Severity of multiple punishments deployed by magistrate and customary courts against common offences in Botswana: A comparative analysis

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Abstract

There are persistent and growing concerns about the degree of divergence in the standards of justice rendered by customary and common law courts in criminal cases in Botswana. The present article focuses on severity of multiple punishments imposed by customary and magistrate courts on offenders in relation to selected offences that are triable in either type of court. It presents results of an investigation that was part of a large study on sentencing outcomes of customary and magistrate courts in two large population centres in Botswana. The results of the study show that there were significant differences in the severity and combinations of multiple punishments deployed by customary and magistrate courts against similar categories of offences triable in either type of court. To that extent the results of the study would seem to suggest that some of the concerns regarding the lack of comparability of justice in customary and the general/common law courts may be justified.

Keywords: Measurement, Offence Seriousness, Punishment Severity.

Introduction

There is growing disquiet amongst sections of the public, the legal community, scholars and international agencies about variability in the standards observed in customary and general courts/western style courts in Botswana (WLSA, 1999; Boko, 2000; Tshosa, 2001). Concerns revolve mainly around trial processes and their outcomes (Ballie, 1969; Kirby, 1985; Boko, 2000) where these courts have concurrent jurisdiction. Customary and general courts apply the same basic law, found mainly in the Penal Code (Brewer, 1974; Sanders, 1985; Fombad, 2004). While there are significant differences in procedure rules governing the trial process in the customary and general courts, there has been some attempt to converge and harmonize them (Brewer, 1973 & 1974). For example the principles underlying some of the rules such as those pertaining to standard of proof required for conviction, are the same. Before the Penal Code became the universal criminal law to be applied by both customary and general courts, the Customary Courts Act (CCA hereafter) was amended in order to align punishments imposed by customary

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courts with those found in the Penal Code (Brewer, 1973 & 1974). However, major differences between the customary and general system remain at institutional, value and process level despite various attempts at convergence (Malila, 2010, p. 71). It is these differences, which often result in disparities in outcome in comparable cases that generate controversy (Kirby, 1985; Boko, 2000).

This paper considers the problem of variability of practices and standards between the two legal systems from a sentencing perspective. More specifically, it focuses on the comparative severity of multiple punishments imposed by customary and magistrate courts on offenders in relation to selected offences that are triable in either type of court.

Focus of the Study

This study presents results of an investigation that was part of a large study on sentencing outcomes of customary and magistrate courts in two large population centres in Botswana. It was hypothesized that there would be likely to be differences in the way the two types of court deployed multiple punishments and the severity of those punishments. For purposes of comparison, the study focuses on the combinations and severity of punishments deployed against common offences that are triable in both courts.

Hypothesis:

Multiple punishment(s) deployed by customary and magistrate courts against similar categories of offences are generally likely to differ in severity when weighted and compared with each other.

Method

Primary data from which information used in this paper was extracted was gathered by means of a census of recorded criminal cases going back ten years (1991-2001) at the two peri-urban villages of Kanye and Mochudi in the southern part of Botswana. The census yielded a total of 10 024 criminal cases tried before magistrate and customary courts.

Measuring severity of multiple punishments

The task of determining and measuring the relationship between punishment severity and offence seriousness is, on its own, a complex one. But it becomes appreciably more so if it involves and is done in context of cross-systems comparisons as is the case in present study. In view of this, the present section considers measurement of punishment severity and offence seriousness generally, and how it was tackled in present the study, specifically.

Relating Punishment Severity to Offence/ Offence Seriousness

According to von Hirsch (2004, p. 185), while analyses of opinion surveys involving members of the public suggest that it is possible for ordinary people to reach a consensus regarding the comparative seriousness of offences; it is much more difficult to define clearly from a theoretical point of view what offence gravity means. He argues that between the two elements that go to the gravity of the offence, namely culpability of the offender and harmfulness of the conduct, it is often easier to determine the former dimension because substantive law provides some guidance whereas in the case of the latter there is usually no guidance at all.

Notwithstanding that, von Hirsch and Jareborg (1991) have developed a general framework for scaling crime based on the impact of different offences on the welfare of

the victim ('living standards'). In terms of this model, living standards can be evaluated at three levels: (a) subsistence (b) minimal wellbeing (c)"adequate" well-being (von Hirsch, 2004, p. 187). The model is concerned with impairment of the means or capability to achieve a certain quality of life. The majority of what von Hirsch terms 'victimizing offences' can be assessed on the basis of the extent to which they affect the following aspects of life: (a) physical integrity (b)material support and amenity (c) freedom from humiliation and (d) privacy (von Hirsch, 2004, p. 187). The model such as it is allows for variation scaling of offences according to culture. But important questions arise: What culture? Whose culture? For instance in the case of customary law whose customary law would form the normative basis for the ranking of offences? It has been suggested that there are many versions of customary law including lawyers' customary law, traditionalists' customary law and living law (Molokomme, 1995). Because of the difficulties involved in the formulation of a model from scratch based on the values proposed by von Hirsch and Jareborg (1991), the present study relied instead on differences in the possible maximum penalty that an offence attracts, to rank the offences. When the study was conducted virtually all offences were imprisonable.

Public opinion has proved to be as much a reliable guide for gauging severity of punishment as it has been in the measurement of offence gravity. Researchers working in the area of offence seriousness generally base their models on the Selling-Wolfing offence severity scale (Myers & Talarico, 1987). The Selling-Wolfing offence severity scale is widely used in the United States of America and is constructed using data on community attitudes towards particular offences. Other approaches to scaling of severity values include self-constructed scales where different values are assigned to different types of punishments on a sliding scale based on the researcher's own assessment of such punishments (Shoham, 1959; Tiffany et al., 1975) or a scale based on post-facto evaluations of judicial performance (McDavid & Stipak, 1981/82).

The Selling-Wolfing scale could not be utilized in this study for a number of reasons. First, score values used the Selling-Wolfing scale may not necessarily translate into the same values in the Botswana context. Second, no data on community judgements about crime severity existed in Botswana that could be used to construct a scale based on the principles underlying the Selling-Wolfing scale. Instead we constructed a scale with severity score values for different penalties ranging from one to five. Others have used similar scales though with different value ranges from our own (e.g. Shoham, 1959). In terms of the scale used in this study, the different values must be added up to obtain the overall score for multiple punishments (see the next section below). We did not believe that the model based on post facto evaluations of judicial performance would have been suitable because of the cross-system nature of the present research.

Measuring severity in context of the present study

In order to facilitate measurement of severity punishments were given weightings based on their harshness in comparison to other punishments. Thus different types of punishments were each given a score value which represents its severity relative to other punishments. The values ranged from 1-5. The higher the score value assigned, the more severe the punishment. Ranking of the punishments was based on a rough sense of the degree of unpleasantness that each type of punishments induces (von Hirsch 1990; 1992).

Punishments were assigned weights or values as follows:

- Caution = 1(score of 1)
- Community Service/Probation/Supervision = 2
- Fine/Compensation=3
- Strokes (Lashing)=4
- Prison/Suspended Prison Term = 5

Limitations

When comparing punishments imposed by the two courts we must remain alive to the possibility that the two may be premised on different agendas due to a variety of factors including philosophical differences and focal concerns. The approach to punishment would therefore be expected to be mediated by court or system-specific factors. Culture and lifestyle also come into play (von Hirsch, 2004). Furthermore the score values and rankings assigned to the various punishments relative to one another cannot escape criticism since they were of necessity influenced by local factors. For example, in some jurisdictions corporal punishment might be considered to be less harsh than imprisonment but in Botswana convicts often ask for the former to be substituted for the latter (see e.g. The Voice 2006) though this does not suggest that there is consensus on the issue. These problems should prevent us from measuring severity from an objective point of view.

Based on literature, courts might be placed along a continuum as follows:

1. Liberal Western model
2. Botswana's General Courts: possibly a mixture of liberal western model and Tswana model but more inclined towards the western model (mixed). One the distinguishing features of the Tswana model is that it emphasizes the use of corporal punishment (Schapera, 1938; Leslie, 1969; Frimpong, 2000; Shumba & Moorad, 2000; Tafa, 2002)
3. Botswana's Customary Courts: more emphatically Tswana (but also mixed).

The western punishment model (with the possible exception of the United States of America) is generally more liberal than other models in that certain punishments like the death penalty have been abolished and minor social disorder offences are generally not imprisonable (see von Hirsch & Ashworth, 2004).

Data Presentation

This section presents data on the use and severity of multiple punishments by type of court. Data presented in the opening part of the section is concerned with the distribution of multiple punishments and propensity of either type to deploy them generally. It is important to have a sense of how each type of court tends to punish generally before we consider how it punishes selected common offence. However, the bulk of the data in this section is concerned with the types and combinations of multiple punishments deployed by customary and magistrate courts against certain commonly occurring offences triable in either type of court and their severity score values. The offences in question consisted of the following broad categories crimes: assault-related offences, burglary and related offences, theft-related offences, malicious damage to property and nuisance and related offences.

Distribution of multiple punishments (General): 1991-2001

Table 1 below provides a global picture regarding the distribution and deployment of multiple and non-multiple punishments in magistrate and customary courts in general. Results show that single punishments dominated outcomes in magistrate and customary courts at 82.3% and 83%, respectively.

Table 1
Distribution of single and multiple punishments by court type: General

	Magistrate		**Customary**	
Type of disposal	**N**	**%**	**N**	**%**
Single punishment	2596	82.3	3839	83.0
Multiple punishments	558	17.7	785	17.0
Total	3154	100.0	4624	100.0
Chi-square	0.67	Sig.	0.41	
Type of offence⋆	**N**	**%**	**N**	**%**
Single offence	3084	90.3	5194	93.4
Multiple offences	330	9.7	365	6.6
Total	3414	100.0	5559	100.0
Chi-square	28.45	Sig.	0.000	
⋆	The Chi-square statistic is significant at the 0.05 level.			

Source: Developed from analysis of census survey data

Deployment of multiple punishments against selected offences

As a preliminary point it is important to note that each of the two types of court generally tended to use multiple punishments combinations peculiar only to itself that is, not used by the other. This was the case in more than 90% of the cases involving multiple punishments. The combinations of punishments represented in tables 2 to 6 were exclusive to each court type. The only exception was the strokes and imprisonment combination under burglary. Only a few combinations were common to both courts.

Table 2: Assault-Related Offences

Assault– Related Offences⋆	
Punishment Court	**Scores**
Customary Court	
Fine and Community Service	5
Fine and Compensation	6
Strokes and Fine	7
Fine, Community Service and Compensation	12
Strokes, Imprisonment and Compensation	12
Magistrate Court	
Suspended Prison Term and Compensation	8
Suspended Prison Term and Fine	8
Suspended Prison Term and Strokes	9

Source: General census data

⋆Assault-related offences included the following: common assault, unlawful wounding, and actual bodily harm, grievous bodily having and associated attempts.

Table 2 shows that the severity scores for assault-related offences tried in customary courts ranged between 6 and 12 and scores for cases processed in magistrate courts were

relatively narrow in terms of range with the lower-end score at 8 and the upper end score of 9. Results also show that customary courts used six different combinations of multiple punishments to punish this group of offences whereas in comparison magistrate courts deployed half the number of combination used by the former.

Table 3: Damage to Property

Damage To Property*	
Punishment Court	**Scores**
Customary Court	
Strokes, Compensation and Suspended Prison Term	12
Strokes and Suspended Prison Term	9
Imprisonment and Compensation	9
Stroke, Imprisonment and Compensation	13
Fine, Compensation and Imprisonment	12
Fine and Compensation	6
Strokes, Fine and Compensation	10
Strokes and Compensation	7
Magistrate Court	
Compensation and suspended Prison Term	8
Strokes and Imprisonment	10

Source: General census data

*Damage to property consisted of the following offences: arson, attempted arson, injury to animal, malicious injury to property.

With respect to damage to property the lowest and highest severity score values for customary courts were 6 and 13 respectively. For magistrate courts the only two multiple punishments recorded and their values were 8 at the lower-end and 10 at the top end. Customary courts used eight different combinations of multiple punishments against this category of offences. In contrast only two types of combination punishments were deployed by magistrate courts.

Table 4: Theft Related Offences*

Punishment	**Scores**
Customary Court	
Strokes and Imprisonment	10
Strokes and Fine	7
Strokes, Fine and Compensation	10
Compensation and Imprisonment	9
Strokes and Compensation	7
Fine and Compensation	6
Fine, Compensation and Imprisonment	12
Fine, Community Service and Compensation	8
Strokes, Compensation and Imprisonment	12
Strokes, Fine and Compensation	10
Imprisonment and Compensation	9
Strokes, Imprisonment and Compensation	13
Fine and Suspended Imprisonment Term	8
Compensation and Suspended Imprisonment Term	8

Compensation and Strokes	7
Strokes, Compensation and Suspended Prison Term	12
Magistrate Court	
Fine and Suspended Prison Term	8
Compensation and Suspended Prison Term	8

Source: General census data

*Theft-related offences were defined as: theft common, housebreaking with a theft element, burglary with a theft element, stock theft and associated attempts.

The score range for theft-related offences in the customary courts was 6 to 13 while the magistrate courts' score was simply 8 in every instance. Combinations of punishments deployed by customary courts against this group of offences were as many as sixteen while those used by magistrate courts for this offence group were no more than two.

Table 5: Burglary-Related Offences*

	Scores
Customary Court	
Strokes, Compensation, and Suspended Prison Term	12
Strokes and Compensation	7
Strokes and Imprisonment	10
Magistrate Court	
Strokes and Imprisonment	10

Source: General census data

*Burglary-related offences consisted of the following: burglary, stealing from dwelling, house breaking, and criminal trespass.

Burglary-related offences tried in customary courts tended to attract multiple punishments with severity scores ranging from 7-12 and of different combinations. Cases tried in magistrate courts attracted only one type of combination punishment which registered a score of 10.

Table 6: Nuisance-Related Offences*

Punishment Court	**Scores**
Customary Court	
Compensation and Imprisonment	9
Fine and Compensation	6
Fine and Compensation	5
Strokes and Fine	7
Strokes and Imprisonment	10
Fine and Imprisonment	9
Imprisonment and Compensation	9
Compensation and Suspended Prison Term	8

Source: General census data

*Nuisance-related offences as category was made up of the following offences: common nuisance, idle and disorderly behaviour, breach of peace and use of insulting language.

Only customary courts deployed multiple punishments of any description in relation to nuisance-related offences. The severity scores for this offence category ranged from 5 to 10.

Combinations of multiple punishments deployed

Table 7: Combinations of multiple punishments by offence and type of court

Offence Category	No of combinations of multiple punishments used	
	Customary Court	Magistrate Court
Assault-related offences	5	3
Damage to Property	8	2
Theft-related offences	16	2
Burglar-related offences	3	1
Nuisance-related offences	8	-

Table 7 above shows that when they deployed multiple punishments, customary courts used a wider range of combinations than magistrate courts. For instance, in the case of theft-related offences the customary courts used a total of sixteen different punishment combinations while magistrate courts deployed only two combination types. The diversity of punishment of punishments imposed by customary against each offence category suggest wide variability. By contrast those deployed by magistrate courts fell within a narrow range.

Punishments: Intra-Court Range / Variability

Table 8: Variability of punishment by offence and type of court

Offence Category	Punishment score value range	
	Customary Court	Magistrate Court
Assault-related offences	5-12(7)★	8-9(1)
Damage to Property	6-13(7)	8-10(2)
Theft-related offences	6-13(7)	8(0)
Burglar-related offences	7-12(5)	10(0)
Nuisance-related offences	5-10(5)	-

★ ( ) The value in the brackets represents the difference between the lowest and the highest value in the score value range of punishment imposed by a court in respect of a particular offence.

Table 8 above shows that punishment score value ranges of punishments imposed by customary courts were high compared to those punishment imposed by magistrate courts.

Analysis

Hypothesis:

Multiple punishment(s) deployed by customary and magistrate courts against similar categories of offences are generally likely to differ in severity when weighted and compared with each other.

The results of the study show that multiple punishments deployed by customary and magistrate courts against similar categories of triable-either way offences differed in severity as postulated. More specifically, customary courts punished those offences more severely than magistrate courts. In general terms the two types of court courts tended to deploy multiple punishments against similar categories differently. In the analysis that follows we consider the latter point first.

When the general use of multiple punishments was considered for all offences, without regard to jurisdiction, the level of use was found to be roughly similar. However, patterns of use of multiple punishments against triable-either way offences showed considerable variations both in terms of the types and combinations of punishments deployed by the courts. Each of the two types of court generally tended to use multiple punishments combinations peculiar only to itself that is, not used by the other. Only a few combinations were similar. Customary court combinations were quite varied whereas those of magistrate courts tended to be limited mostly to a suspended term of imprisonment plus some other punishment. Furthermore, while magistrate court combinations rarely exceeded two punishments, those of customary courts often included up to three different punishments. So, customary courts used a wider range of multiple punishments, across all categories of selected triable-either-way offences namely assault-related offences, malicious damage to property, theft-related offences, burglary and related offences and nuisance-related offences than magistrate courts. They also used these punishments more extensively in relation to each specific offence group than the latter. In other words, not only were customary courts more likely to impose multiple punishments for all the named offence groups but they were also likely to do so more often.

Magistrate courts tended to use multiple/combined punishments very sparingly. They relied heavily on the deployment of one type of penalty on its own to punish single or non-multiple offences in the selected offence categories. The highest level of use of combined or multiple punishments by magistrate courts was registered against burglary and related offences. Magistrate courts did not deploy multiple punishments at all against nuisance-related offences though it must be said that the number of nuisance-related offences tried in these courts were so small as to be statistically insignificant.

There was no offence for which customary courts did not deploy multiple punishments. However the level of use of multiple punishments varied enormously among the selected offence groups. The lowest levels of use were recorded for nuisance-related offences and assault-related offences. Damage to property had the highest level of use multiple of punishments of any offence group.

The results show that customary courts punished triable-either way offences more severely than magistrate courts. Customary courts had the highest severity scores for all of the offence groups. The highest scores in customary courts for most categories except for nuisance-related offences were 12 or above. In contrast for magistrate courts the highest score was 10, even then for only two out of five offence categories. If we take into account only punishment that takes effect immediately (i.e. non-suspended sentences), then we find that the multiple punishment scores of magistrate courts were much lower for all offences than is reflected by the severity scores. This is because a suspended prison term unlike all the other punishments is only activated if the offender is convicted of a similar offence within a given period. In the case of common nuisance-related offences magistrate courts did not deploy multiple punishments at all.

Customary courts recorded the highest punishment scores across all the five offence categories under discussion. The largest difference between the maximum score values of the two courts in respect of any offence group was 5 points, which was registered in relation to theft-related offences. Assaults and damage to property registered a 3 points difference in scores while the smallest difference in scores was 2 points registered in respect of burglary and related offences. Unlike customary courts, magistrate courts did not deploy multiple punishments in relation to nuisance-related offences.

The severity score ranges, and the degree of variability in combinations of multiple punishments imposed by customary courts in relation to any given offence category means that there were wide disparities in the punishment of the same type of offence or offences from the same band of offences by the same court at different times (intra-system disparity). This suggests a high degree of inconsistency in the sentences passed by customary courts. By contrast the score ranges for punishments awarded by magistrate courts for corresponding offences were very narrow and the variability of punishments very limited, implying relatively high levels of consistency in the sentences.

Discussion

The underlying assumption of the study was that despite convergence in a number of critical areas brought about by the introduction of a common offence framework (penal code), reform to punishment and introduction of standardized procedures for customary courts which incorporate common law principles (Brewer, 1973 & 1974), there would still likely be differences in the way the customary and general courts punish similar offences. It was considered that this would be so not only as a result of the flexibility or rigidity of rules governing the imposition of penalties in each type of court, but also because the courts are anchored social and legal cultures with potentially divergent value systems. Thus differences in the severity of punishments awarded by the two types of court were at a deeper level, possibly determined by deeply-rooted differences between them regarding the meaning of punishment as well as other factors such as attitude towards certain types of offences/offenders. Some of these factors are considered in the sections that follow:

Choice as to punishment and substitutability of punishment

There were a number of points of divergence in rules governing punishment in the customary and magistrate courts that were probably influenced the patterns of punishments in these courts. Generally, the law gave customary courts greater flexibility than magistrate courts regarding choice as to punishment and punishment combinations. It arguable that divergence in rules, explains in part the differences in the way customary and magistrate courts deployed of multiple punishments.

The first point of divergence pertained to choice as to the combinations of punishment a court could impose and whether it was allowed to substitute one type punishment for another. Differences referred to here are as they were in the CCA and Penal Code in the period 1991-2001 before amendment of the latter in 2004. However some of the differences still remain unchanged. Even though customary and magistrate courts had concurrent jurisdiction as far as the selected penal code offences were concerned, the former were/are not bound to impose punishments that were/are prescribed in the offence-creating sections of the Penal Code and other laws except where they were/are otherwise required to do so as would be the case where mandatory penalties apply.

Customary courts could instead punish offenders according to section 17(1) of the CCA in terms of which a customary court 'may sentence a convicted person to a fine, imprisonment, corporal punishment or any such combination of such punishments' subject to certain generally applicable restrictions pertaining to age, gender and jurisdiction. Thus the punishment or mixture of punishments that a customary court could impose in any given instance would be a matter entirely at the discretion of the court. In contrast magistrate courts would be expected to inflict the penalty prescribed in the offence-creating section of the applicable law (mainly the Penal Code) subject to the usual restrictions. Otherwise the court could replace the prescribed penalty with another punishment where such substitution was permitted.

It is convenient at this point to consider briefly the character and import of general and specific restrictions in the CCA and Penal Code in the context of the differences between the discretion of magistrate and customary court judges in relation to choice of punishment or combination of punishments. From a comparative point of view the effect of the general restrictions was that, save for one section, all other sections cancelled each other out. The area of difference between the courts was in respect of applicability of corporal punishment to males under the age of 18 years in certain circumstances. While the CCA and the Penal Code had similar provisions relating to the use of corporal punishment on males under the age of 18 years, the applicability of corporal punishment in respect of this group was prohibited under the latter in certain circumstances. The Penal code(Section 28(4)) prohibited corporal punishment where imprisonment of a convicted person had been ordered for defaulting from the payment of a fine or a sum ordered to be paid as compensation and in cases where imprisonment had been ordered for failure to surrender any sum ordered to be forfeited to the state. Recognizing that the penal code menu was rather restrictive parliament amended it 2004 to allow, amongst other things, more flexible use of corporal punishment as an additional or substitute punishment, subject to restrictions regarding age and gender (see Penal Code (Amendment) Act 2004).

Another point of divergence between the courts related to procedures to be followed in cases where compensation was to be awarded. In terms of section 316 of the Criminal Procedure and Evidence Act (1986), magistrate courts were not allowed to award compensation without formal application from the victim (see *State v Mothobi (Practice Note)1985 BLR19*). Otherwise the expectation would be that if the victims wished to pursue the matter further they could do so in the civil courts. In contrast, in the customary courts there were no special procedures that victims were required to follow in order to be awarded compensation. Instead compensation was awarded as matter of course where appropriate and could be awarded even where the victim had not asked for it. This is consistent with traditional practice under the customary system (Schapera, 1938). Data from the general survey (see tables 2-6 above) shows that customary courts deployed compensation as part of a combination of multiple punishments for all the selected offence groups. Furthermore customary courts combined compensation with a wider variety of other punishments than did magistrate courts.

It seems likely that differences in the structuring of discretion as to punishment played a role in the tendency of customary courts to deploy a variety of multiple punishments more than it did in magistrate courts. The result of this pattern was that the customary courts punished similar offences more harshly than the latter. However, this pattern is consistent with sentencing research evaluations and reviews which have shown that unstructured discretion tends to result in greater inconsistency and disparities than in situations where

discretion is structured (Spohn, 2002; Ashworth, 1992(a&b), Tonry, 1988; 1996). Given the flexibility allowed customary courts in relation to the punishment array, a great deal of inconsistency could be expected from customary courts and was indeed shown by the range of punishments deployed. The extent and range of multiple punishments that customary courts in this study imposed for triable-either way offences means that it would be difficult to predict the sort of punishment that a person is likely to suffer for committing an assault, for instance. In comparison the patterns in the magistrate courts were not too difficult to predict in cases involving multiple punishments. In magistrate courts the dominant multiple punishments would normally include imprisonment/suspended prison term.

However, it was also clear that differences in discretion as to choice of punishment could not account for all the variances in the patterns of punishment of the courts because magistrate courts often did not deploy even allowable punishments combinations in the same way as the customary courts. Customary courts used their sentencing powers rather differently from magistrate courts. For instance, even where their powers to substitute or add corporal punishment to punishment awarded in respect of young males under the age of 18 years were similar to those of the latter, the patterns of punishment still differed. The diversity of penalties deployed by customary courts against all offence types and the sheer score value ranges of those punishments suggest that punishment patterns in these courts were highly unpredictable. This raises the question whether customary courts considered equivalence (Tonry, 2004; Marinos & Griffiths, 2005) when they substituted one penalty for another. It is probably the unsystematic approach to substitution/enhancement/reduction of penalties that contributed to inconsistencies in the punishment of offences suggested by patterns of punishment in customary courts (table 7 and 8).

Thus, it was not just the breadth of choice that was significant but also the nature of substitution or additions. While substitutions could just as likely be used to reduce as to enhance punishments, it was evident from the patterns in the study that customary courts were more likely to make additions than substitutions. Moreover, where they might be expected to make a substitution such as the replacement of imprisonment with strokes, they seemed to prefer to award the strokes together with some other punishment including a suspended prison term. Magistrate courts generally did exactly the opposite.

Discretion and Secondary Value-Indicative Factors

Even though differences in the way customary and magistrate courts deployed multiple punishments appeared to be related in some respects to variation in the discretion as to choice of punishments, some differences in the use of or non-use of some combination punishments seemed to be unrelated to the non-availability of choices in relation to the particular type of court as regards those punishments. Consequently, we found that even in cases where particular combinations of punishments could have been deployed, they were not. Yet, as it happened the other type of court would often choose that very combination. There were still differences in the way the two types of punished offences in that magistrate courts appeared to be more circumspect than customary courts in their use of multiple penalties within the scope of permissible substitutions and/or additions. So there was a divergence in the patterns of use of some punishments combinations even where there need not have been any given similarities in availability of choice with respect to choice of combinations. To that extent, it seemed that other factors other than variation

in the structure of discretion were at play. These factors probably included value-related reasons and general orientation.

Even though there was no systematic way of measuring directly the impact of beliefs and postures adopted by the courts towards certain offences and offenders on sentencing outcomes, there was a lot of indirect evidence pointing to the possible influence of focal concerns on the behavior of customary courts, in relation to sentencing. Available evidence suggests that customary courts often want and succeed in getting certain offences that the police know to be of special interest to them such as nuisance-related offences (Baillie, 1969; Kirby, 1985).It is therefore not surprising that these being offences they would like to suppress, customary courts consequently tended to punish them more severely than might otherwise have been reasonably expected. Social disorder offences such as affray, common assault and nuisance-related offences may be seen as a direct challenge to the authority of traditional leaders as leaders of their communities (Schapera, 1970). A notable feature of these offences was that they involve young persons whom the customary courts were eager to deal with in the customary way through lashing (Schapera, 1938; Leslie, 1969; Frimpong, 2000; Shumba & Moorad, 2000; Tafa, 2002). The demographic situation in the country, the rapid pace of social change and the high rate of unemployment amongst the youth make a clash between the youth and traditional authorities almost inevitable. These factors, together with many others, have probably helped to undermine the ability of in-formal control mechanisms to curb social disorder so that traditional authorities have to deal directly with it more and more (Roberts, 1972).

The relatively unstructured discretion of customary court judges probably allowed secondary factors associated with social change as it affects the customary system, together with the inherent tendencies of customary courts, to come into play. Other researchers on the Botswana legal system have pointed to changes in both the patterns of cases dealt with by customary court over time (Roberts, 1972; Love & Love, 1996; Kuper, 1969) and the growing use of penal sanctions by customary courts generally (Bourman, 1984). The resulting harsh penalties may, in some cases be simply a result of these factors rather than a deliberate attempt by customary courts to be punitive. However, as we argue below, the possibility that in some cases harsh punishment was what was probably intended cannot be excluded. Wide discretion simply provided greater scope for that eventuality. For instance, customary courts appeared to be generally deploying multiple punishments to enhance penalties probably as way of addressing the deficits in their substantive powers while magistrate courts appeared generally to deploy multiple punishments (at least in respect of triable-either-way offences) to avoid imposing harsher punishment.

Hybridization of Punishment(s)

Among the possible factors explaining the propensity of customary courts to deploy multiple penalties the way they did was that such was the product of the combined effect of the hybridization of punishments in customary courts resulting from changes in the law, and the retention of traditional elements of the customary process which allowed these courts to impose civil and penal sanctions all at once like in cases involving compensation (Schapera, 1938, Bourman, 1984; Nsereko, 1989). What appeared to be happening at least in the case of some offences that were previously regarded as civil wrongs under customary law (e.g. Use of Insulting Language (formerly Obscene Abuse)), and therefore, generally or mostly subject to civil sanctions, was that customary courts now tended to

apply a mixture of traditional sanctions and penal sanctions in those cases where they decided that multiple punishments would be the appropriate penalty. Where preference for a certain penalty in respect of certain offences was combined with the basic, general or standard punishment prescribed by the law, the effect was to make punishment of that particular offence harsher in comparison to previously existing approaches. The deployment of multiple punishments showed both consistency and departure from traditional ways of punishing thus suggesting hybridization of punishments (see Roberts, 1972). It is therefore clear that even as punishments have changed they have remained the same on some level in that, where multiple punishments were awarded, the traditional punishments, were more often than not, used in combination with new penalties. As a result, we see both the persistence of customary ways of dealing with certain wrongs and the perverse effects of incorporating new punishments into the traditional menu: harsher punishment.

The interaction between the legal cultures of the two systems and the social context, in which these processes unfold, has the potential to change the meaning of punishments that are traditionally part of the repertoire of these legal systems (Findlay, 1997, Cain, 2001). This is particularly so in the case of customary systems which have, in the area of criminal law, been subordinated to the common law. This would be consistent with observations made by others regarding the changing nature of punishments in customary courts which are sometimes state-initiated, sometimes not (Schapera, 1938, pp. 46-50; Roberts, 1972; Bourman, 1984). On the other hand, in the present context, the common law system may be less affected in that it forms the basis for the basic offence and punishment framework for the whole system, flexibility clauses pertaining to punishment in the customary courts notwithstanding.

Internal and External relativities

Amongst the possible reasons why customary courts' punishments were harsher than those awarded by magistrate courts was that the two courts appeared to have different starting and end points as far as the internal relativities regarding scaling of offences were concerned. The substantive jurisdiction of customary courts in relation to ordinary criminal offences was and is still limited to what the general courts would regard as low to moderately serious offences. However, for the customary courts these 'moderate' offences were 'serious' offences since, if we exclude the two offences for which customary courts have been granted extraordinary jurisdiction, namely stock-theft and drug-related offences, 'moderate' offences sit at the top of the most serious offences that come before these courts. It is, therefore, not surprising that customary courts tended to punish such offences more severely than the general courts.

On the other hand, customary courts may well believe that they do not have sufficient substantive powers to punish offenders as severely as they would like using a single penalty even where they would prefer to do so. Customary courts have been known to be unhappy with restrictions pertaining to punishment of young persons (Frimpong, 2000). So it could be that they saw themselves as making up for that by deploying a larger combination of multiple punishments with the result that for most offence categories they scored higher on severity than magistrate courts even though they generally tried the lower band of offences within those general offence categories than magistrate courts. However, when the issue of multiple punishments is considered in the context of choice as to discretion and the comparative substantive powers of the courts with regard to all

punishments, then it is easy to see why customary courts would use multiple punishments to enhance punishment while magistrate courts use them as a means to avoid imposing more severe sentences. The fact that imprisonment is the basic punishment for all offences despite being the most severe penalty may also explain why we get these divergent results.

Conclusion

The findings of the study have implications for the current debate on comparative justice in Botswana since perceived disparities in the sentences awarded by customary and received courts are at the heart of the debate. The study found that when customary courts employed multiple punishments, they tended to punish more severely than magistrate courts did similar offences. This was evident from the following general patterns: (a) the variety of punishment combinations deployed by customary courts exceeded those employed by magistrate courts, sometimes by a very wide margin; (b) it was not unusual for the average number of multiple punishments used to punish a single offence in customary courts to exceed three whereas those deployed by magistrate courts rarely exceeded two; (c)customary courts registered the highest severity scores across all offence groups considered and (d) the severity score differentials ranged from large to very large. The question is not whether there should be any similarities/differences in the way customary and common law courts punish offenders as the system was deliberately designed to accommodate both. Rather the question is one of degree. In other words it is the magnitude of difference that matters, both from the standpoint of principled sentencing, and public perception. If the disparities are of an unacceptable magnitude then there is a risk they will undermine the system as a whole. The structural arrangement of the courts and the statutory and constitutional framework allow for and presume differences in the way customary and common law courts approach criminal cases while ensuring comparability. Thus it can be inferred from this that the differences in outcomes in criminal cases were not really intended to exceed tolerable limits. The system should be deemed to be failing if the differences in the sentences are of such a magnitude as to undermine cardinal and ordinal proportionality.

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