procedures in contradistinction to the general court particularly the right to legal representation of criminal accused and its implication in the dispensations of fair and justice decision-making.

The criminal jurisdiction of the Customary Courts is established under Section 12 of the Act which reads as follows:

> "1. Subject to the provisions of section 13, a Customary Court shall have and may exercise criminal jurisdiction to the extent set out in its warrant in connection with criminal charges and matters in which the charge relates to the commission of an offence committed either wholly or partly within the area of jurisdiction of the court.
>
> 2. No Customary Court shall sentence a person to a period of imprisonment in excess of the period of imprisonment authorised in its warrant.
>
> 3. In the exercise of the jurisdiction under the provisions of this section Customary Courts may be guided by the provisions of the Penal Code.
>
> 4. In any prosecution in a Customary Court the prosecutor may be either the person who has a right to bring such prosecution under customary law or the Director of Public Prosecutions or any person authorized thereto by the Director of Public Prosecutions.
>
> 5. Notwithstanding the provisions of subsection (2), the President may, by order under his hand, authorize an increased jurisdiction in criminal cases to be exercised by any Customary Court to the extent specified in the order.
>
> 6. No person shall be charged with a criminal offence unless such offence is created by the Penal Code or some other written law."

From the reading of the section and its subsections there are two critical observations to be made. The first is that Customary Courts only have jurisdiction to try statutory offences, that is to say a person cannot be tried and convicted of customary law offence(s). The further point being that prosecution in Customary Courts is not any different from general law courts, where the discretionary to initiate or discontinue criminal proceedings is the sole reserve of the Director of Public Prosecutions, therefore those acting on behalf of the state are properly trained and/or experienced in the area of criminal law and criminal procedure. The jurisdiction and sentencing powers of Customary Courts are limited and/or defined in the warrant establishing a certain court

Otlhogile rightly noted more two decades ago that the relationship between criminal justice and the dual legal system is an uneasy one.[34] The uneasy relationship between the two raise serious constitutional and/or human rights questions, those are, whether there is fairness resulting from parallel criminal procedure for indigenous people in Customary Courts and for non-tribesmen in general courts. On the one hand, those falling within the jurisdiction of the Customary Courts for certain offences are liable for "swift" justice or convenience in that "they appear to operate well, provide justice to the poor, and help reduce the burden on the magistrate's courts, which have great difficulty in coping with an ever-increasing caseload"[35].

3.3 Criminal justice and Customary Courts: A constitutional analysis

The place of Customary Court system in a constitutional democracy and the necessity of the preservation of a dual legal system in a modern African state, in particular the participation of Customary Courts in the administration of criminal justice was dealt with by the South African Courts in the cases of *Bangindawo and Ors v Head of Nyanda Regional Authority and Anor; Hlantalala v Head of the Western Tembuland Regional Authority and Others.*[36]

It is worthwhile to note that the court considered two applications together, one being arising from civil proceedings and the other from criminal proceedings. In *casu*, the material facts were that the co-applicants in the

34 *Ibid.*
35 *Tirelo* v *Attorney-General* 2008 (2) BLR 38 at 45.
36 1998 (3) SA 262 (Tk).

criminal application were each sentenced to undergo three year imprisonment. The forum that handled their trial was a regional authority or Customary Court.[37] They instituted proceedings seeking a declaratory order to an effect that Regional Authority Courts Act was inconsistent with the then Interim Constitution of South Africa and therefore, invalid essentially for violating the right of every accused to a fair trial in terms of the Constitution among other grounds not relevant for this article.[38]

The applicants in the civil matter sought an interdict to bar the continuation of a trial scheduled to be heard in a regional/Customary Court.[39] The constitutional attack in this application is similar to that of the criminal application, hence the hearing of the cases together. The applicants main argument being that the relevant provisions of the Regional Authority Courts Act deny litigants in civil cases the right to legal representation in violation of this section. [40]

The court held that the standard of justice imposed on the general law courts which is premised on a value system different from a value system underlying the customary legal system should not be used to judge the Customary Courts.[41] The learned judge aptly noted that in some instances the law to be applied by the customary law has nothing to do with customary or law of indigenous population but "western" law particularly criminal law which is statutory law enacted by parliament, therefore it makes sense to judge Customary Court with western sense and value of justice.[42] This is equally applicable in the case of Botswana wherein presiding officers in Customary Courts have jurisdiction in some criminal offence having to apply common and statutory law to be able to render judgments.

However, quiet importantly and directly relevant for purposes of this article, the court ruled that the prohibition of legal representation of the accused in the regional authority (customary) courts violated section 25 (3) of the then Interim Constitution of South Africa.[43] It is worth noting that section 25 (3)

37 *Ibid* at p.265.
38 *Ibid,* at p.265.
39 *Ibid*, at p.265.
40 *Ibid*, at p.265.
41 *Ibid*, at p.266.
42 *Ibid*.
43 Act No. 200 of 1993. The section reads "Every accused person shall have the right to a fair trial,

of the then applicable constitutional regime which it is similar to Section 10 of the Constitution of Botswana.[44] Customary Courts Act explicitly prohibits legal representation under any circumstances, it is submitted that the prohibition of the right to legal representation no matter how justifiable is ultra vires the constitution. The fact that Customary Courts exercises concurrent jurisdiction with the magistrate courts in some offences yet are expected to dispensed different type of justice has no place in Botswana. The duality of the legal system it is submitted should not be to the detriment to the litigants in any other courts system.

The preceding section of the article critical discusses the issues created by the criminal jurisdiction of Customary Courts. It articulates the historical conflict of laws arising from the duality of parallel legal systems in Botswana.

4 THE PROBLEM OF CRIMINAL JUSTICE JURISDICTION OF THE CUSTOMARY COURTS

4.1 The internal conflict of law

The superiority of the general law over the customary law is reflected in the subordinate position of the Customary Courts.[45] Furthermore, the subordinate nature of Customary Courts is inherent in their governance process, generally those manning them are appointed in terms of customary law of succession.[46] It is accepted that *Dikgosi*[47] ascend to their positions mostly through hereditary without any regard to their qualifications and/or experience. Notwithstanding this, they hold powers to deprive natives subject to their jurisdictions their personal liberty through convicting and sentencing them to prison. On the other hand, general courts are presided over by magistrates and judges properly

which shall include the right –… (e) to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights…"

44 Section 10(2) reads "Every person who is charged with a criminal offence-…(d)shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice...".

45 A.G.J.M .Sanders, "Internal Conflict of Laws in Swaziland" 19(1) *CILSA* (1986), p. 123.

46 Section 7 of Bogosi Act [Cap.41:01] Laws of Botswana.

47 *Dikgosi* is a Setswana noun for Kings, Paramount Chief, Headmen, and heads of villages and/or wards depending of the context used.

trained in the law with necessary technical skills to preside over trials both civil and criminal in a consistent and fair manner.

This anomaly was judicially noted by the High Court of Swaziland which its legal system is similar to a large extent with that of Botswana, Nathan CJ (as he was then) *Fix Gama v R* in his dicta stated the qualifications and powers of the presiding officers in Swazi Customary Courts should be defined taking into consideration the impact of their jurisdiction on the rights and liberties of the litigants.[48]

The position which obtained and/or still obtains in Swaziland is in no way different from that which obtains in Botswana. The law and practice of appointing *Dikgosi* has nothing with qualifications in various customary laws across Botswana but has everything to do with being born in a certain family. It is thus submitted that situation alone is evidence of inherent injustice prevalent in customary system of courts. Customary law seems to presuppose that wisdom and/or knowledge of the law and its application is innate, thus inborn in those who deserves to be appointed tradition leaders who automatically becomes judicial officers applying the criminal laws to some extent just as magistrates and judges of superior courts of record.

In relation to the qualification of those presiding over Customary Courts more problematic has been the issue of procedural rights in indigenous courts.[49] The fact that legal representation was not permitted under the rules of such courts exposes their proceedings to attack under those provisions of the Bill of Rights guaranteeing the right to legal representation.[50]

Kirby J (as he was the) in the civil application of *Tirelo v the Attorney General and Another*[51] in which the applicant sought to challenge the constitutionality of the refusal of the Customary Court of Appeal to transfer the civil proceeding before the Customary Court made the following *obiter dictum* in respect to the right to legal representation of an accused person appearing before Customary Courts:

48 1970-6 SLR 462 at 464C-F.

49 B Harris, "Indigenous Law in South Africa- Lessons for Australia" 5 *James Cook University Law Review* (1998), p. 92.

50 Ibid.

51 2008 (2) BLR 38 (HC).

> "In a criminal trial, where there is a qualified constitutional right to legal representation, the interests of the state and those of the accused should be weighed in the balance…However these cases also carry lengthy mandatory gaol sentences, so the liberty of the individual is at stake…In regard to criminal cases, I agree with the applicant's counsel that s 37(1) of the Act provides an escape valve, which permits an accused person to exercise his constitutional right to be represented at his expense by a lawyer of his choice. In those cases I hold that the Customary Court of Appeal is obliged, in exercising its discretion, to accede to the request of an accused person who has briefed a lawyer to have his trial in the Customary Court transferred to a magistrate's court, where he can be legally represented. To refuse to do so will be an improper exercise of discretion and will be reviewable...Where the application for transfer in a criminal trial is for reasons other than the desire for legal representation, the Customary Court of Appeal should weigh all the relevant factors in the interests of justice, and allow or decline the application accordingly; but *where the charge is of a complex nature, or for a serious offence likely to earn imprisonment, it should normally grant the application so as to allow the trial to proceed before a legally qualified judicial officer*."[52]
>
> Italics mine for emphasis**.**

The learned judge's reasoning by necessary implication creates classes of criminal offences; (i) those worthy of legal representation and judgment of a properly legally qualified judicial officer; (ii) those capable of being presided by a lay judicial officer. It is submitted that irrespective of the possible sentence after conviction i.e. imprisonment or fine, the effects of mere criminal conviction

52 2008 (2) BLR 38 (HC) at 53.

on the lives of those unfortunate to be known as convicts can be overreaching and irreversible. In this context, the court in *Bangindawa* held as follows:

> "…Regional authority courts….exercise concurrent jurisdiction with magistrates" courts. This means that these courts have the power to adjudicate on complex statutory and common law matters. In criminal matters they may impose substantially robust prison terms in respect of statutory offences where the penal jurisdiction is not the limited jurisdiction in terms of the statutes….As the substantive law justiciable in such courts is not purely customary law and as the penal provisions applicable to such non-customary substantive law may be quite drastic, the `justification" relied upon for the prohibition against legal representation hardly suffices…"[53]

The important of the right to legal representation cannot be downplayed or sacrificed for administrative expediency that "justice" is dispensed of within a short period of time in Customary Court. Furthermore, it is to a large extent unjustifiable to a judicial officer who is not *legally qualified* to preside in any form of a criminal trial irrespective of the seriousness and/or complexity of the nature of the crime and/or possible resultant sentence.

Irrespective of the seriousness and/or nature of the offence the art and science of rendering a judgment in legal proceedings is the same, so is the penal statutes that the accused is charged under.[54] It is only fair that all the accused persons appear before a legally qualified judicial officer. The South African court in the *Bangindawo* case held that in respect of civil proceedings, it was to be held that there is no constitutional right to legal representation.[55] The court went on further to hold that even the best educated lay people need the assistance of professional legal representation to exercise their right to access to court in a meaningful way.[56] This applies with more force in respect of the vast numbers of uneducated and illiterate people of this country who are subjected to the

53 *Ibid*, at p.276.
54 See generally A.L. Goodhart, "The ratio decidendi of a case" 22(2) *Modern Law Review* (1959). pp. 117-124.
55 Ibid p.277.
56 Ibid p.277.

customary legal system in criminal trials.[57]

The Customary Courts enjoys support and legitimacy from a larger section of the society mainly because they are seen to be an integral element of the culture of Batswana, further that they are easily access and known to dispense of swift justice.[58] In colonial and post-colonial Africa, irrespective of the acceptance of Customary Courts and customary, received legal system has always been seen to be superior to them. Their legality has to conform to a test of acceptance common referred to as the repugnancy clause which shall be briefly be discussed in the next section.

4.2 Repugnancy clause: Supremacy of the General Law over Customary Law

In post democratisation constitutions, the status of customary law in most African jurisdictions is constitutionally protected.[59] However the application of customary law and procedures in a constitutional democracy has to meet the constitutional norms and values. From the inception of colonial rule, customary law was applicable on two conditions: (i) that it was not repugnant to justice, equity, or good morality and; (ii) that it was neither in its terms nor by necessary implication in conflict with any written law.[60] In the context of Botswana, the repugnancy clause is contained in section 2 of the Customary Law Act.[61]

The Botswana Court of Appeal has judicial pronounced on the supremacy of the constitutional provisions over custom in the case *of Attorney-General v. Dow* when Amissah P (as then was) held as follows:

57 Ibid p.277.

58 Section 2 in respect to definition of Customary Law reads as follows: ""customary law" means, in relation to any particular tribe or tribal community, the customary law of that tribe or community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice"; see further R. Kumar "Customary Law and Human Right in Botswana: Accredited Survival of Conflict" 2 *City University of Hong Kong Law Review* (2010), p. 296.

59 M. Ndulo, "African Customary Law, Customs, and Women's Rights" 11(1) *Indiana Journal of Global Legal Studies* (2011), p. 98.

60 Supra at p. 92.

61 [Cap.14:02] Laws of Botswana.

> "…Custom and tradition have never been static. Even then, they have always yielded to express legislation. Custom and tradition must a fortiori, and from what I have already said about the pre-eminence of the Constitution, yield to the Constitution of Botswana. A constitutional guarantee cannot be overridden by custom. Of course, the custom, will as far as possible be read so as to conform to the Constitution. But where this is impossible, it is custom not the Constitution which must go…"[62]

The court confirmed the common law position that in so far as customary law and procedures are inconsistent with the constitution and/or any other written law the Constitution and other statute takes precedence. The doctrine of constitutional supremacy entails that to an extent that any other law including statutory enactments contradict Constitutional provisions, the Constitution takes precedence.[63]

Jurisdiction of Customary Courts is specified and/or defined by the Establishment and Jurisdiction of Customary Courts Order made in terms of section 7(2) and 12(5) of the Customary Courts Act. The equivalence of Customary Courts which are often referred to as urban courts which for all intends and purposes operates under the institutional and regulatory framework of Customary Courts, the only difference being that their leadership is not hereditary based on customary law are found in towns and cities in Botswana. The constitution of Botswana guarantees the right to a fair hearing in any legal proceedings either in civil or criminal matters. It does not create classes of tribunals in which fair trail can be dispensed of. For purposes of this paper, the content of the right to fair trial shall be discussed in the section immediately below.

62 *Attorney General* v *Dow* [1992] BLR 119 at 137.

63 See generally J.F. Mitchell, "Stare Decisis and Constitutional Text" 110(1) *Michigan Law Review* (2011), pp. 2-68.

5 THE RIGHT TO A FAIR TRIAL

5.1 Equality in Criminal Proceedings

Justice is based on respect for the rights of every individual and as such, every government has the duty to guard against the violation of human rights.[64] The suspected wrongdoer on trial is subjected to state power in the process of establishing their guilt or innocence.[65] Therefore, a criminal trial tests the State's commitment to respecting human rights. Trials aim at rendering justice, but when people are subjected to unfair trials, justice cannot be served.[66] The right to fair is a norm of international human right law and also adopted by many countries in their procedural law.[67] Like most countries, Botswana is a party to various International Human rights instruments and has included some of them in its Bill of Rights.[68]

Equality is considered to be of the most fundamental human rights, this right is protected in the Constitution of Botswana.[69] In criminal proceedings, the right to equality also ensures "equality of arms"-it provides that all parties unless distinction is based on law on reasonably justifiable grounds.[70] Its large scope among others covers the right to legal representation which is an important element of guaranteeing fairness of trial.[71] The constitutional right to legal representation differs in contents and scope from one country to another, in some jurisdictions the state is obliged to provide defence counsel to accused persons, while in some the costs for representation are to be borne by the accused. This section discusses the detail and substance of the right to a fair trial with particular focus on the right to legal representation in criminal proceedings

64 F. Kayitare, *Respect of the right to a fair trial in indigenous African Criminal Justice Systems: The case of Rwanda and South Africa* (unpublished LLM dissertation, University of Pretoria, 2004), p.10.

65 *Ibid.*

66 *Ibid.*

67 N. Tiwari, "Fair trial vis-à-vis criminal justice administration: A critical study of Indian criminal justice system" 2(4) *Journal of Law and Conflict Resolution* (2010), p. 66.

68 B.R. Dinokopila and T.E Tladi, "The Constitutionality of judicial corporal punishment in Botswana" 15(3) *University of Botswana Law Journal* (2012), pp. 3-4.

69 *Ibid,* at p.14.

70 J. Zhang, "Fair Trial Rights in ICCPR", 2(4) *Journal of Politics and Law* (2009), p. 39.

71 *Ibid* at p.40.

5.2 The accused right to legal representation

Cole posits that the right to legal representation which is a constitutional enshrined right in Botswana is a fundamental right, perhaps the most important, since with effective legal representation the accused other procedural rights will be ultimately be protected, it is *the right* of all rights.[72] It is critical to note that the right to legal representation which is guaranteed under the constitution has been ousted by the statute establishing Customary Courts in Botswana. Section 32 of the Customary Courts Act[73] bars legal representation in both civil and criminal proceedings, the wording of the statute is as follows:

> "Notwithstanding anything contained in any other law, no advocate or attorney shall have a right of audience-
> *(a)* in any Customary Court; or
> (*b*) In any magistrate's court in any criminal proceedings or in any civil proceedings which fall to be determined by customary law, taken under the provisions of sections 37, 39 and 42 except with the special permission of such court."

In response to this limitation of the accused to defend him/herself with an aid of a properly trained lawyer of his/her choice to match the might of the state which is represented by the Director of Public Prosecutions and/or those acting under his direction, it has been strongly posited that the criminal proceedings in the *Kgotla* violates the accused's fundamental right to legal representation as guaranteed by the Constitution.[74]

Lord Denning MR (he was then) had an occasion to make a judicial pronouncement on the importance of legal representation when he observed as follows:

> "It is not every man who has the ability to defend himself on his own.

72 R.J.V. Cole, "Between judicial enabling and adversarialism: The role of the judicial officer in protecting the unrepresented accused in Botswana in a comparative perspective", 11 *University of Botswana Law Journal* (2010), p. 95.
73 [Cap. 04:05] Laws of Botswana.
74 Otlhogile (note 19) p. 529.

> He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: "you can ask any questions you like;" whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?"[75]

The right to legal representation is meant to ensure the procedural equality to match a standing body of trained prosecutors who are supported by the police.[76] In the context of Customary Courts, prosecutors are police officers who have gained prosecutorial experience over years by appearing in magistrate courts. It is practice in Botswana that due to shortage of skilled personnel some police officers have been authorised by the Director of Public Prosecutors to appear on his behalf. It cannot be discounted that there is a possibility of legally trained police officers to appear on behalf of the state in Customary Courts. However, irrespective of the fact that experience and/or trained prosecutors appear for the state, the right to legal representation in Customary Courts as Boko notes is shockingly non-existent.[77] The Customary Courts Act does not impose obligations on the presiding officers to inform the accused person of their right to legal representation and to make use of the case transfer procedure in terms of section 37.[78] The effect of non-obligatory duty on the presiding officers means that even those accused persons who could afford to engage legal representation at their own costs end up not exercising their rights out of ignorance of their own and/or that of those presiding over Customary Courts.

5.3 Correlation between Customary Courts and imprisonment

Empirical evidence indicates that the overwhelming majority of Botswana's prison population have been sent there by the Customary Courts and the

75 *Pett v Greyhound Racing Association (No.1)* [1968] 2 All E.R. 545, at p. 549.
76 R.J.V. Cole, "The Right to Legal Representation and Equality before the Law in Criminal Proceedings in Botswana" 1 *Stellenbosch Law Review (*2011), p. 94.
77 Boko (note 29) p.458.
78 Boko (note 29 above) p.458.

disparity has been blamed on lack of legal representation.[79] Numerically it is observed that two-thirds of the prisons inmates in the whole country have been sent to prison by Customary Courts, which is a serious concern.[80]

There is growing disquiet amongst sections of the public, the legal community, scholars and international agencies about the variability in the standards observed in customary and general courts in Botswana.[81] Malila in his criminal sociological study observed that Customary Courts punished offences more severely than magistrate's courts and argues further that amongst reasons why Customary Courts" punishments are harsher than those awarded by magistrate's courts was that the two courts appear to have different starting and end points as far as internal relativities regarding scaling of offences were concerned.[82] The justice delivered by the traditional courts is not wholesome due to absence of legal representation.[83]

The above points out that there exist a position relationship between the absence of legal representation in trials conducted in Customary Courts and the rate of imprisonment. It is submitted that this indicates to the absence of equal protection of the law between the tribesmen who are subject to the jurisdiction of Customary Courts and those who are tried by the general courts. A conclusion can be drawn that likelihood of conviction by a Customary Court is higher in comparison to other courts with criminal jurisdiction in Botswana.

5.4 Use judicial precedents and fairness in a common law system

As in Britain and Botswana, discussed below, the common law doctrine of judicial precedent, or stare decisis, enables the judiciary to set precedents that have a quasi-legislative effect.[84]With the passage of time, the system of precedent or stare decisis also provided judiciary, with a medium to develop our

79 Otlhogile (note 15 above) at p.531.

80 See generally Boko (note 26 above) and Otlhogile (note 15 above).

81 I.S. Malila, "Severity of multiple punishments deployed by magistrate and Customary Courts against common offences in Botswana: A comparative analysis", (2012) 7(2) *International Journal of Criminal Justice Sciences*, p. 631.

82 *Ibid*.

83 See generally Boko, op cit note 29.

84 C.M. Fombad "The Separation of Powers and Constitutionalism in Africa: The Case of Botswana" 25 (2) *Boston College Third World Law Journal* (2005), p. 312.

system of uncodified common law.[85] The judicial function of legal interpretation and application has a quasi-legislative effect, creating precedents that must be followed in subsequent cases with similar facts.[86] This principle is succinctly summed up as below by the Roman-Dutch common law courts in South Africa as followed:

> "…In the legal system the calls of justice are paramount. The maintenance of the certainty of the law and of equality before it, the satisfaction of legitimate expectations, entails a general duty of Judges to follow the legal rulings in previous judicial decisions. The individual litigant would feel himself unjustly treated if a past ruling applicable to his case were not followed where the material facts were the same. This authority given to past judgments is called the doctrine of precedent. It enables the citizen, if necessary with the aid of practising lawyers, to plan his private and professional activities with some degree of assurance as to their legal effects; it prevents the dislocation of rights, particularly contractual and proprietary ones, created in the belief of an existing rule of law; it cuts down the prospect of litigation; it keeps the weaker Judge along right and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice, thereby not only securing justice in the instance but also retaining public confidence in the judicial machine through like being dealt with alike. . . . Certainty, predictability, reliability, equality, and uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis."[87]

However, the Customary Courts do not follow the common law traditions of judicial precedents. That is to mean, each decision of a Customary Court in a criminal matter need not follow the previous decisions of the same

85 F.D.J. Band, "The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of The Common Law and the Constitution" 126(1) *South African Law Journal* (2009), p. 72

86 Fombad (note 71) at p.338

87 Per Kriegler J in *Ex Parte Minister of Safety and Security and Others: In re S* v *Walters and Another* 2002 (4) SA 613 (CC) at 644.

court, or courts higher than the trial court. The situation creates room for inconsistency and unpredictability of the decision of Customary Courts. On the other hand, an accused person charged with the same offence as with his/her compatriot appearing before the magistrate court with the assistance of counsel is almost certain of consistency and uniformity of the outcome of his/her trial with the previous ones before the courts of Botswana.

The criminal jurisdiction of Customary Courts which does not follow common law traditions is uncertainty, unpredictable, unreliable and not uniform in a way that it arrives at its decisions. This might explain the high number of criminal convictions and imprisonment of those who appear before it in comparison with general law court. In light of that, a question arises as to which has supremacy between the constitutionally enshrined rights of the criminal accused or the Customary Courts Act which takes away the right to legal representation.

5.5 Hierarchy of laws: Customary Courts Act and the Constitution

Fundamental rights are conferred on the basis that, irrespective of the government's nature or predilections, the individual should be able to assert his rights and freedoms without reliance on its goodwill or courtesy.[88] It is protection against possible tyranny, oppression or deprivations of same or similar rights.[89] A fundamental right or freedom once conferred by the Constitution can only be taken away or circumscribed by an express and unambiguous statement in that Constitution or by a valid amendment of it.[90] The question of constitutionality of the Act arises due to the very irregular situation in which an ordinary statute passed by parliament effectively amends the Constitution by removing the right to legal representation to accused person appearing before Customary Courts.[91] The said section as stated above article provides that notwithstanding anything contained in any other law no legal practitioner shall have audience in Customary Courts. The prohibition of legal representation results in a situation where the Constitution is subordinate to a

88 Op cit, note 42 at p.148
89 *Ibid.*
90 *Ibid.*
91 See section 32 of the Act.

non-constitutional legislative enactment contradicts the hierarchy of sources of laws in Botswana.

The seminal judgment of *Attorney General* v *Dow* clarified the position of the Constitution vis-à-vis other laws when it held that it is impossible to consider a Constitution of this nature on the same footing as any other legislation.[92]

In light of the foregoing it is submitted that section 32 of the Customary Courts Act is *ultra vires* the Constitution of Botswana in that is seeks to amend and/or interfere with the fundamental human rights enshrined therein. It is further submitted that the offending section is liable for invalidation by the High Court to an extent of its unconstitutionality.

The argument that customary law and/or its institutions are constitutionally empowered by section 15 of the Constitution[93] to operate side by side the even if they are discriminatory and *prima facie* unconstitutional and therefore unchallengeable is unsustainable.[94] The position that discrimination arising from customary law practices was rejected by the in *Edith Mmusi & Others v Molefhi Ramantele & Others*[95]in which a customary practice that violates the Constitutional right to equal protection of the law was successfully challenged.[96]The decision on *Kgafela & Others v The State*[97] which the court determined the question whether customary practises are above the Constitution and therefore the appellants entitled to flock people in terms of Sekgatla customary law, an argument which is often referred in literature as "*cultural defence"*[98]. These judgements confirm that indeed the Constitution reigns supreme all other law in Botswana, therefore all other laws have to conform to the country's constitutional principles and values.

The legal framework denying legal representation in Customary Courts

92 Op cit, note 42 at p.123.

93 [Cap.01] Laws of Botswana.

94 O. Koboyankwe, "*Legal Pluralism and Discriminatory Application of Progressive Laws to Women Subject to Customary Law in Botswana"* (unpublished LLM dissertation, Loyola University, 2014) at p.12.

95 Case No MAHLB-000836-10 (unreported) at paragraph 70 where is was held that "…no member of society should be made to feel that they are not deserving of equal concern, respect and consideration and that the law is likely to be used against them more harshly than others who belong to other groups…."

96 See generally Dinokopila and Tladi (note 48 above).

97 CHLB-000148-10 (unreported).

98 See generally T.W. Bennet, "The cultural defence and the custom of *Thwala* in South African Law" 10 *University of Botswana Law Journal* (2010), pp. 3-26.

is *ex facie* unconstitutional in that it violates the rights to fair trial and equal protection of the law. It is on this basis that this article submits and argues for the abolition of Customary Court's criminal jurisdiction. The abolition will not only gives the accused person access to legal representation, but will also ensure that everyone accused of having committed a criminal offence in Botswana is tried by a trained presiding officer. The current set-up in which there are different standards of justice for different people who committed similar offence is unfair and unjust. It is on those grounds that I submit that the criminal jurisdiction of the Customary Courts be abolished.

6. CONCLUSION

The holding in *Bangindawo and Others*[99] to an extent applicable to similar provisions of Botswana Constitution which grants fundamental right to legal representation in criminal proceedings which right is purported to be ousted by provisions of the Customary Courts Act, the purported ousting cannot be reasonably ousted in a constitutional democracy. In *casu,* the court invalidated the statutory provision which denied legal representation to persons appearing before indigenous courts, holding that this infringed the right to access to the court and to a fair trial contained in sections 22 and 25(3) of the Interim Constitution of South Africa[100].[101] Harris notes that the decision in *Bangindawo* is important in that it indicates a promising avenue for the reconciliation of indigenous law and the Bill of Rights - preserving the essence of indigenous institutions while ensuring that those subject to their authority enjoy fundamental rights.[102] The same remains true for Botswana, hope still remains to ensure equality of all accused persons by subjecting them to the same procedural standards.

99 Supra.
100 Supra.
101 Harris, note 39 above at p. 92.
102 *Ibid.*

It is further submitted that this particular section of the Customary Courts Act which bars appearance of legal representatives in Customary Courts takes away the constitutional right of legal representation of accused person. *Prima facie* section 10 of the Constitution of Botswana satisfies the Latin maxim *audi alteram partem* rule, but when critically analysed one would realise that it gives the accused persons a right with one hand and at the same right is taken away in case of tribesmen whom the Customary Courts have jurisdiction over.

Imagine a scenario where two people accused of the same crime, the one being a foreigner or an educated tribesman who insisted transfer of his criminal case from the Customary Court in terms of section 37 of the Customary Court Act" and the other poor and/or ignorant illiterate black African, former end up being acquitted and the poor black fellow convicted of that offence simply because the other was well-represented in court while the other could not have a lawyer to defend him, can that said to be fair and just? The answer is a resounding no.

Customary law (and African culture) held sway in the sphere of domestic relationships, but, in the public realm, colonial laws and values were to provide uniform standards for everyone in the state. Hence, little or no attempt was made to accommodate African culture in the criminal justice system.[103]Brewer posits that the original intention during colonial era was that the criminal law to be administered by the Customary Courts was not the Cape Colonial law introduced in 1891 but rather the unwritten customary law.[104] That position fell away with the introduction of the Penal Code which outlawed the application of unwritten criminal offences, and also to avoid a system which resulted in the application of the criminal law by two separate systems of courts.[105]

The article argues that irrespective of the fact that the prohibition of legal representation in Customary Courts and/or other courts where the subject

103 T.W. Bennet, "The cultural defence and the custom of *Thwala* in South African law" 10 *University of Botswana Law Journal* (2010), p. 6.

104 Brewer (note 20 above) at p.34.

105 *Ibid*.

matter is customary law, such prohibition falls foul of the doctrine of equality before the law and violates the right to fair trial provided for under section 10 of the Constitution. The only solution it is argued in this article is to take a drastic action, which is the only necessary evil in the reformation of the criminal justice system. There is no objective and reasonable justification for an anomaly which resulted by the promulgation of the Customary Courts Act creation of two parallel and different criminal justice system in Botswana. The inevitable consequence of the abolition of the criminal jurisdiction of Customary Courts is the "limping" duality of the legal system in favour of more liberal and progressive administration of justice which protects the fundamental rights of everyone appearing in the courts of Botswana irrespective of their race, race and/or tribe. It need not be emphasised that being accused with a criminal offence means there is possible loss of freedom of the accused person, and most likelihood of losing such liberty by merely being adjudged by a traditional leader presiding over a Customary Court.