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THE IMPROVEMENT OF THE TREATMENT OF OFFENDERS THROUGH THE ENHANCEMENT OF COMMUNITY-BASED ALTERNATIVES TO INCARCERATION

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I. INTRODUCTION

The states of Africa are diverse and multifarious; they are sovereign independent states in their own right, with differing histories, cultures, traditions, languages and institutions. However, for all their diversity they do share some commonalities; i.e. the international conventions and agreements to which all or most of them are party and existence of their respective criminal justice systems. In spite of this, commentators have pointed out that the concept of prisons is an alien model and a form of punishment unknown to most societies of pre-colonial Africa in dealing with offenders (Moroka 2008, Mujuzi 2008).

II. BOTSWANA'S PRE-COLONIAL JUSTICE SYSTEM

In Botswana the traditional/indigenous criminal system focused on "reclaiming" the offender from the crime, and the punishment was meant to fit the offence. Moroka points out that at the core of the system was an obligation to "restore the victim and undo the harm done" without condemning the offender to permanent criminal being. The author further states that punishment aimed at "taking the offence out of the offender and not the offender out of society" (4: 2008). The indigenous criminal code was made of two classes: *Crimina in se* i.e. murder, rape, theft, robbery etc. and *crimina prohibita* i.e. hunting outside the hunting season, starting bush fires, ploughing or harvesting out of season, adultery, disrespect for elders, etc.

Offenders were tried at the main community or *Kgotla*. The family, immediate clan and the community at large all had a role to play in dealing with deviant and offensive behaviour that threatened social order. Their participation in the proceedings was crucial in that the offender was given the opportunity to make restitution and the victim would be able to request the type of restorative punishment he or she believed served adequate justice. Moroka maintains that only after several attempts by the community to restore order by employing corrective action would an offender be banished from the community – this would be a last resort where an offender did not attempt to mend her/his ways (2008). There were no institutionalized forms of punishment.

III. THE DUAL LEGAL SYSTEM IN BOTSWANA

During the British colonial era, African Customary law and the Roman-Dutch law 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 a "repugnancy clause", i.e. for as long as the Customary Law was not an offence to the colonial administration it was allowed to exist. However, in due course the "received" law became territorial: where the indigenous people broke the settlers' rules, they were governed in accordance to the settlers' laws. This resulted in the *Kgosi* (chief) losing jurisdiction of most criminal and civil matters; the *Kgosi* would mainly preside over all family law matters that involved the indigenous populations or criminal matters between tribesmen. In 1964 the Penal Code came into existence as the set standard to establish a code of criminal law. Significantly, none of the indigenous communities were consulted regarding its conception; i.e. it was "accordingly imposed." One reason for this status quo could have been that Traditional/Customary law was not written. It was encoded in the psyche of the people and passed down by oral tradition. Moroka (2008) asserts that S.10 (8) of the

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Constitution “drove the last nail” into the dignity of the Customary Law by stating: “No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law: Provided that nothing in this subsection shall prevent a court of record from punishing any person for contempt of itself notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty therefor is not so prescribed.”

And thus the way was paved for the current dual legal system as it exists at present in Botswana.

In Botswana the Customary Courts are established under an act of Parliament. Customary Law according to this means: in relation to any particular tribe or tribal community, the customary law of that tribe or tribal community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice. Customary courts have powers to sentence people to imprisonment, and in the exercise of the provision may be guided by the Penal Code of Botswana. Section 18 of the Customary Courts Act provides for the sentences that may be administered and also provides for imprisonment in S. 23. (Refer to Appendix C). The Customary Courts also impose suspended sentences; impose fines and order compensation.

In reference to what has been stated above; it has been asserted that the State became the fundamental player in prosecuting criminal cases; while the role of the communities dwindled. As communities were pushed further and further to the periphery, the fight against crime became the responsibility of the police. Furthermore, *di-Kgosi*¹ who normally preside over cases in the customary courts had to interpret complex statutory law in which they had no training.

In administering criminal justice, the Magistrates Courts also sentence people to imprisonment in accordance with the provisions of S. 60 of the Magistrates Courts Act. Sentences may be suspended according to the discretion of the presiding magistrate. The High Court of Botswana has appellate jurisdiction from any decision of the Magistrate Court and Customary Courts in Botswana; and has power to confirm or amend or set aside any judgment, decision or order and also to impose such punishment whether more or less severe than the court of the first instance. In terms of the law the High Court also has jurisdiction in certain crimes, such as treason and murder, and may impose appropriate sentences accordingly. The Court of Appeal is also established under the provisions of Cap. 04:01 of the Laws of the Republic of Botswana. In terms of S. 7 of the Act, the Court of Appeal shall have, in addition to any other power, authority or jurisdiction conferred by the Act or the Constitution, the power and jurisdiction vested in the High Court. On appeal against conviction the Court of Appeal may set aside a conviction on grounds that it is unreasonable or may quash the conviction (S. 13).

The Prisons Service is the custodian of all the offenders sent by the above-mentioned courts.

IV. THE PROBLEMS OF IMPRISONMENT

The aims of incarceration are retribution, deterrence, protection of the society (i.e. by incarceration), and rehabilitation of the offender. In Botswana, imprisonment is a form of punishment that derives its legitimacy from the Constitution. Section 5 (1) states: “No person shall be deprived of his or her personal liberties save as may be authorized by law in any of the following cases, that is to say (a) in execution of the sentence or order of a court, whether established for Botswana or some other country, in respect of a criminal offence of which he or she has been convicted”.

However, imprisonment as a preferred method of punishment has a number of disadvantages that have an effect on the offender, family, community and national policy. These disadvantages include the following:

- Stigmatization and humiliation of the offender; resulting in prospects that the offender may never regain her or his self-respect and dignity within the community.
- Creation of an environment where offenders “forget” those they have harmed and regard themselves as victims; this in turn creates a sense of bitterness and this builds a culture of vengeance.

¹ *Kgosi* means Chief/ Community Tribal Leader. *Di-Kgosi* is the plural of *Kgosi*.

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- The desire to avenge often leads to further crime, after the offender has been released.
- Since the majority of offenders are adults, imprisonment robs families of the presence and support of key family members and often leaves children without adequate support and parental guidance.
- Imprisonment never takes the interests and the concerns of the offender into consideration.
- Lack of juvenile prison facilities in Botswana results in young people being incarcerated with older “hardened” offenders who pass on their wilful and unruly behaviour to these young and impressionable people. Thus the cycle of crime continues.
- Maintaining offenders in prisons is costly and diverts valuable resources that can be used for other national development projects.

In essence, imprisonment appears not to solve problems, it seems to cause more problems. It fails to achieve deterrence and reform.

V. THE BOTSWANA PRISONS ACT – CAP 21:03

Under the provisions of S.97 of the Prisons Act, courts may order extra-mural labour for offenders. With consent, the offender may be employed under the immediate control and supervision of the public authority on public work or service outside prison. Officers-in-charge have the ultimate control of offenders doing extra-mural labour. The Commissioner of Prisons or an official visitor may also order extra-mural labour for offenders. The disadvantage of ordering extra-mural labour for offenders in Botswana is that it is only available to offenders who have been sentenced to a term of imprisonment not exceeding 12 months. It would be of great assistance to alternative sentencing if the condition of sentencing exceeds 12 months to include a longer period, depending on the gravity of the offence.

VI. JUVENILE JUSTICE SYSTEM

The Juvenile Courts are governed by Sections 22 to 33 of the Children’s Act – Cap 28: 04. A magistrate’s court or customary court may sit for the purpose of hearing a charge against a juvenile (S. 22 (1) a). Section 22 (2) of the Act further states that: “A juvenile court shall not have jurisdiction to hear and determine any charge against any person other than those persons who are between the ages of seven years and 18 years”.

Section 28 of the Act provides that where a child or juvenile is found guilty of an offence the following may be considered:

- (a) dismissing the charge;
- (b) discharging the offender on his entering into a recognizance;
- (c) placing the offender on probation for a period of not less than six months or more than three years;
- (d) sending the offender to a school of industries for a period not exceeding three years or until he attains the age of 21 years; or
- (e) ordering the parent or guardian of the offender to pay a fine, damages or costs.

The Minister of Labour and Home Affairs may establish and maintain shelters for juveniles who have been charged with offences and are waiting to appear before the Juvenile Court. Currently there is a school of Industry that has the capacity to shelter 100 male juvenile offenders. However, there are no facilities for juvenile female offenders, who are currently sheltered with the general female adult prison population.

A. Current Types of Introduced Community-Based Alternatives to Incarceration in Botswana

TYPE OF SENTENCE	DESCRIPTION	ADVANTAGES	DISADVANTAGES	COMMENTS
Extra Mural Labour	Supervised unpaid public work/service carried on outside the prison for not more than 8 hours by an offender whose sentence is not more than 12 months. Or where an offender has to pay a fine not exceeding P800.	* The offender can partake in the decision of whether or not to consent to extra-mural labour. * Offender re-pays debt to society.	* The final decision is taken following an assessment by the parole board – (the decision can be subjective). * Prison officers may be short-staffed with regard to supervising offenders sentenced to extra mural labour.	See Prisons Act Cap 21:03 S.97 – 104.
Corporal Punishment	Caning with a cane approved by the court. The number of caning strokes do not exceed 12 and not more than six for an offender under the age of 18.	The offender re-pays debt to society.	* Only male offenders under the age of 40 are sentenced in this manner. * It is agonizing, both physically and emotionally.	See Penal Code Cap 08:01 S.28 and The Criminal Procedures & Evidence Act Cap 08:02 - S.305
Fines	The offender may be requested to pay a fine in lieu of imprisonment at the discretion of the court.	This can be combined with compensation to the injured party or restitution of the injured party's stolen property.	The offender may not be able to pay the requested amount of money to pay the fine; due to financial constraints. Where the offender is of a high socio-economic status he or she may be under the mistaken believe that he or she can manipulate the justice system to his or her advantage.	See Penal Code Cap 08:01 S.29 and The Criminal Procedures & Evidence Act Cap 08:02 - S.316 & S.318
Discharge without punishment	The offender's charges are dismissed at the discretion of the court following the consideration of the character, antecedents, age, health or mental condition of the accused; or the trivial nature of the offence or the extenuating circumstances in which the offence was committed.	The offender is given the opportunity to redeem him or herself.	The offender may repeat the offence especially where his or her environment contributed to his or her offence.	See Penal Code Cap 08:01 S.32
Discharged into the care of an appointed custodian	An offender who is under the age of 18 is released into the care of a designated suitable person for a specific period. This may be combined with corporal punishment.	The offender receives support & guidance from those close to him or her; and can be counselled formally by the relevant professionals.	The offender may repeat the offence especially where his or her environment contributed to his or her offence.	See The Criminal Procedures & Evidence Act Cap 08:02 - S.304

VII. AUTHORITIES AND AGENCIES WITH COMPETENCE FOR INVESTIGATION OF OFFENDERS

A. The Botswana Police Service

The Botswana Police Service is established by an Act of Parliament – the Police Act Cap 21:01 of 1979. With regard to the general powers and duties of a police officer, S. 6(1) and S. 16(5) of the Police Act states that: “It shall be the duty of every police officer at all times to protect life and property, prevent and detect crime, repress internal disturbance, maintain security and public tranquillity, *apprehend offenders, bring offenders to justice, enforce all written laws* with which the Service is directly charged and generally maintain the peace.”

The main challenge facing the Botswana Police Service is the shortage of qualified personnel to interpret the complex statutory law; this can result in poor quality investigations.

B. The Botswana Local Police

The Botswana Local Police Service is also established by an Act of Parliament – the Local Police Act Cap 21:04 of 1972. With regard to the general powers and duties of a local police officer, S. 8(c) of the Local Police Act states that a Local Police Officer shall: “preserve the public peace, prevent the commission of offences and *apprehend all persons in respect of whom he holds a valid warrant of arrest.*”

Furthermore, S.9 states that a Local Police Officer: “shall at all times co-operate with the Botswana Police Force and shall, if the President so directs in writing, be subject to the Orders of the Commissioner of Police.”

This gives Local Police the power to in effect operate in the same manner as Botswana Police Officers. However, the main challenge facing the Botswana Local Police Service is the shortage of qualified personnel who are able to interpret the complex statutory law; this can result in poor quality investigations.

C. The Directorate of Corruption and Economic Crime

The Directorate of Corruption and Economic Crime (DCEC) is established by an Act of Parliament – the Corruption and Economic Crime Cap 08:05 of 1994. With regard to the general powers of the Directorate, S.6 (a. – d.):

The functions of the Directorate shall be

- (a) to receive and investigate any complaints alleging corruption in any public body;
- (b) to investigate any alleged or suspected offences under this Act, or any other offence disclosed during such an investigation;
- (c) to investigate any alleged or suspected contravention of any of the provisions of the fiscal and revenue laws of the country;
- (d) to investigate any conduct of any person, which in the opinion of the Director, may be connected with or conducive to corruption

The main challenge facing the DCEC is potential for corruption within the organization; this can result in poor quality investigations.

D. Customs and Immigration

The Customs sector investigates issues of customs, i.e. the regulation of exportation and importation of goods. Immigration investigates issues pertaining to the regulation of the movement of individuals crossing Botswana's borders.

VIII. AUTHORITIES AND AGENCIES THAT HAVE COMPETENCE FOR THE PROSECUTION OF OFFENDERS

The Directorate of Public Prosecutions (DPP) is headed by the Director of Public Prosecutions appointed in terms of Section 51A of the Constitution. Section 51A (3 - 4) states that: “The Director of Public Prosecutions shall have power in any case in which he or she considers it desirable -(a) to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of

any offence alleged to have been committed by that person; (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and (c) to discontinue, at any stage before judgment is delivered, any such criminal proceedings instituted or undertaken by himself or herself or any other person or authority.”

In relation to this, Section 51A (4) states that: “The powers of the Director of Public Prosecutions under subsection (3) may be exercised by him or her in person or by officers subordinate to him or her acting in accordance with his or her general or special authority.”

The primary mandate of DPP is the prosecution of criminal cases before all courts of the land and criminal applications and appeals arising from criminal litigation.

Prior to 1 October 2005, there was no Directorate of Public Prosecutions and prosecutorial functions were vested squarely and exclusively in the Attorney General. The 1 October 2005 saw the coming into effect of the Constitution (Amendment) Act No. 9 of 2005, which provided for the appointment of a Director of Public Prosecutions with an entrenched tenure of office and constitutional protection.

Parallel to the Constitution (Amendment) Act came into effect the Constitution (Amendment) Consequential Provisions Act No: 14 of 2005, covering at least 30 statutes dealing with criminal prosecution. In terms of the Constitution Amendment Act, in carrying out his or her professional mandate, the Director of Public Prosecutions shall not be under the control or direction of any person, a position consistent with international best practice.

A. Primary Statutes

The primary penal statutes used by the Directorate in criminal prosecution are the Penal Code Cap 8:01 of 1964 and the Criminal Procedure and Evidence Act Cap 8:02 of 1939, which give guidance on general matters of procedure in criminal litigation. However, the prosecutorial mandate extends broadly to all such other legislation as creates penal offences, except where statute provides for trial by court martial. In the prosecution of the Director’s mandate the Director is constitutionally obligated to consult with the Attorney General on matters considered by the latter to be of national importance. The final decision on whom and whether or not to prosecute remains that of the DPP.

However the Director remains under the administrative supervision of the Attorney General (AG) for institutional accountability.

IX. AUTHORITIES AND AGENCIES THAT HAVE COMPETENCE FOR THE ADJUDICATION OF OFFENDERS

Please refer to Part III “THE DUAL LEGAL SYSTEM IN BOTSWANA” (above).

X. TYPES OF TREATMENTS DESIGNATED AND IMPLEMENTED FOR OFFENDERS IN BOTSWANA

The Penal Code came into existence in 1964; it is an Act to establish the code of criminal law. Under Ss. 25 – 33, the Penal Code defines² different punishments as follows: “The following punishments may be inflicted by a court - (a) Death; (b) Imprisonment; (c) Corporal punishment; (d) Fine; (e) Forfeiture; (f) Finding security to keep the peace and be of good behaviour or to come up for judgment; (g) Any other punishment provided by this Code or by any other law.”

XI. CHALLENGES WITHIN THE CRIMINAL JUSTICE SYSTEM IN BOTSWANA

As part of the preparation of compiling this report I interviewed colleagues and people who either worked directly with offenders or within the criminal justice sector. The objective was to obtain their

² Please refer to Appendix A for a description of the above-mentioned punishments in accordance of the Penal Code Ss. 26 -33. Please refer to Appendix B for a description of the above-mentioned punishments in accordance of the criminal procedures and Evidence Act Ss. 298 -315.

views on the current system and to determine their appreciation of community-based alternatives to imprisonment. These officers included:

- Senior Prison Officers
- A Senior Police Officer
- A Chief Magistrate
- A *Kgosi* who presides in the Customary Courts
- The Deputy Director of Tribal Administration
- The Principal of the Ikago School of Industry (who is a professional social worker).

A. Senior Prison Officers

The Prison Officers presented a picture of an effective but under-staffed and under-resourced environment.

- Emphasis was on rehabilitation of offenders. Through the assistance of, and assessment by, the Employment Allocation Committee (EAC) comprising of a team Rehabilitation Officers, offenders are offered employment and skills development while incarcerated. They are employed in areas of agriculture and industry (e.g. welding). However, only a certain number of offenders can be employed because there are more offenders than there are jobs; and the waiting list is long.
- All offenders are treated humanely in accordance with the Prisons Act – Cap 21:03; even where offenders are problematic they are still treated humanely.
- The most familiar alternative to incarceration facilitated by the prison system is extra-mural labour. The offender is supervised by prison officials and is provided with meals in the form of a dried-food ration on a weekly basis. The extra-mural labour is ordered either by the Commissioner of Prisons, a magistrate or any of the courts.

Nelson (2008) asserts that the prison system environment worldwide is isolated and is removed from public attention. This suggests that the environment that prisons operate in, and the challenges faced by prison administrators, are both misunderstood. The author states that:

“The role that they perform is neither obvious nor easily explained to the political leaders and the general public prisons are most often ignored in discussions of mainstream legal and criminal justice matters and reform initiatives; furthermore, they are not considered a priority for funding in comparison to other social and economic challenges that governments face. The absence of increased funding for other criminal justice reforms, such as harsher and longer prison terms for certain offences and significant limitations on the use of non-custodial measures, have significantly impacted on the number of persons incarcerated. While the number of offenders continues to grow in prisons; prison administrators are simply expected to manage.” (Power point pres. 2008)

This observation summarizes my contact with the Botswana Prison Officers; on explaining the purpose for the exercise I was conducting, they were very polite and really wanted to assist but I felt that they withheld vital information. They stated that they were bound by confidentiality; despite that fact I explained that I would treat all information as confidential and would not disclose names or locations. This poses a serious problem because I found out that even attorneys or members of the general populace relied on hearsay from the media, or NGOs who monitor incarcerated offenders' welfare. For example, AIDS NGOs have pointed out that the issue of HIV and AIDS affects the prison population as much as it does the general public; as a result, male offenders should be provided with HIV/AIDS prevention education and condoms because it transpires that male prisoners have unprotected sex with other men (MSM) and this can only exacerbate the spread of HIV and AIDS. This was an issue that is not discussed openly by prison officials.

B. Senior Police Officer

The police officer (who was also a prosecutor) was aware of the current alternatives to imprisonment in Botswana, but felt that the stumbling block within the criminal justice system was the “mandatory minimum sentence” which required sentencing officers to consider incarceration as a first option. Furthermore, he believed that the victim was never adequately considered, focus was mainly on the offender. He believed

that the answer for a solution lay in “a robust public education [*campaign*] on non-imprisonment alternatives to sentencing.”

C. Chief Magistrate

The Chief Magistrate asserts that: crime violates the relationship between the offender, the victim, his or her next of kin and the greater community. It is these relationships that need to be mended if order and peace are to prevail in any society. The answer lies in restorative justice; therefore:

- There is urgent need to review our laws to make our criminal justice system less offender-focused and more victim-focused;
- There is also need to involve the greater community more directly in the criminal process;
- A reparative model of criminal justice is needed which focuses on reparation to the victim by the offender;
- There is need to urgently review the role of customary courts to make them part of the solution and not a part of the problem.

The Chief Magistrate believes that the fragmentation of Botswana’s criminal justice system has contributed to the status quo.

D. Kgosi and Deputy Director Tribal Administration (Customary Courts)

As stated previously; customary courts have powers to sentence people to imprisonment and in the exercise of the provision may be guided by the Penal Code of Botswana. Section 18 of Customary Courts Act provides for the sentences that maybe administered and also provides for imprisonment in Section 23. The Customary Courts also impose suspended sentences, impose fines and order compensation. However, *di-Kgosi** who normally preside over cases in the customary courts have problems in interpreting the complex statutory law in which they have no training. The Deputy Director – Tribal Administration stated that this has resulted in a 70% backlog of cases waiting to be tried at the Customary Court of Appeal. The Deputy Director also stated that the powerlessness of the Customary Courts was also due to the fact that there was little or no collaboration between the Customary Courts and the Administration of Justice Division.

The *Kgosi* expressed concern over “excessive” modernization which has resulted in disorderliness in communities, especially among young people. The *Kgosi* believed that building on a justice system that starts in *di-kgotlana* (village wards), i.e. adults guiding each other and young people, would assist in cutting down on crime. Major cases would be the ones tried at the main *Kgotla* under Customary Law.

Regarding corporal punishment being regarded as “degrading and inhumane” (refer to *Petrus and Another v State. 1984*; as well as *Desai & Others v State. 1987* - Botswana Law reports); the *Kgosi* stated that communities believe it to be a just punishment.

Ultimately, the main challenges facing the Customary Courts are lack of capacity building of the sentencing officers and an inadequate relationship with the mainstream justice system.

E. Principal – Ikago Centre: School of Industry

Ikago Centre, the only school of industry in Botswana, is situated about 50km from the capital city Gaborone. It was established in 2001 to shelter male juveniles charged with horrific crimes ranging from murder to rape to robbery. The Centre has the capacity to house 100 juveniles aged 14 to 18 years. At the time of compiling this report there were 30 male juveniles accommodated there. Ikago does not have facilities for female juveniles. The staff complement is 46. Twenty-two are professional officers and 14 are auxiliary members of staff.

1. Daily Routine

Though the daily routine is fairly structured, the residents at the Centre are reluctant to wear uniforms because of perceived stigma (on their part) by members of the community; therefore it is not compulsory. The daily routine is as follows:

- The day commences at 06:00
- Breakfast – 06:30

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- Assembly – 07:30 (Gives the staff and boys the opportunity to start the day together. Morning talk emphasizes motivation and development of life-skills.)
- The workday begins – 08:30
- Lunch – 12:30 to 14:00

Monday, Wednesday and Friday are Workshop Education days. The Centre residents are taught a number of practical vocational skills which include auto-mechanics, welding, woodwork, etc.

Tuesday and Thursday are mentoring and social skills development days. Led by the social workers and the school nurse, activities include: psychosocial therapy, individual counselling and healthcare education. On alternative Tuesdays and Thursdays the Centre residents work in the community under the supervision of the social workers and the Centre's technical staff.

There is an entertainment hall where the residents can play snooker or watch satellite TV. The Centre also boasts a *marimba* band and the residents are being encouraged to form a traditional dance ensemble.

2. Challenges in Effective Functioning of Ikago Centre

The Principal at the Centre draws attention to the issues that hampered effective functioning of the Centre. These included:

- Unless the Centre administration makes an effort to establish linkages with magistrates in the various jurisdictions, there is no formal linkage between the Centre and the justice system. As a result, many juveniles are sent to the Boy's Prison where they ultimately associate with people hardened by crime.
- It appears that the Centre was established on the spur of the moment and as result it is "a white elephant" that breeds juvenile criminals and does not rehabilitate them. The Centre is not "categorized" as a prison, school or reformatory. The name "School of Industry" is redundant.
- Rehabilitation is only emphasized in the written word, not practically, because the staff members are not qualified in this area. There are occasions where the members of staff have failed as role-models.
- Due to being under-staffed and lack of training, the members of staff are employed on a 07:30 – 16:30 basis, going home at the end of the day. As a result, the Centre residents are left to their own wilful ways during the night under the supervision of security guards hired from an external security company.
- Security is lax. The Centre's boundaries are marked by a high fence with barbed wire on the top to create a "normal" environment as well as to deter the residents from leaving the premises. However, the residents cut through the fence at night to leave the Centre to "entertain" themselves out in the community and engage in disorderly behaviour until the early hours of the morning.
- Due to lack of staff qualified in the area of rehabilitation and due the extreme anger of some of the Centre's residents, vandalism of the Centre's property is commonplace.

In conclusion, the purpose for having Ikago as a juvenile rehabilitation facility is defeated because it has a poor resource base and lacks qualified members of staff ensure its efficient functioning.

Lastly, as a professional working in Botswana's justice system, I would like to draw attention to the fact that, in my experience, the main down-fall of our sentencing systems at present is lack of physical infrastructure, lack of financial resources and lack of human resources to ensure an efficient and effective system.

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APPENDIX A

THE PENAL CODE Cap 08:01

PART I

General Provisions (ss 1-33)

Punishments (ss 25-33)

26. Sentence of death

(1) When any person is sentenced to death, the sentence shall direct that he shall be hanged by the neck until he is dead.

(2) Sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of 18 years, but in lieu thereof the court shall sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody.

(3) Where a woman convicted of an offence punishable with death is found in accordance with the provisions of section 298 of the Criminal Procedure and Evidence Act to be pregnant, she shall be liable to imprisonment for life and not to sentence of death.

27. Imprisonment

(1) Sentence of imprisonment shall not be passed on any person under the age of 14 years.

(2) A person convicted of an offence punishable with imprisonment for life or any other period may be sentenced for any shorter term.

(3) A person convicted of an offence punishable with imprisonment may be sentenced to pay a fine in addition to or instead of imprisonment.

(4) Notwithstanding any provision in any enactment which provides for the imposition of a statutory minimum period of imprisonment upon a person convicted of an offence, a court may, where there are exceptional extenuating circumstances which would render the imposition of the statutory minimum period of imprisonment totally inappropriate, impose a lesser and appropriate penalty.

28. Corporal punishment

(1) Subject to the provisions of subsection (4), no person shall be sentenced to undergo corporal punishment for any offence unless such punishment is specifically authorized by this Code or any other law.

(2) A sentence of corporal punishment shall be inflicted once only. The sentence shall specify the number of strokes, which shall not exceed 12, nor, in the case of a person under the age of 18 years, six.

(3) No sentence of corporal punishment shall be passed upon any of the following persons-

(a) females;

(b) males sentenced to death;

(c) males whom the court considers to be more than 40 years of age.

(4) Where any male person under the age of 40 is convicted of any offence punishable with imprisonment, other than an offence listed in the Second Schedule to the Criminal Procedure and Evidence Act, a court may, in its discretion but subject to the provisions of section 27(1), order him to undergo corporal punishment in addition to or in substitution for such imprisonment.

(5) Where it is provided that any person shall be liable to undergo corporal punishment such punishment shall, if awarded, be inflicted in accordance with the provisions of section 305 of the Criminal Procedure and Evidence Act.

29. Fines

(1) Where a fine is imposed under any law, then in the absence of express provisions relating to such fine in such law the following provisions shall apply-

(a) where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive;

(b) in the case of an offence punishable with a fine or a term of imprisonment, the imposition of a fine or imprisonment shall be a matter for the discretion of the court;

(c) in the case of an offence punishable with imprisonment as well as a fine in which the offender is sentenced to a fine with or without imprisonment, and in every case of an offence punishable with a fine only in which the offender is sentenced to a fine, the court passing sentence may, in its discretion-

(i) direct by its sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in addition to any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of sentence; and also

(ii) issue a warrant for the levy of the amount in accordance with the provisions of section 303 of the Criminal Procedure and Evidence Act.

(2) In the absence of express provisions in any law relating thereto, the term of imprisonment or corporal punishment ordered by a court in respect of the non-payment of any sum-

(a) imposed as a fine;

(b) ordered to be forfeit to the State;

(c) ordered to be paid under the provisions of any other law,

shall be such as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale-

Amount of fine Maximum

Not exceeding P200 14 days or 6 strokes

P 200-P1000 One month or 9 strokes

P 1001-P10,000 Six months or 12 strokes

Exceeding P10,000 Two years imprisonment.

30. Forfeiture

The provisions of this Code with respect to the forfeiture of property to the State shall be in addition to and not in derogation from the provisions of sections 58 and 319 of the Criminal Procedure and Evidence Act.

31. Security for keeping the peace or to come up for judgment

(1) A person convicted of an offence not punishable with death may, instead of, or in addition to, any punishment to which he is liable, be ordered to enter into his own recognizance, with or without sureties, in such amount as the court thinks fit, on condition that he shall keep the peace and be of good behaviour for a time to be fixed by the court, and may be ordered to be imprisoned until such recognizance, with sureties, if so directed, is entered into; but so that the imprisonment for not entering into the recognizance shall not extend for longer than one year, and shall not, together with the fixed term of imprisonment, if any, extend for a term longer than the longest term for which he might be sentenced to be imprisoned without fine.

(2) When a person is convicted of any offence not punishable with death the court may, instead of passing sentence, discharge the offender upon his entering into his own recognizance, with or without sureties, in such sum as the court may think fit, on condition that he shall appear to receive judgment at some future sitting of the court or when called upon.

32. Discharge of offender without punishment

(1) Where, in any trial before a magistrate's court, the court thinks that the charge is proved but is of the opinion that, having regard to the character, antecedents, age, health or mental condition of the accused, or to the trivial nature of the offence, or to the extenuating circumstances in which the offence was committed, it is inexpedient to inflict any punishment, the court may, without proceeding to conviction, make an order dismissing the charge.

(2) An order made under this section shall, for the purpose of re-vesting or restoring stolen property, and enabling the court to make any order under the provisions of sections 318 and 319 of the Criminal Procedure and Evidence Act have the like effect as a conviction.

33. General punishment for offences

When in this Code no punishment is specially provided for any offence, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both.

APPENDIX B

THE CRIMINAL PROCEDURE AND EVIDENCE ACT Cap 8:02 PART XVIII

Punishments (ss 298-315)

298. Sentence of death upon a woman who is pregnant

(1) Where a woman convicted of an offence punishable with death alleges that she is pregnant, or where the court before which a woman who is so convicted thinks fit to order, the question whether or not the woman is pregnant shall, before sentence is passed on her, be determined by the court.

(2) The question whether the woman is pregnant or not shall be determined on such evidence as may be led before the court either on the part of the woman or on the part of the State, and the court shall find that the woman is not pregnant unless it is proved affirmatively to its satisfaction that she is pregnant.

(3) Where in any proceedings under this section the court finds that the woman in question is not pregnant, the woman may appeal to the Court of Appeal and the Court of Appeal, if satisfied that for any reason the finding should be set aside, shall quash the sentence passed on her and, in lieu thereof pass on her a sentence of imprisonment for life.

299. Manner of carrying out death sentences

(1) No sentence of death shall be carried into effect except upon the special warrant of the President, to whom a record of all proceedings in the case shall be forwarded as soon as may be after sentence together with a report upon the case from the officer presiding at the trial.

(2) Such special warrant shall be issued to the Sheriff or his deputy who shall, as soon after the receipt of such special warrant as fitting arrangements for the carrying out of the sentence can be made, execute such special warrant in the place appointed therein:

Provided that the Sheriff or his deputy shall not execute the warrant aforesaid if at any time the President by written notice under his hand to the Sheriff or Deputy-Sheriff intimates that he has decided to grant a pardon or reprieve to the person so sentenced or otherwise to exercise the prerogative of mercy with regard to him. Any notice by the President under this proviso shall be construed for all purposes as a cancellation of the warrant aforesaid.

300. Cumulative or concurrent sentences

(1) When a person is convicted at one trial of two or more different offences, or when a person under sentence or undergoing punishment for one offence is convicted of another offence, the court may sentence him to such several punishments for such offences or for such last offence (as the case may be) as the court is competent to impose.

(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such punishments shall run concurrently.

301. Conviction of other charges pending

Where an accused person is found guilty of an offence, the court may, in passing sentence, take into consideration any other charge of a similar offence then pending against the accused if the accused admits the other charge and desires it to be taken into consideration and if the prosecutor of the other charge consents.

302. Imprisonment in default of payment of fines

Whenever a court has imposed upon any offender a sentence of a fine without an alternative sentence of imprisonment, and the fine has not been paid in full or has not been recovered in full by a levy, the court which passed sentence on the offender may issue a warrant directing that he be arrested and brought before the court which may thereupon sentence him to such term of imprisonment as could have been imposed

upon him as an alternative punishment in terms of section 29 of the Penal Code or other written law.

303. Recovery of fine

(1) Whenever an offender is sentenced to pay a fine, the court passing the sentence may, in its discretion, issue a warrant addressed to the Sheriff or messenger of the court authorizing him to levy the amount by attachment and sale of any movable property belonging to the offender although the sentence directs that, in default of payment of a fine, the offender shall be imprisoned. The amount which may be levied shall be sufficient to cover, in addition to the fine, the costs and expenses of the warrant and of the attachment, and sale thereunder.

(2) Such warrant when issued by the High Court may be executed anywhere within Botswana.

(3) Such warrant, if issued by a magistrate's court, shall authorize the attachment and sale of the movable property within the local limits of the jurisdiction of such magistrate's court, and also without such limits when endorsed by the magistrate having jurisdiction in the place where the property is found.

(4) If the proceeds of sale of the movable property are insufficient to satisfy the amount of the fine and the costs and expenses aforesaid the High Court may issue a warrant, or in the case of a sentence by any magistrate's court may authorize such magistrate's court to issue a warrant, for the levy against the immovable property of the offender of the amount unpaid.

(5) When an offender has been sentenced to pay a fine only or, in default of payment of the fine, to imprisonment, and the court issues a warrant under this section, it may suspend the execution of the sentence of imprisonment and may release the offender upon his executing a bond with or without sureties as the court thinks fit, on condition for his appearance before such court or some other court on the day appointed for the return to such warrant, such day not being more than 15 days from the time of executing the bond; and in the event of the amount of the fine not having been recovered, the sentence of imprisonment shall be carried into execution at once.

(6) In any case in which an order for the payment of money has been made on non-recovery whereof imprisonment may be awarded and the money is not paid forthwith, the court may require the person ordered to make such payment to enter into a bond as prescribed in subsection (5), and in default of his doing so may at once pass sentence of imprisonment as if the money had not been recovered.

(7) When an offender has been sentenced to pay a fine only or, in default of payment of the fine, to a period of imprisonment, and before the expiry of that period any part of the fine is paid or levied, the period of imprisonment shall be reduced by a number of days bearing as nearly as possible the same proportion to the number of days to which such person is sentenced as the sum so paid and levied bears to the amount of the fine. An amount which would reduce the imprisonment by a fractional part of a day shall not be received. No payment of any sum under this section need be accepted otherwise than during the ordinary office hours.

304. Manner of dealing with convicted juveniles

(1) Any court in which a person under the age of 18 years has been convicted of any offence may, instead of imposing any punishment upon him for that offence (but subject to the provisions of section 26(2) of the Penal Code) order that he be placed in the custody of any suitable person designated in the order for a specific period:

Provided that such order may be made in addition to the imposition of corporal punishment; and provided further than no order made in terms of this subsection shall direct that the convicted person shall remain in the custody in which he has been placed after he attains the age of 18 years.

(2) Any person who has been dealt with in terms of subsection (1) and who absconds from the custody in which he was placed may be apprehended without warrant by any policeman and shall be brought as soon as may be before a magistrate of the district in which he was apprehended.

(3) When any person is brought before a magistrate under the provisions of subsection (2) the magistrate shall, after having questioned the absconding person as to the reason why he absconded, order-

- (a) that he be returned to the custody from which he absconded;
- (b) that he be placed in the custody of another person for the remaining period of the original order; or
- (c) that he be committed to prison for the remaining period of the order made under subsection (1).

305. Corporal punishment

(1) When a person is sentenced to undergo corporal punishment such sentence shall be a sentence of caning and shall be in accordance with the following provisions-

(a) the caning shall be carried out in a manner and with a cane of a type approved by the Minister, who may approve different types of cane for different classes of person;

(b) no caning shall be inflicted on any convicted person until he has been certified by a medical officer to be fit for such punishment; caning shall only be inflicted in the presence of a medical officer, or, if one is not available, in the presence of a magistrate; the medical officer or magistrate shall immediately stop the infliction of further punishment if he considers that the convicted person is not in a fit state of health to undergo the remainder thereof and shall certify the fact in writing;

(c) whenever under the provisions of paragraph (b) any medical officer or magistrate has certified that any prisoner sentenced to undergo caning is not in a fit state of health to undergo the whole or the remainder thereof he shall immediately transmit his certificate to the court which passed the sentence or to a court having jurisdiction which may substitute another punishment in lieu of the sentence of caning; such prisoner may lawfully be kept in custody pending the decision of the court to which the medical officer or magistrate has transmitted his certificate as hereinbefore provided;

(d) no sentence of caning shall be carried out by instalments;

(e) where at any one sitting of a court more than one sentence of caning is imposed on any person, the sentences so imposed shall be deemed to be one sentence for the purposes of subsection (2) of section 28 of the Penal Code.

(2) Every sentence of corporal punishment shall be carried out privately in a prison: Provided that in the case of a person under 18 years of age the court before which such person is convicted may direct that the punishment be administered by such person and in such place as it may specify and in such case the parent or guardian of such first mentioned person shall have the right to be present.

(3) The Minister may by statutory instrument make an order specifying such places as he may consider proper for administering corporal punishment in traditional manner with traditional instruments.

306. Recognizances to keep the peace and be of good behaviour

If the conditions upon which any recognizance or security under section 31 of the Penal Code was given are not observed by the person who gave it, the court may declare the recognizance or security to be forfeited and any such declaration or forfeiture shall have the effect of a judgment in a civil action in that court.

307. Payment of fine without appearance in court

(1) When any person has been summoned or warned to appear in a magistrate's court or has been arrested or has been informed by a peace officer that it is intended to institute criminal proceedings against him for any offence, and an officer holding a rank or post to be designated by the Minister from time to time for the purposes of this section by order published in the *Gazette*, has reasonable grounds for believing that the court which will try the said person for such offence will, on convicting such person of such offence, not impose a sentence of imprisonment or corporal punishment or a fine exceeding P200, such person may sign and deliver to such officer a document admitting that he is guilty of the said offence; and-

(a) deposit with such officer such sum of money as the latter may fix; or

(b) furnish to such officer such security as the latter deems sufficient, for the payment of any fine which the court trying the case in question may lawfully impose therefor, not exceeding P200 or the

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maximum of the fine with which such offence is punishable, whichever amount is the lesser, and such person shall, subject to the provisions of subsection (8), thereupon not be required to appear in court to answer a charge of having committed the said offence.

(2) Such person may at any time before sentence is passed upon him in terms of subsection (5) submit to any person in charge of the aforesaid document an affidavit setting forth any facts which he desires to bring to the notice of the court in mitigation of the punishment to be imposed for the said offence, and such affidavit shall be submitted together with the said document to the court which is to pass the sentence.

(3) An officer designated as aforesaid, if he is not the public prosecutor attached to the court in which the offence in question is triable, shall, as soon as practicable after receiving a document referred to in subsection (1), transmit it to such public prosecutor.

(4) Whenever such public prosecutor has received any such document he shall transmit it to the clerk of the said court: Provided that before doing so he may report the matter to the Director of Public Prosecutions and ask him for his directions thereon.

(5) After receiving such document the clerk of such court shall cause it to be numbered and filed consecutively in the records of that court in a file to be known as the criminal record (admission of guilt) file, which file shall for the purposes of any written law be deemed to be a criminal record book of that court and the person in question shall, subject to the provisions of subsection (8), thereupon be deemed to have been convicted by such court of the said offence, and such court shall pass sentence upon such person in accordance with law: Provided that such court may decline to pass sentence upon him and may direct that he be prosecuted in the ordinary course, and in that case, if the said person has been summoned or warned in terms of subsection (1), he shall be summoned afresh to answer such charge as the public prosecutor may prefer against him.

(6) If the court imposes a fine on such person such fine shall be paid out of any sum deposited in terms of paragraph (a) of subsection (1), or if security has been given in terms of paragraph (b) of subsection (1) and the fine has not been paid in accordance with the terms of the security, the latter, if corporeal property, may be sold by public auction and the fine paid out of the proceeds of the sale: Provided that if the whereabouts of such person are known, written notice of the intended sale and of the time and place thereof shall be given to him not less than three days before the sale takes place.

(7) If any balance remains of any such deposit or of the proceeds of any such sale, after payment of such fine, such balance shall be paid over to the person who made such deposit or gave such security and if such deposit or such security is insufficient to pay the fine imposed, the balance remaining due shall be recovered from the person upon whom the fine was imposed in the manner provided in this Act.

(8) At any time before sentence has been passed upon the person in question under subsection (5), the Director of Public Prosecutions may direct that no action be taken in the matter under subsections (5), (6) and (7), but that such person be brought to trial in the ordinary manner: Provided that in that case, if such person has been summoned or warned in terms of subsection (1), he shall be summoned afresh to answer such charge as the Director of Public Prosecutions may direct.

(9) If at the conclusion of the trial referred to in subsection (8) the person tried is sentenced to pay a fine, the provisions of subsections (6) and (7) shall apply.

(10) If at the conclusion of any proceedings against any person under this section, no fine is imposed upon him, the money or security deposited by or on behalf of such person shall be returned to the person who made the deposit.

308. Powers as to postponement and suspension of sentences

(1) Whenever a person is convicted before the High Court or any magistrate's court of any offence other than an offence specified in the Second Schedule, the court may in its discretion postpone for a period not exceeding three years the passing of sentence and release the offender on one or more conditions (whether as to compensation to be made by the offender for damage or pecuniary loss, good conduct or otherwise) as the court may order to be inserted in recognizances to appear at the expiration of that period,

and if at the end of such period the offender has observed all the conditions of the recognizances, the court may discharge the offender without passing any sentence.

(2) Whenever a person is convicted before the High Court or any magistrate's court of any offence other than an offence specified in the Second Schedule, the court may in its discretion pass sentence, but order that the operation of the whole or any part of the sentence be suspended for a period not exceeding three years, which period of suspension, in the absence of any order to the contrary, shall be computed in accordance with the provisions respectively of subsections (3) and (4). Such order shall be subject to such conditions (whether as to compensation to be made by the offender for damage or pecuniary loss, good conduct or otherwise) as the court may specify therein.

(3) The period during which any order for the suspension of a part of a sentence, made under subsection (2) and affecting a sentence of imprisonment shall run, shall commence on the date upon which the person convicted was lawfully discharged from prison in respect of the unsuspended portion of such sentence, or if not then discharged because such person has to undergo any other sentence of imprisonment, such period shall commence upon the date upon which such person was lawfully discharged from prison in respect of such other sentence. If any portion of such other sentence is itself suspended, the periods of suspension of all such sentences shall, in the absence of any order to the contrary, run consecutively in the same order as the sentences.

(4) The period during which any order for the suspension of the whole of a sentence of imprisonment shall run, shall commence-

(a) where the convicted person is not serving another sentence, from the date from which the sentence wholly suspended was expressed as taking effect, or took effect; and

(b) where the convicted person is serving another sentence, from the date of expiration of that sentence including any period thereof which may be subject to an order of suspension.

(5) If during the period of suspension of the whole of a sentence the convicted person is sentenced to imprisonment the portion then remaining of the sentence wholly suspended shall be deemed to be consecutive to the sentence of imprisonment subsequently awarded.

(6) If the offender has, during the period of suspension of any sentence under this section, observed all the conditions specified in the order, the suspended sentence shall not be enforced.

309. Commencement of sentences

Subject to the provisions of section 308, a sentence of imprisonment shall take effect from and include the whole of the day on which it is pronounced unless the court, on the same day that sentence is passed, expressly orders that it shall take effect from some day prior to that on which it is pronounced.

310. Payment of fines by instalments

Whenever a person is convicted before the High Court or any magistrate's court of any offence other than an offence specified in the Second Schedule, the court may in its discretion order that any fine imposed on such person be paid in instalments or otherwise on such dates, and during such period not exceeding 12 months from the date of such order, as the court may fix therein. If on such date or dates the offender has made all payments in accordance with the order of the court, no warrant shall be issued committing the offender to prison to undergo any alternative imprisonment prescribed in the sentence in default of payment of the fine.

311. Consequences of failure to comply with conditions of postponement or suspension of sentence

(1) If the conditions of any order made, or recognizance entered into, under the provisions of section 308 or section 310 are alleged not to have been fulfilled, the local public prosecutor may, without notice to the offender, apply to any magistrate's court within the local limits of whose jurisdiction the offender is known or suspected to be, for a warrant for the arrest of the offender for the purpose of bringing him before the court to show cause why such offender shall not undergo the sentence which has been, or may be, lawfully imposed.

(2) Any application made under subsection (1) shall be supported by evidence in the form of an affidavit or on oath, that the order or recognizance is still binding upon the offender and that such offender has failed, in a manner to be specified, to observe the conditions thereof.

(3) The court to which application is made under subsection (1) may, if it is satisfied that the offender ought to be called upon to show cause why he shall not undergo the sentence which has been, or may be, imposed, grant a warrant for the arrest of such offender for the purpose of bringing him to court to show cause as aforesaid.

(4) The court, before which any offender appears in consequence of an application under subsection (1), shall read, or cause to be read, to the offender, such application and the evidence given in support thereof, and shall thereupon call upon the offender to say whether he opposes such application.

(5) If such offender does not oppose the application and admits that he has not fulfilled the conditions of the order made, or recognizance entered into, the court may order that the offender shall undergo the sentence which was, or is then, imposed upon him or may make an order under section 312 if the original order was made under section 308(2) or under section 310.

(6) If the offender denies the allegations and opposes the application, the court shall proceed to hear the matter in accordance with the principles generally applicable to criminal trials under this Act, and if it finds that the offender has not fulfilled the conditions of any order made, or recognizance entered into, the court may thereupon order that the offender shall undergo the sentence which was, or is then, imposed upon him, or may make an order under section 312 if the original order was made under subsection (2) of section 308 or under section 310.

312. Further postponement or deferment of sentence

The court before which an offender appears may, if the original order related to the suspension of a sentence under section 308(2), or to the payment of a fine by instalments or otherwise under section 310, and if the offender proves to the court's satisfaction that he has been unable through circumstances beyond his control to fulfil the conditions of such order, in its discretion grant an order further suspending the operation of the sentence or further deferring payment of the fine, subject to such conditions as might have been imposed at the time the original order was made.

313. Magistrates' courts not to impose sentences of less than four days

No person shall be sentenced by a magistrate's court to imprisonment for a period of less than four days, unless the sentence is that the offender be detained until the rising of the court.

314. Discharge with caution or reprimand

Whenever a person is convicted before the High Court or any magistrate's court of any offence other than an offence specified in the Second Schedule, the court may in its discretion discharge the offender with a caution or reprimand, and such discharge shall have the effect of an acquittal, except for the purpose of proving and recording previous convictions.

315. Regulations

The President may make regulations, not inconsistent with this Act, as to all or any of the following matters, namely, the appointment, powers and duties of persons (to be known as probation officers) to whom may be entrusted the care or supervision of offenders whose sentences of imprisonment have been suspended under this Act, the circumstances under which courts of law may entrust such care or supervision to probation officers, the conditions which shall be observed by such offenders while on probation and the varying of such conditions, and generally for the better carrying out of the objects and purposes of this Part.

APPENDIX C

CUSTOMARY COURTS ACT CAP 04:05

12. Criminal jurisdiction

(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.

13. Cases excluded from the ordinary jurisdiction of customary courts

Subject to any express provision confirming jurisdiction, no customary court shall have jurisdiction to try-

(a) cases in which the accused is charged with-

- (i) treason, riot or any offence involving the security or safety of the State,
- (ii) an offence in consequence of which death is alleged to have occurred,
- (iii) bigamy,
- (iv) any offence under Division II of Part II (Offences against the Administration of Lawful Authority) of the Penal Code with the exception of offences under sections 108, 119, 123, 125 and 128 of the said Division,
- (v) bribery,
- (vi) an offence concerning counterfeit currency,
- (vii) robbery, where the person accused is of or above the age of 21 years,
- (viii) extortion by means of threats,
- (ix) an offence against insolvency law or company law,
- (x) rape,
- (xi) contravention of prohibitions relating to precious stones, gold and other precious metals,
- (xii) such other offences as may be prescribed;

(b) any cause or proceeding whereby divorce or a declaration of nullity of marriage or an order for judicial separation is sought where such marriage has been contracted other than in accordance with customary law;

(c) any cause or proceeding-

- (i) arising in connection with a testamentary disposition of property,
- (ii) arising in connection with the administration of a deceased estate to which any law of Botswana applies,
- (iii) arising under the law relating to insolvency, or
- (iv) involving matters of relationships to which customary law is inapplicable;

(d) cases relating to witchcraft without the general or special consent of the Director of Public Prosecutions.

18. Punishments

(1) Subject to the provisions of subsections (2), (3) and (4) and section 21 and to the provisions of any other law for the time being in force a customary court may sentence a convicted person to a fine, imprisonment, corporal punishment or any combination of such punishments but shall not impose any punishment exceeding those set out in its warrant.

(2) No customary court shall sentence any female or any person who is, in the opinion of the court, of the age of 40 years or over to corporal punishment.

(3) Where any person under the age of 40 years is convicted of any offence, a customary court may, in its discretion, order him to undergo corporal punishment in addition to or in substitution for any other punishment:

Provided that this subsection shall not apply to-

(a) any offence in respect of which a minimum punishment is by law imposed; and

(b) any conspiracy, incitement or attempt to commit any offence referred to in paragraph (a).

(4) No customary court shall subject any person to any punishment which is not in proportion to the nature and circumstances of the offence and the circumstances of the offender.