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College of Social and Behavioral Sciences

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Review Committee
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Criminal Justice Faculty

Dr. Robert Spivey, Committee Member,
Criminal Justice Faculty

Dr. Daniel Jones, University Reviewer,
Criminal Justice Faculty

Chief Academic Officer
Eric Riedel, Ph.D.

Walden University
2019

Abstract

Recidivism and Prison Overcrowding due to Denial of Legal Representation in Botswana

by

Sidney Pilane

MBA, University of Botswana, 1994

LLB, University of Swaziland (in conjunction with the University of Edinburgh), 1983

Dissertation Submitted in Partial Fulfillment

of the Requirements for the Degree of

Doctor of Philosophy

Criminal Justice

Walden University

February 2019

Abstract

Botswana has been experiencing high rates of recidivism and prison overcrowding, but the causes of these problems have not been explored. Thus, this qualitative study was conducted to investigate whether the denial of legal representation to criminal defendants tried in the customary courts is one of the causes of high rates of recidivism, prison overcrowding, or both. The main research question addressed a possible relationship between these factors and the denial of legal representation, and the study was guided by the punctuated equilibrium theory and the policy feedback theory. Data were collected through semi structured interviews with 10 released first offender prison inmates, 10 released recidivist prison inmates, and 10 professional participants from disciplines in the criminal justice system in addition to reviewing statistics and scholarly research. Data were analyzed through detailed description, categorical aggregation, direct interpretation, which led to naturalistic generalizations and patterns. The results indicated that the denial of legal representation to criminal defendants tried by customary courts appeared to contribute to both recidivism and prison overcrowding, which may undermine public safety and security. The implications of the study for positive social change include informing policy-makers of the need to reform the policy on legal representation to ensure that criminal defendants tried in the customary courts receive fair trials. The additional implications for positive social change include impacting rates of recidivism and prison overcrowding and enhancing community safety and security.

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Dedication

This study is dedicated to my mother, the greatest woman to ever live. She gave her life so we may have ours in abundance. I owe my being to her love, for I am because she loved me so, and all that I have accomplished is on account of values she inculcated in me. To a lesser extent to my father who, in a way only Africans are capable of understanding he taught me how to be a man, and the unsurpassable value of hard-work and thoroughness in the doing of all that a man undertakes. For all other things I forgive him.

My wife Portia Neo and daughters Keletso, Pulane, and Yolisa, for they merit a measure of the dedication for their understanding and encouragement, and in return for time with me which they gave up in order that I may do this work in the hope that it would prove of profit to those it concerns. No less to a friend I shall not name for frequently and anxiously asking after my progress.

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To the wonder of the searchable Internet I owe locating Walden University and accessing the opportunity to do this work. But for my former chair and mentor Dr. Anthony B. Leisner there would be nothing for which to write this acknowledgment. Single-mindedly he held my hand and patiently and tirelessly led me through the thicket of this formidable work. I could not have wished for a better chair and mentor. Dr. Robert Spivey, the second member of the committee who supervised my research, and Dr Daniel Jones, my URR, perfected and elevated to scholarship the modest efforts of an amateur graduate student. His work on me done and called to greater causes, Dr. Anthony B. Leisner gave over to Dr. Gabriel M. Telleria who, as a delightfully exceptional replacement chair took me to the mountain top. To all these eminent scholars I convey my heartfelt and deepest gratitude. I shall try to be worthy of their confidence always.

My family and mentors acknowledged, it remains to thank the several Professors who aided me through the coursework that preceded the dissertation research and earned me the award of two national honors in the United States and one international honor. It would be remiss of me did I not thank my siblings, my friends, colleagues, and classmates and the exceptional staff of the university who made all of this possible by providing indispensable support.

Table of Contents

List of Tables v

Chapter 1: Introduction to the Study 1

Introduction 1

Background to the Study 3

Statement of the Problem 4

Purpose of the Study 6

Research Question 6

Theoretical Framework of the Study 7

Nature of the Study 8

Definition of Terms 9

Assumptions 9

Scope and Delimitations 10

Limitations of the Study 11

Significance of the Study 12

Summary 13

Chapter 2: Literature Review 15

Introduction 15

Literature Search Strategies 16

Theoretical Foundation 17

Dual Legal System of Botswana 17

Legal Representation in the Customary Court System 21

High Rate of Recidivism & Prison Overcrowding 30

Discussion, Analysis, and Conclusion....35
Chapter 3: Research Method....38
Introduction....38
Research Design and Rationale....39
Theoretical Method of Inquiry....41
Sample and Population....43
Sampling Procedures....43
Sample Size....44
Gaining Access to Participants....45
Data Collection....47
Interviews....47
Documents....49
Observational Field Notes....49
Method of Data Analysis....50
Data Management, Analysis and Representation....50
Structure of Narrative Report....52
Issues of Trustworthiness....53
Role of the Researcher....54
Dealing with Researcher Bias....55
Participants' Protection....56
Summary....57
Chapter 4: Results....58
Introduction....58

Context of the Study 58
Method of Data Analysis 60
Method of Data Presentation 61
Summary of Findings 63
Sub Question 1 63
Sub Question 2 65
Sub Question 3 66
Sub Questions 4, 5, and 6 67
Sub Questions 7 and 8 74
Sub Questions 9 and 10 81
Sub Questions 11 and 12 83
Conclusion 85
Chapter 5: Discussion, Conclusions, and Recommendations 86
Introduction 86
Discussion and Interpretation of Findings 86
Prison Overcrowding 87
High Rates of Recidivism 89
Influence of Denial of Legal Representation on Prison Overcrowding & Recidivism 91
Limitations of the Study 94
Implications for Social Change 96
Recommendations for Further Research 98
Summary and Conclusion 100

References 103

Appendix A: Interview Protocol 118

List of Tables

Table 1. Botswana Prison Occupancy Level 2000 to 2016 82

Chapter 1: Introduction to the Study

Introduction

Imprisonment is a phenomenon that was unknown to the Batswana of Botswana until 1891 (Moroka, 2008; Mujuzi, 2008). It was introduced in 1885 when the British declared Botswana a Protectorate; unable to pronounce “Batswana,” the British called the territory “Bechuanaland” that means “land of the Bechuana or Batswana” (Moroka, 2008; Mujuzi, 2008). The protecting power introduced a system of laws, but even in 1966 when Botswana became independent from the protecting European power, imprisonment as a punishment was not often used, and the precolonial criminal justice system that the Batswana had carried was mostly unaffected (Coldham, 2000; Cole, 2010; Makunga, 2009).

Botswana’s criminal justice system, as that of most African countries, was largely restorative (Akeredolu, 2016; Coldham, 2000; Cole, 2010). The precolonial system emphasized reclaiming the offender back from crime (Makunga, 2009). Though the content of customary law has been mostly unwritten, the traditional penal policy that kept offenders out of prison continued until the independence Constitution intervened by requiring that only offenses prescribed by written laws were prosecutable. Major among the written laws is the penal code, which has its origins in the 1899 Queensland Code that was introduced into Botswana in 1964 (Coldham, 2000). It was based on 19th century English criminal law, meaning it did not address the African context and the local legal system that had been followed for many centuries (Read, 1963). Customary law legislation followed and required that all criminal cases tried by the customary courts must be founded on offenses and penalties prescribed by written laws as the Constitution

required (Sections 15 and 16). Laws such as the Stock Theft Act have followed the penal code, retaining the harsh penal policy of retribution and zero tolerance for crime and translating into mass imprisonment (Akeredolu, 2016; Coldham, 2000). These pieces of penal legislation have not evolved with criminological and penal thinking in Western democracies away from over-emphasis on imprisonment (Akeredolu, 2016; Coldham, 2000).

Because of the dominance of imprisonment as a form of punishment, scholars have argued for alternative forms of punishment (e.g., Letsatle, 2009; Love, 1992; Makunga, 2009; Mathumo, 2008; Mokanoki, 2012; Moroka, 2008; Nelson, 2008, Roy, 2013; Seitshiro, 2016). Recidivism and prison overcrowding are the product of the shift toward harsher retribution as Botswana society has become more educated, sophisticated, and middle class. Policy-makers from the middle class middle class that impact the poor, lesser educated sectors of society, who "get prison" when the rest get richer (Reiman & Leighton, 2016). Although there is scholarly attention on this issue, much of it is concentrated on seeking solutions without considering causation. In particular, little consideration has been given to the need to investigate that the causes may be systemic, which can lead to better solutions. Therefore, this study was necessary to focus on potential systemic causes of recidivism and prison overcrowding focuses on.

This chapter will include the background of the study, the statement of the problem, the purpose of the study, the research question, the theoretical framework, the nature of the study, the definition of terms, the assumptions made in the study, the scope and delimitations of the study, the significance of the study, and a summary of the chapter.

Background to the Study

Eighty-five percent of all criminal cases in Botswana are tried in the customary courts in any 1 year (Ditshwanelo, 2007). As a matter of law, lawyers do not have the right of audience before customary courts; these courts are presided over by traditional leaders who may have no formal education (South African Law Commission, 1999). The original reason for this was that the legal profession was unknown in African societies. Although this reason no longer obtains, currently there are reasons that relate to the informal, cost-effective, and simple nature of the procedures adopted by customary courts that result in expeditious trials (South African Law Commission, 1999).

Prisons in Botswana are overcrowded, and rates of recidivism are high (Letsatle, 2009; Makunga, 2009; Roy, 2013), but no research has been conducted to determine the causes of these problems. However, researchers have called attention to the injustice of denying legal representation to criminal defendants tried in the customary courts (Boko, 200; Ditshwanelo, 2007; Soyapi, 2014). Additionally, Section 10 of the Constitution of Botswana makes it requisite that for a criminal offense to be prosecutable, it must have been prescribed by a written law and its sentence assigned by such law. The laws for offenses tried in customary courts are generally no less complex than those that prescribe offenses triable only by civil courts, which are presided over by magistrates and judges, all of whom must by law be trained lawyers. In fact, all offenses tried by all the courts are prescribed in the penal code and many other laws. However, the Customary Courts Act empowers the director of public prosecutions to personally or by other appointee prosecute criminal cases before the customary courts because the director is a constitutional creation who must have legal training and qualifications.

There has been much research on forms of punishment and programs that reduce imprisonment because of concerns regarding recidivism and prison overcrowding (Letsatle, 2009; Love, 1992; Makunga, 2009; Mathumo, 2008; Mokanoki, 2012; Moroka, 2008; Nelson, 2008; Roy, 2013; Seitshiro, 2016). But there is a lack of research on the causes of these problems. Thus, this study was conducted to investigate one of many systemic features that can help identify a possible cause of recidivism and prison overcrowding as well as better solutions to these problems.

Prior to this study no research had been conducted that explains why the rates of recidivism are high in Botswana, and why prisons are overcrowded. Similarly, no scholarly literature exists on the implications of denying legal representation to criminal defendants tried in the customary courts contributing to the high rates of recidivism and the problem of prison overcrowding. The study was made necessary by the fact that both these problems have been little affected by the various interventions that were introduced to resolve them (Makunga, 2009; Mujuzi, 2008).

Statement of the Problem

The problems that I investigated are that rates of recidivism are high, and prisons are overcrowded in Botswana (Makunga, 2009; Letsatle, 2009; Roy, 2013). The problem of high rates of recidivism involves the male population of the ages 18 to 24 (Love, 1992). These problems lead to the question of whether defendants tried in customary courts—they constitute 85% of all criminal defendants tried in the country (Ditshwanelo, 2007)—constitute the largest portion of the prison population as first and repeat offenders because they do not receive fair trials from being denied legal representation (Boko, 2000). This denial of legal representation might conduce the defendants to habitual

offending, and impacts the male population 18 and above, which may also affect community safety and security (Love, 1992). The problems persist despite the remission of sentences, rehabilitation, extra-mural forms of punishment, and periodical declarations of amnesty for prisoners (Makunga, 2009; Mujuzi, 2008) in addition to defendants who can afford lawyers—and there are few—requesting a transfer of their cases to magistrates' courts where they may be legally represented. Because trials in customary courts are quick and legal representation is denied, suspects tried in these courts may reoffend, which results in prison overcrowding (Boko, 2000).

Another issue with the denial of legal representation to defendants tried by customary courts is that it is contrary to Section 10 of the Botswana Constitution while allowing per the Customary Courts Act §12(4) the director of public prosecutions or his appointee, both of whom have legal training, to bring prosecutions before the customary courts (Ditshwanelo, 2007; Soyapi, 2014). The fact that there is no presumption of innocence before the customary courts is also contrary to Section 10 of the Constitution. The denial of legal representation encompasses all factors that undermine due process, including the failure to administer the Miranda rules to a suspect on first contact with law enforcement, failure to allow a first call to a lawyer prior to interrogation, failure to allow access to a lawyer prior to being taken to court, presumption of guilt and inquisition at trial, and failure to advise the defendant following conviction as to the right of appeal. All these failures, held by the U.S. Supreme Court in *Gideon v. Wainright* (1963) written for the court by Justice Black, result in the denial of access to justice, a denial of justice, and the denial of a free trial. Based on this evidence, the problem in this study is current,

relevant, and significant to criminal justice in Botswana, and exposes the existence of a gap in the area the subject of this study.

Purpose of the Study

The purpose of this qualitative study was to explore, understand, and explain the ways denying legal representation to defendants who are tried by customary courts contributes to high rates of recidivism and/or prison overcrowding. I further sought to determine whether defendants who are tried by customary courts are aware that Section 10 of the Botswana Constitution:

- decrees that their innocence must be presumed—Subsection 2(a);
- entitles them to legal representation—Subsection 2(d); and
- gives them the right to be tried by an independent and impartial court (Subsection 1) and not an inquisitorial one that presumes them guilty and requires them to prove their innocence, as the State Department of the United States Government (2010) and the South African Law Commission (1999) have concluded. (Boko, 2000)

If these defendants are aware of that they have been denied these salutary rights, the final question is whether a sense of grievance disposes them to reoffending. That is the concept or phenomenon of study.

Research Question

In what way does denying defendants' right to legal representation in criminal trials conducted before customary courts impact defendants, dispose them to reoffending, and contribute to the problems of high rates of recidivism and/or prison overcrowding experienced in Botswana?

Theoretical Framework of the Study

Criminal justice policy, its implementation, and administration is a matter of public policy and administration. Thus, the theoretical basis of this study is two-fold. First, the punctuated equilibrium theory (Baumgartner, Jones, & Mortensen, 2014), guided a response to the longstanding policy of denial by the criminal justice system of the right to legal representation. The policy, by its incrementalism, may have led to high rates of recidivism and prison overcrowding that may undermine its effectiveness and make it a candidate for reform. The second theory is the policy feedback theory (Mettler & Sorelle, 2014), which offered feedback to the policy of denying criminal defendants' right to legal representation and indicating the need for reform.

The changing circumstances regarding the policy of denying legal representation to defendants tried in the customary court system typifies both theories. Marked by stability and incrementalism for centuries during which the notion of legal representation was unknown to the society of Botswana, evolution of the political, legal, and cultural systems has brought the policy and its continued viability into focus. The political and cultural development of the Batswana, combined with the Constitution and contemporary universal values, increasingly characterizes the policy and has precipitated a crisis around it. Thus, the policy needs to be reformed to accord with the current socioeconomic and legal environment. Feedback from the operation of the policy itself now militates against its retention and compels its reform. Although it creates problems in the lives of those who suffer from it, research into how its operation may undermine current justice policy and its objectives may motivate policy-makers to recognize that circumstances have

transformed the policy, and there is a need to eliminate the criminal justice problems that is may be contributing to.

Nature of the Study

The study is qualitative and involved semi structured interviews. I identified the appropriate respondents and, following receipt of the Institutional Review Board (IRB) approval, solicited 30 participants to use in this research. I selected and prepared the research materials and data collection tools employed in data collection. The choice of method, number and identity of participants, the research materials and data collection tools, and the procedures were determined by the Research Question derived from the Problem Statement.

This study involved multiple sources of data. I obtained statistics on prison overcrowding from official government sources, but no official statistics are maintained on rates of recidivism. A statistical analysis was used to determine whether there was a relationship between the high rates of recidivism and prison overcrowding and the denial of legal representation to criminal defendants tried before customary courts. However, this did not require tests and measurements commonly used in quantitative research. Other data were collected through semi structured, face-to-face interviews. Thirty participants (10 former prisoners who had been tried and convicted by customary courts on a first offense, 10 former prisoners who were repeat offenders tried and convicted by customary courts, and a small sample of professional and scholarly participants from disciplines and professional work associated with the criminal justice system) were selected purposively to contribute to understanding the phenomenon under study.

Furthermore, data were obtained from the literature that suggests that rates of recidivism are high and that prisons have been over-crowded.

Definition of Terms

Bechuana: Refers to the Batswana or Tswana people. The British could not pronounce "Batswana," and "Bechuana" was the best they could do (Ramsay,1998).

Customary law: The law that issues from the culture, customs and usages of a people. It is the original law of the Batswana outside the received European system of the Roman-Dutch law heavily influenced by South African court decisions over the centuries (Fombad & Quansah, 2006).

Commissioner of prisons: Head of the prison service in Botswana (Ditshwanelo, 2015).

Customary courts: Courts that administer customary law (Fombad & Quansah, 2006).

Dual legal system: Refers to the customary law and Roman Dutch law that are applied in Botswana (Pain, 1978).

Criminal defendants: Defendants who are tried before the customary courts without legal representation (Boko, 2000). In this study, these individuals are referred to as defendant participants. Those who have not been criminal defendants will be referred to as non-defendant participants.

Assumptions

The study was based on several assumptions. The first is that it is generally known that criminal defendants who appear before customary courts are denied legal representation. The second assumption was that these defendants do not have much

education and are for the most part unable to afford lawyers. The third assumption was that the denial of legal representation denies these defendants proper justice. The fourth assumption was that the denial of legal representation in addition to judicial officers in customary courts not having education or training makes convictions more likely. All these assumptions are intuitive but established a framework for the collected data.

Scope and Delimitations

The specific aspects of the research problem that were addressed in the study are recidivism, prisons' limits of capacity, and the denial to defendants' right to legal representation in criminal trials conducted before customary courts. High rates of recidivism and prison overcrowding were focused on because resolving their cause—perhaps the policy of denying defendants' right to legal representation—can address these problems of the criminal justice system.

The populations that were studied were primarily prisoners convicted by customary courts who had served and completed custodial sentences on a first or subsequent conviction. These participants were selected because they constituted the best source of data on the implications of the policy of denying legal representation. It was asked of them whether they were upset by the denial and whether they resigned themselves to a life of crime resulting in recidivism that contributed to prison overcrowding.

Prisoners tried and convicted by the civil courts were excluded, as they fell outside the scope of the research problem and were excluded by the theoretical framework on which this study was grounded. The study was limited to Botswana because it is a country experiencing high rates of recidivism and prison overcrowding.

The study is not transferrable to other countries, as their circumstances relative to the research problems may be different.

Limitations of the Study

One of the limitations of this study was that I was the main instrument for data collection, analysis, and interpretation. There was potential for my bias as a member of the study's setting and the legal profession (see Creswell, 1998; Maxwell, 2013; Nachmias & Nachmias, 1987; Goulding, 2002). To minimize the effects of the bias and subjectivity, I made a conscious effort to remain neutral and objective throughout the data collection process. Furthermore, I have used other sources of data to confirm research findings and engaged a third party to check whether the findings were warranted by the evidence available (see Creswell, 1998; Goulding, 2002).

A further limitation was the lack of literature on the subject of the study. Although there is literature that acknowledges the injustice of denying the right to legal representation, no study of its effects on the criminal justice system has been done that I could find. Instead I used surrounding literature as there was not enough available that was directly related to critically analyze.

Purposive sampling was used to identify and select appropriate participants, but there was a limitation that the subject population consisted of former prisoners, who are a semi vulnerable group. Although I initially intended to study prisoners still serving their sentences, getting access would not have been possible. However, released prisoners were just as useful and informative, though I still used secondary sources for supplemental data. Although this may have been a limitation because secondary sources can never be as reliable as primary sources, which may have undermined the

effectiveness of the purposiveness of the sampling (Trochim, 2001; Singleton & Straits, 2005), this did not significantly affect the efficacy of my study.

Significance of the Study

I investigated the problems of high rates of recidivism and prison overcrowding and any causal relationship between these problems and the denial of the right to legal representation for defendants tried before customary courts. I further explored whether the denial of the right to legal representation aggrieved defendants, disposed them to reoffending, and thereby contributed to the problems of high rates of recidivism and prison overcrowding. This addressed a gap in current knowledge on the subject. The study was also timely and appropriate, as at least 85% of all criminal defendants in Botswana are tried by customary courts (Ditshwanelo, 2007), meaning the denial of legal representation and possible implications required exploration .

Recognizing that the denial of legal representation has disposed criminal defendants to reoffending may incline policy-makers to rethink the practices that result in the denial. Additionally, this denial of representation is contrary to Section 10 of the Constitution of Botswana, violating the right of the criminal defendant to the presumption of innocence and permitting the prosecution to be conducted by people with legal prosecutorial training while denying defendants the same right. Thus, the results of this study have implications for positive social change in that the response of policy-makers may reform the system, which can provide a better justice system for those disenfranchised by the current policy, thereby also enhancing public safety and security.

Summary

The denial of the right to legal representation in proceedings before the customary courts is increasingly attracting the attention of the public. The injustice of it and the fact that it violates the Constitution contribute to the growing awareness of its existence in addition to the number of criminal defendants who are tried in the customary courts as a proportion of all defendants in the country. The denial of legal representation also has ramifications for public safety and security. Therefore, this study was conducted to discover whether the high rates of recidivism and prison overcrowding are in any way caused by the denial of legal representation. It was necessary to investigate:

- the cause or causes of high rates of recidivism and prison overcrowding, and
- the impact of the denial of legal representation to criminal defendants tried by the customary courts, particularly as they represent 85% of all criminal defendants in Botswana, on the high rates of recidivism and prison overcrowding.

Next follows Chapter 2, which includes a review of existing literature on the subject of the study. I examined, synthesized, and analyzed the available literature relevant to the problems which necessitate the study. Chapter 2 also includes literature on the theoretical and conceptual basis of the subject and an analysis of the legal environment in which the policy of denial of legal representation occurs, the origins of the policy, its rationale, and the circumstances that explain its continued existence. The chapter also offers a critical analysis of the policy and the legal and institutional environment. The chapter finally includes literature on rates of recidivism and prison overcrowding and attempts that have been made to mitigate these problems. This

literature justified the need for this study because the cause or causes of recidivism and prison overcrowding and the implications of trying so many defendants while denying them legal representation have not been addressed.

Chapter 2: Literature Review

Introduction

The purpose of the study was to investigate whether there is a linkage between the high rates of recidivism and prison overcrowding in Botswana and the policy in practice of denying criminal defendants who are tried in customary courts, who constitute 85% of all criminal defendants in Botswana, legal representation at their trials. This study can bring to the attention of policy-makers that this policy may require reform. The goal of this literature review was to examine, synthesize, and analyze the literature relevant to the denial of legal representation and problems of recidivism and prison overcrowding.

This chapter offers a comprehensive review of literature on the theoretical and conceptual basis of the study. In addition, it will provide an analysis of the legal environment in which the denials of representation occur, as well as the historical socio-legal factors that help explain these denials. The chapter will also include the conceptual framework and methods. Finally, it will identify gaps in the literature that require further research. The chapter is organized as follows: a brief examination of the history of the dual legal system of Botswana; the legal context of the customary law system and how it operates; the constitutional and legislative framework of the criminal justice system of Botswana; the legal rationale for the requirement that a defendant have legal representation in a criminal trial; the legal sources of the denial of legal representation; the genesis and explanation of the policy that underpins the denial of legal representation to defendants tried in the customary court system of Botswana; a critical analysis, including criticism and justification of the latter policy; and the examination of the literature showing rising rates of recidivism and prison overcrowding.

Literature Search Strategies

I conducted a comprehensive literature review for this study. Such literature came in part from the library of the University of Botswana. Google, Walden Library, and bibliographies were also used to research the relevant literature. Data were also obtained from the office of the Botswana government statistician general, archives of the Government of Botswana, reports from the Botswana Centre for Human Rights, Botswana prison and crime statistics, the global report on human settlements, the United Nations literature on basic education in prisons, the U.S. human rights and country reports on Botswana, the *Global Journal of Advanced Research*, Botswana government reports on recidivism and prison overcrowding as well as international literature, a report of the South African Law Commission, a journal on criminal law forum and other African law journals, literature on the Botswana legal system, the Botswana Constitution and various statutes; and Botswana, South African, and U.S. case law.

The approach used in the search was mostly subject based. Among the terms used in the search were *legal representation in Botswana, recidivism in Botswana, prison overcrowding in Botswana, international criminal justice, right to legal representation, rationale for requirement of legal representation, criminal process in the customary court system, legal representation in customary courts, legal sources of right to legal representation, denial of legal representation in customary courts, rationale for denial of legal representation in customary courts, Botswana legal system, legal duality,* and *traditional criminal justice processes*.

Theoretical Foundation

The theoretical base of this study included the punctuated equilibrium theory and policy feedback theory. The punctuated equilibrium theory (Baumgartner et al., 2014) addressed a change-compelling crisis of recidivism and prison overcrowding precipitated by the policy of denying the right to legal representation. The policy feedback theory (Mettler & Sorelle, 2014) was also used because it offered feedback from the existing policy that indicate the need for reform.

Though the policy of denying legal representation began because of lack of legal knowledge in Botswana, it still continues despite the requirements of the Botswana Constitution that legal representation is a right. The Constitution enjoins all courts to obedience, including customary courts. But the Roman Dutch law of the Botswana legal system has complicated the situation. As the punctuated equilibrium theory states, developments have precipitated a crisis in policy that may compel a change in the policy (Baumgartner et al., 2014). Additionally, the policy feedback theory provides that feedback from the operation of a policy may necessitate a change in that policy in consequence of undesirable results that that policy yields (Mettler & Sorelle, 2014). Section 10 of the Botswana Constitution was informed by the experiences of others that revealed that the absence of the presumption of innocence, prosecution for unwritten offenses, and the denial of legal representation result in lack of proper access to justice and a fair trial.

Dual Legal System of Botswana

A brief review of the origins and development of the customary legal system of Botswana and its broad legal context is necessary. Botswana, before Bechuanaland,

became a protectorate of the United Kingdom of Great Britain and Northern Ireland in 1885 (Otlhogile, 1994). The British declared Bechuanaland a protectorate primarily to prevent Afrikaaners, the White descendants of Dutch settlers who had arrived at the Cape of Good Hope, South Africa from Holland in 1652, from using Bechuanaland territory for the reinforcement of Afrikaaner troops who had uneasy relations with the British (Ramsay, 1998). The second reason was to prevent the Germans, who had colonized South West Africa (now Namibia), from over-running Bechuanaland and having a coast-to-coast presence in the sub region (Alverson, 1978). A protectorate is not quite a colony (Fombad & Quansah, 2006); it is a territory that the protecting power undertakes to protect against external aggression and attempts to colonize by other countries while not taking responsibility for the territory’s internal administration and socioeconomic well-being (Fombad & Quansah, 2006). Unlike in the case of a colony, the Bechuana (Batswana) were not British subjects, Bechuanaland (Batswanaland) was not British soil, and the powers of local rulers as to domestic matters were left intact and unimpaired (Frimpong & McCall-Smith, 1992).

On declaring Bechuanaland a protectorate, the British found a system of traditional values associated with the Bechuana that the latter used to maintain law and order in Tswana society (Molokomme, 1994). The customary law that was developed followed how the Batswana had been governed for centuries (Fombad & Quansah, 2006; Molokomme, 1994; Otlhogile, 1994; Schapera, 1984). Because customary law was mostly unwritten, the British requested Isaac Schapera to codify it, which he did in 1938 (Schapera, 1938). Customary law then and now incorporates the criminal law of the

Batswana administered by customary courts presided over by chiefs and their subordinates, themselves of royal lineage (Schapera, 1938).

The declaration of the protectorate attracted European missionaries, hunters, colonists, and traders in search of opportunities (Fombad & Quansah, 2006). Because these Europeans came from countries with a different legal system, the British were compelled to establish an administration in the Cape of Good Hope and introduce a system of laws and legal administration to which these recent arrivals were accustomed (Otlhogile, 1994). The Queen of England did this by proclaiming an Order-in-Council on May 9, 1891 in exercise of powers by the Foreign Jurisdiction Act of 1890 (Pain, 1978). Section 19 of the 1891 proclamation reads:

> Subject to the foregoing provisions of this Proclamation all suits, actions or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the colony of the Cape of Good Hope; provided that no Act after this date by the Parliament of the Cape of Good Hope shall be deemed to apply to the said territory.

Thus, the Roman Dutch law and the English criminal and procedure laws were introduced into the Bechuanaland protectorate as the laws applicable in the Cape of Good Hope (Fombad & Quansah, 2006; Otlhogile, 1994; Pain, 1978). This system of laws has also been affirmed by the Court of Appeal of Botswana in *Silverstone (Pty) Limited v. Lobatse Clay Works (Pty) Limited, 1996 BLR 190* by the following dictum:

> it is to be noted that the common law of Botswana is the Roman Dutch law. Although this was laid down as long ago as 1909 (by Proclamation No. 36 of

1909) when Botswana was still the Bechuanaland Protectorate, the Roman Dutch law has continued to this day to be applied and is still so applied in Botswana.

The Roman Dutch law and English law received into Bechuanaland only applied to Europeans, and they were administered by European courts established for the purpose (Fombad & Quansah, 2006; Frimpong & McCall-Smith, 1992; Otlhogile, 1994; Pain, 1978). To be sure that these laws were not applied to the Bechuana, the protectorate administration, by Article 4 of the 1891 proclamation, required that the high commissioner at the Cape of Good Hope must,

> respect any native laws or customs by which the civil relations of any native chiefs, tribes or populations under Her Majesty's protection are now regulated, except so far as the same may be incompatible with the due exercise of Her Majesty's power and jurisdiction.

This is how customary laws and procedures of the Bechuanaland (also Basotholand and Swaziland) protectorate were preserved. The jurisdiction of customary courts over the Bechuana, referred to as "tribesmen," was further affirmed by the Native Tribunals Proclamation of 1934. The Customary Courts Act of 1968 modernized the 1934 statute. The Customary Law Act of 1969 further affirmed the modernized version of Article 4 of the 1891 proclamation following the attainment of independence from the British on September 30, 1966 when the Bechuana became the Batswana and Bechuanaland became Botswana. The dual legal system of Botswana and the continuation of the customary law system were firmly established for modern times by the Common Law and Customary Laws Act in 1969.

Even though the Customary Laws Act declares that customary law, largely an unwritten system of laws, shall continue to be applied to the Batswana, the 1966 Botswana Constitution §10(8) has varied by providing that "no person shall be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law." In furtherance of this the penal code, creating hundreds of offenses crafted in legal jargon, was enacted in 1964 as Law Number 2 of 1964 (Coldham, 2000). The Customary Courts Act §12(6) also requires that offenses charged shall be ones created by the penal code or other written law.

Legal Representation in the Customary Court System

Section 12(1) of the Customary Courts Act gives criminal jurisdiction to customary courts, and Section 13 excludes

- offenses of treason
- rioting or any offense involving the security or safety of the state
- any homicide in whatever degree
- bigamy
- offenses against the administration of lawful authority, save impersonation of a person employed in the public service
- destroying evidence
- offenses relating to judicial proceedings, save escape and obstructing court officers
- bribery
- an offense concerning counterfeit currency
- robbery where the defendant is 21 years of age or older

- extortion by means of threats
- an offense against insolvency law or company law
- rape
- contravention of prohibitions relating to precious stones, gold, or other precious metals
- other offenses as may be prescribed

These exclusions are mainly because of the seriousness of the offense, which was unknown in the economy of a traditional society and would not be within the competency of officers who preside over customary courts.

Defendants charged with criminal offenses before the customary courts are, by law, not permitted legal representation (Boko, 2000; Soyapi, 2014). It is so not just in Botswana but also in many African countries, particularly in Southern Africa (Classens, 2009; Gasa, 2011; Himonga, 2011; Hinz, 2010; Lehnert, 2005; McQuoid-Mason, 1999/2013; Soyapi, 2014; South African Law Commission, 1999; Weeks, 2011), though Namibia is a notable exception (Soyapi, 2014). The operation of the policy continues even though it is a denial of access to justice and access to a fair trial (Boko, 2000). The rationale for the policy of denying audience to lawyers in criminal and civil litigation before the customary courts has orally been passed down. However, now the South African Law Commission has led to a paper on the harmonization of the common law and indigenous (customary) law, particularly on traditional courts and the judicial function of traditional leaders.

Though the reasons for the policy are from the only available source, literature on South Africa on the subject of this study is relevant for two reasons. First, there is more

literature on any subject in South Africa than there is in Botswana because South Africa has many more universities and tertiary institutions while Botswana has one such university. Second, Botswana, whose territorial size is approximately the same as France and Texas has had a population of 2,038,228, of whom 99% are ethnic Batswana (Botswana Government Statistician General, 2011) with a common language and culture (Ramsay, 1998; Schapera, 1938). In South Africa, the ethnic Batswana left behind the larger population of ethnic Tswana who are of the same culture and speak the same language (Ramsay, 1998), and they constitute approximately 8% or 3,280, 076 of South Africa's population (South African Government Statistician, 2001). Additionally, because all the Black African peoples of Southern Africa emigrated from Central Africa in the early centuries and are all of negroid stock and speak Bantu languages, their cultures have much in common (Central Intelligence Agency World Factbook, 2012; Tlou & Campbell, 2013; Ramsay, 1998; United Nations, 2011). Therefore, what is written in the paper of the South African Law Commission and other works on the culture and customary law and institutions of the Batswana in South Africa still applied to the Batswana of Botswana.

Though the South African and Botswana customary institutional landscape is similar, there is a significant difference in their structures. In South Africa, traditional courts are presided over by chiefs and headmen, and are called by the rank of the presiding officer (Bekker, 1989; Bennett, 1995). These are born royals who qualify by reason of the factor of birth alone and often do not have education but are considered to know traditional law because of their upbringing and grooming for these roles (Bekker, 1989; Bennett, 1995). Another tier of traditional courts, the regional authority courts that

operate in the Eastern Cape Province amongst the Xhosa, has concurrent jurisdiction with magistrate's courts, a significant distinction from the courts of the chiefs and headmen. In South Africa, legal representation is unknown in the traditional courts presided over by chiefs and headmen (Bekker, 1989; Bennett, 1995) but not in regional authority courts based on *Bangindawo & Others v. Head of Nyanda Regional Authority & Another*, *Hlantalala v. Head of the Western Tembuland Regional Authority and Others*, and *1998 (3) South African Law Reports 262 (TK).* Additionally, although it was constitutional that legal representation was unknown in proceedings before customary or traditional courts, regional authority courts exercised jurisdiction concurrent with the magistrates courts, whose jurisdiction includes serious offenses and excludes only capital offenses. Accordingly, J. Madlanga ruled in *Bangindawo* that it was unconstitutional to deny legal representation in regional authority courts.

In Botswana, the hierarchy of customary courts ranges from the courts of headmen of record, chief's representatives, senior chief's representatives, deputy chiefs, chiefs and the customary court of appeal (Customary Courts Act, 1971). The jurisdiction of all these courts is limited to minor offenses by subject matter, and consequently by severity of sentence, as discussed above, and they are to be regarded as comparable in status and jurisdiction to the courts of headmen and chiefs in South Africa. Accordingly, the distinction made with the regional authority courts in South Africa by J. Mandlanga in the *Bangindawo* case has no application to the customary courts in Botswana as no customary court has jurisdiction which is concurrent with that of the magistrate's courts.

Now the reasons for denying criminal defendants legal representation in criminal litigation before customary courts must be discussed. These are articulated in Discussion

Paper 82 of the South African Law Commission (1999), and are to be found in Paragraphs 2.2 and 7.5 under the rubric of disadvantages of traditional courts in the chapter on "Traditional Courts and the Judicial Function of Traditional Leaders." The nomenclature in Botswana is "customary courts" while in South Africa it is "traditional courts." The reasons given in the law commission paper, the only written source I have been able to find, for excluding legal representatives from customary courts, are fivefold. These arise from modern conditions and circumstances.

First, litigants who are parties in these courts tend to be poor and without means to afford such representation. In civil cases, such parties would be disadvantaged if their opponent should be able to afford a lawyer. The prohibition keeps the playing field level. Secondly, the nature of the cases tried before these courts, it is said, is relatively simple and does not require complicated legal argument by lawyers. Parties in these cases, it is said, are generally knowledgeable in customary law.

Thirdly, lawyers' legal jargon would confuse the lay judicial officer and thereby undermine his understanding of the case leading to a faulty judgment. Fourthly, legal technicalities that lawyers are wont to raise would cause delays and undermine the very essence of these courts, that of speedy trials and the expeditious disposal of cases, flexibility and simplicity. Finally, lawyers are trained in English and would seek to conduct cases in that language to the disadvantage of the lay and uneducated judicial officer and opposing party who might not have a lawyer.

All these reasons are vulnerable to counter argument, most of such counter arguments sound. The rationale would seem to be an excuse for denying criminal defendants in these courts legal representation, access to justice and fair trials, Boko

(2000) argues. I quite agree. Some litigants, including criminal defendants who are tried in civil or common law courts, are similarly poor, yet they are not denied the right to legal representation at their trials. The provision of legal aid at all levels would overcome the problem, and there is much to commend its provision to all who need it.

Because customary courts, of necessity by constitutional fiat, try criminal cases arising from offenses prescribed in written laws, the cases they try are no more simple than are cases involving more serious offenses as complicated legal arguments usually arise from the interpretation of the provision upon which the charge is founded and the facts of the case in the context of the law. The severity of the sentence, usually the distinguishing marker between minor and serious offenses, bears no relationship to the manner and language in which the offense is prescribed. For example, the offense of murder is framed in much simpler language than is the offense of contempt, which is justiciable in customary courts. The answer to this problem is that judicial officers in these courts, as in the common law courts, should possess legal training. There is nothing like customary law crimes because, in terms of the Botswana Constitution, all offenses must be prescribed and their penalties stated in written laws.

The employment of legally trained judicial officers in customary courts would also overcome the problem of the tendency of lawyers to invoke legal jargon, for the judicial officers would meet the lawyers on terms of equality on those matters. So too the matter of legal technicalities and the length of time trials would take, for that should not be more important than the need to do proper justice. The problem of language would also be eliminated by the use of legally trained judicial officers.

In any event, there seems to exist a double standard. In terms of Section 12(4) of the Customary Courts Act, the director of public prosecutions may himself/herself or a person authorized by him/her conduct prosecutions before the customary courts. The Director is unknown and has no equivalent in custom. The position is a creature of the Constitution, is responsible for all criminal prosecutions in Botswana and is, for that reason, a protected office. The Director is, of necessity, a lawyer, which makes nonsense, not only of the prohibition of legal representation for defendants before the customary courts, but also of all the rationale offered to justify the longstanding policy.

As to the necessity for trials to be expedited, it applies no less to criminal defendants tried by the civil or common law courts as the Constitution requires that all criminal defendants be tried and their trials concluded within a reasonable time. There is only really one plausible reason why legal representatives are denied the right of audience before customary courts. The policy is a relic of a historical practical reality: the legal profession was unknown, and had no equivalent, in traditional society. This reason is not now possible of invocation because it is no longer valid.

The remaining reason is a one of financial expediency. The customary court system is cheap and expedient. Its judicial officers receive no training, and constitute cheap labor for the Government. Similarly, prosecutors need have no legal training, although increasingly they do as police officers who prosecute receive training on prosecutions at the Police College. The Director of Public Prosecutions in whom all prosecutorial authority exclusively subsists as a matter of constitutional fiat, is enjoined to ensure that all who he appoints to prosecute on his behalf, including before customary courts, must be competent prosecutors with appropriate training in prosecutions.

Like a conveyor belt, these courts dispose of cases rapidly, a problem which, intuitively, may contribute in no small measure to what is acknowledged to be a high rate of convictions in the customary courts, inevitably negatively impacting high rates of recidivism and prison overcrowding. Customary court proceedings are conducted, not in elaborate buildings with expensive furniture, air-conditioning, modern recording equipment and trained staff with skills as do other courts, but in shelters with a roof in thatch but no walls, benches to sit the parties and the public, and a table and chair for the presiding judicial officer. Court proceedings could not be conducted more inexpensively.

It bears emphasizing that there can be no cheaper way of criminally trying 85% of all criminal defendants in Botswana (Ditshwanelo, 2007) in any one year. Evidently, the value of proper due process and justice, universally recognized and emphasized by the United Nations and all civilized nations, and guaranteed by the Botswana Constitution though it is, is by far exceeded by the importance of saving money for the Botswana Government. It gives credence to the school of thought plaintively articulated by some sociologists and criminologists in their attempt to explain the anatomy of crime in society, and dramatized by Reiman and Leighton (2016) in their book *The Rich Get Richer and The Poor Get Prison*, and in that title.

As the Law Commission states at Paragraph 2.2.2 of the Paper, among the disadvantages of the policy of denial of legal representation is that customary courts engage the inquisitorial procedure entailing the presumption of the guilt of the defendant and the obligation on him to convince the court of his innocence, a procedure contrary to Section 10(2)(a) of the Constitution of Botswana. Secondly, Section 10(2)(d) entitles a defendant to legal representation at his trial. This was affirmed by the full bench of the

Court of Appeal of Botswana in *Ntwayame v. The State, 2008(1) BLR 167* (Court of Appeal).

In the latter case, a defendant hauled before the customary court on a charge of stock theft, which entails a mandatory minimum sentence of five years imprisonment in the event of conviction, applied that his case be transferred to the Magistrates' court to enable him to be represented by a lawyer. The customary court referred the request to the Customary Court of Appeal for its advice. The latter court advised a rejection of the request. Following trial and conviction by the customary court, the defendant brought an application before the High Court for the review and setting aside of his trial and conviction on the basis that he had been denied the exercise of his constitutional right to legal representation. Having failed at the High Court, the defendant successfully appealed to the full bench of the Court of Appeal of Botswana, the Court finding that his constitutional right to legal representation had been violated. The law of Botswana is, as is evident from the Bandinawo case above, different from that of South Africa on this point to some degree.

Boko (2000) relied on the decision of the United States Supreme Court in *Gideon v. Wainright (1963)* for his assertion that the denial of legal representation constitutes the denial of the right to a free trial required by the Constitution. Boko (2000) asserted further that by deciding to prosecute a defendant in any court, customary and not, the Government incurred the obligation to guarantee him a free trial, including by assigning him legal counsel if he cannot afford one. Although in principle I agree with Boko's position that that ought to be the case, it does appear, from the decision of the Court of Appeal for Botswana aforesaid, that Boko (2000) may have gone too far when he says

that the prosecuting Government, by the act of deciding to prosecute, incurs an obligation to provide legal counsel. The right to legal representation arises only if the defendant requests to be allowed to exercise it, and even then he becomes entitled to it at his own expense. Where he does not ask to be allowed to exercise it, there is no violation as there is then no denial would seem to be the reasoning of the Court of Appeal of Botswana in the Ntwayame case. Furthermore, the Government is absolved of the obligation to itself provide legal counsel as the Constitution, at Section 10(2)(d), expressly states that a defendant may appoint counsel at his own expense.

Based on this research, the denial of legal representation to defendants before the customary courts of Botswana violates their constitutional rights of access to justice and to a fair trial on two scores: by denying them the right to legal representation at their trial, and by presuming their guilt and requiring them to establish their innocence. These matters entitle them to be aggrieved (Olesitse, 2017). It is further intuitive that, if 85% of all criminal defendants in Botswana are tried in these conditions, all who are convicted are so convicted without having had the benefit of substantive due process, swell the ranks of prisoners if they are sentenced to terms of imprisonment and, in some measure at least, contribute to recidivism and to prison overcrowding.

High Rate of Recidivism & Prison Overcrowding

The questions that arose in this study were whether, in view of Ditshwanelo’s (2007) assertion that 85% of all criminal defendants in Botswana are tried in the customary courts, the fact that they are denied legal representation: (a) explains the rate of conviction which might not occur at that level if they had a lawyer representing them as he/she would insist on a fair trial and (b) undermines the right to the presumption of

innocence; (c) explains the high rate of recidivism for the same or other reasons, one or both of which could result in prison overcrowding. These are the questions the subject of this research.

The criminal justice system of Botswana is beset with problems. Chief amongst these are recidivism and prison overcrowding. That the rate of recidivism is high is not in doubt (Letsatle, 2009; Makunga, 2009; United Nations Human Settlements Program, 2007; United Nations, 1995; United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders [UNAFEI], 1999), as is the fact that there is prison overcrowding in Botswana (Roy, 2013; Mokanoki, 2012; Baputaki, 2005; Seitshiro, 2016, 2017; Love, 1992; NationMaster, 2003; Ditshwanelo, 2007; U.S. Department of State, 2011). While literature exists on the subjects of recidivism and prison overcrowding and possible solutions thereto, it is scant on the causes. It is established that one of the best routes to finding a solution to a problem is to first identify its cause, for that should provide the key that unlocks the chest in which the solution is to be found. This approach is commonest in the physical sciences, particularly in medical science. There is no reason why it would not be apt in the social sciences, it is submitted.

A review of the literature that identifies the problems of recidivism and prison overcrowding and attempts to offer solutions to them follows. The literature on the two problems is considered together as there may exist a symbiotic relationship between them: recidivism may contribute to prison overcrowding and there is a sense in which large prison populations can create comfort zones for prisoners and conduce to their return following release.

The subject of the denial of legal representation to defendants tried by customary courts has, at least on one occasion, been discussed by one of the two Presidents of the Customary Court of Appeal for Botswana. King Christopher Masunga is the President of the Customary Court of Appeal, Northern Division. During an interview on July 19, 2017 (Olesitse, 2017), he called upon customary courts to explain to parties who come before them their legal rights, stating that members of the public often complained that they were not satisfied with judgments of the lower customary courts. What he said merits direct quoting:

> At times they bring forth complaints that they have been denied the right to legal representation and so we at times realize that the customary courts do not inform the complainants of their rights as enshrined in both the Customary Courts Act and the Constitution of Botswana. (p. 1)

The King was paraphrased as having also said that Section 15 of the Customary Courts Act required customary courts to administer customary law and the written law and that, in doing the latter, they must give effect to Section 10 of the Constitution of Botswana by explaining to defendants that they have a right to legal representation. The enlightened King was further quoted as, significantly, having also said,

> So this means that Section 10 of the Constitution must be read together with Section 32 of the Customary Courts Act. Section 10 sub-section 1 of the Constitution of Botswana says that the cases must have a fair hearing within a reasonable time. Section 10 sub-section 2 states that in a criminal case, a person must be presumed innocent until proven guilty. Also it states that a person must

be informed as soon as practicable in a language that they understand and must also be afforded adequate time and facilities for the case.

The King finally said that Section 10 of the Constitution also states that the defendant shall be permitted to defend himself or herself in person or at his own expense by a legal representative. This interview involving the King is an acknowledgment that the constitutional guarantee of access to justice and right to a fair trial are often violated, much to the disadvantage of the defendant.

The U.S. Department of State, in its Diplomacy in Action Bureau of Democracy, Human Rights and Labor 2010 Country Report on Botswana (U. S. Department of State, 2011), laments the same weaknesses in the system that King Masunga did in the above interview. The Report is specific on the violation of the constitutional right to the presumption of innocence and to legal counsel for defendants before customary courts and calls for adherence to the Constitution. Although the Report states that the country's 22 prisons were overcrowded with a total of 5,063 prisoners when they had a joint capacity of 4,219, it does not link this with any particular cause, including the violation of the constitutional rights of the customary court defendant, nor does it ascribe a cause to the prison overcrowding. These figures, which constitute 120%, represent an improvement on the 2003 figures, which show that the scale of prison overcrowding in Botswana then had been 155.6% (NationMaster, 2003).

As recently as October 2012 (Seitshiro, 2016) and July 2014 (Seitshiro, 2017), the Commissioner of Prisons for Botswana, Silas Motlalekgosi, complained of the persisting problems of recidivism and prison overcrowding. The Commissioner, in neither report, gave a cause for the prison overcrowding. He did, however, call for victim-offender

reconciliation and rehabilitation programs as probable contributory solutions to the problem of overcrowding. He said nothing concerning prisoners who had come through the customary court conveyor belt. Polelo Mokanoki (2012) of Kutlwano also spoke to the Commissioner of Botswana Prisons who emphasized rehabilitation as one of the ways in which overcrowding in prison could be reduced.

Alternatives to custodial sentences have been suggested as possible panacea for recidivism and prison overcrowding (Love, 1992; Makunga, 2009). Love does not attempt to identify the causes of these ills. Makunga blames the advent of imprisonment, a practice unknown prior to colonization, and suggests alternative forms of punishment which exclude imprisonment. In this she is joined by Letsatle (2009), Roy (2013), Mathumo (2009), and the group of eight from eight countries, including Botswana, who met at the 108th International Seminar held in Japan to discuss recidivism and prison overcrowding in their countries and possible solutions to those problems (UNAFEI, September 1999), and the Papers of Moroka L (2008) and Mujuzi J D. (2008) who are cited by Makunga (2009). Itayi Samanyanga (2016) also offers rehabilitation as a program which could assist with recidivism in Zimbabwe.

For its part, the United Nations Institute for Education at United Nations Educational, Scientific and Cultural Organization (1995) touts education as a panacea for recidivism. It presents research which tends to show that prisoners who have received some education and training in prison tend not to return to prison following release. It says that the converse is also generally true. Not to be outdone, Ditshwanelo (2007) also decries overcrowding in Botswana prisons but does not enter into the question of the cause, nor does it discuss any possible solutions.

Some of the literature (Mujuzi, 2008; Moroka, 2008; Makunga, 2009; Nelson, 2008) laments the fact that ameliorative measures such as the remission of sentences, rehabilitation, extra-mural forms of punishment, and periodical declarations of prisoner amnesty have not stemmed the tide of these problems, which is why these scholars suggest alternative forms of punishment to imprisonment. Early release was also used to facilitate prisoner-reintegration into society (UNAFEI, 1999). None of these attempts have eliminated either problem as the problems persist after these measures were long taken.

Discussion, Analysis, and Conclusion

Now, although such literature could exist, an extensive search has not unearthed literature that identifies the cause/s of the problems of high rates of recidivism and prison overcrowding in Botswana. Furthermore, none of the literature that I have been able to find gave an indication that any research into the causes of these problems had taken place. In particular, none of the scholarly work that I have found deals with whether the facts that criminal defendants who are tried in the customary courts, who constitute 85% of all criminal defendants in Botswana, are in practice presumed to be guilty and have to convince the courts of their own innocence while they are denied legal representation, contribute to the high rate of recidivism and/or prison overcrowding, having regard to the intuitive reality that the likelihood is that most, if not all of them, are convicted and sent to prison. If such scholarly work exists, it may be that I have not been able to find it because it might be beyond the limitations of my research.

The fact of the existence of the problems, the fact that such defendants constitute 85% of all criminal defendants in the country, the fact that they are presumed guilty and

are denied legal representation, made it necessary to research and determine whether these lacking elements of a free trial and access to justice do not contribute to the high rates of recidivism and/or prison overcrowding in Botswana. Three of the articles (Boko, 2000; Olesitse, 2017; & the U. S. Department of State, 2011) allude to these shortcomings in the customary court justice system, but fall far short of measuring their impact on the problems that exist at the tail end of the justice system. This gap in the literature requires to be filled, and that is the primary purpose of this study. The study was intended to either find a nexus between the problems of high rates of recidivism and/or prison overcrowding or the absence of that connection. Either way, it would be known whether, how much, and on what matters exactly further research into the causes of the problems is required or not. The study found the nexus to exist, and identified the need for further research, particularly on the subject of other causes.

It is to be noticed from the Reference section that some of the literature is in the form of published books, some of them relatively old but seminal. There is little current research and where it is available it has been used. Where older research has been used, it is because more recent research was not available. Some of the literature available was based on desk-top research. Some made use of data collected in the interview of randomly selected participants. Authors who based their conclusions on statistical data derived it from official sources. Many used a mixture of two or more of these data collection methods. The methods were qualitative, and the design and analysis purely descriptive and narrative, offering very little philosophical and normative underpinnings for it. The strength of the research disclosed by the literature lies in the overview and detailed outcomes it offers and the ramifications for the topic of the study.

The limitations in the literature are betrayed by the failure to give their study methodologies in great detail with the risk that it is difficult to determine the validity, reliability, and trustworthiness of the studies. The evidence, facts and logic of the literature seems to indicate the existence of the problems and some attempts at overcoming them. These claims are, however, yet to be tested. These limitations made it all the more necessary that this study take place. The literature, nevertheless, serves as a framework for future research into the problems and how, if at all, they are related to the denial of the right to legal representation the subject of this study.

Chapter 3 offers a detailed discussion of the research design and method of this study. The design and method include inquiry, research sample, data collection techniques and procedures, data management systems, data analysis method, matters of ethical and quality importance, my role as the researcher, my subjectivity and that of the participants, and all ethical considerations that attend and ensure the protection of the participants.

Chapter 3: Research Method

Introduction

The purpose of this qualitative study was to explore how the denial of legal representation to defendants who are tried by customary courts contribute to high rates of recidivism and/or prison overcrowding. This chapter is concerned with the research design. The research design comprises the theoretical tradition of inquiry, the research population, the research sample, the data collection method and process, the procedures for managing data, the data analysis method, and matters of ethical concern. This study was also guided by numerous questions such as:

- What is Botswana's legal system?
- What is the history of that legal system?
- What are the sources of that legal system?
- What are the institutions that administer criminal justice under that legal system?
- Are criminal defendants permitted to have legal representation before the customary courts of the country? (If not, what are the implications for the criminal justice system of Botswana of that denial?)
- Are these criminal defendants aggrieved by this denial?
- With the problems of high rates of recidivism and prison overcrowding, does the denial of legal representation contribute to the scale of either or both these problems?

This research has yielded answers to all these questions and to all sub questions that arose from them. Additionally, this research can encourage policy-makers to reform policy that

can reduce rates of recidivism along with prison populations. Thus, this research was necessary to address how the denial of legal representation leads to recidivism and prison overcrowding.

This chapter will include the research design and rationale, theoretical method of inquiry,

adopted over other qualitative traditions, sample and population, sampling procedures, sample size, gaining access to participants, data collection, interviews, documents, observational field notes, method of data analysis, data management, analysis, and representation, structure of narrative report, issues of trustworthiness, role of the researcher, dealing with researcher bias, participants' protection, and summary of the content of the chapter.

Research Design and Rationale

This study was guided by the question, "In what way does denying defendants' right to legal representation in criminal trials conducted before customary courts impact defendants, dispose them to reoffending, and contribute to the problems of high rates of recidivism and/or prison overcrowding experienced in Botswana?" To answer this question, I had a choice of one or more of the five qualitative approaches: narrative inquiry, phenomenology, grounded theory, ethnography, or case study (Creswell, 2013). The selection of the best suited design was predicated on the purpose of this study and the types of data that had to be collected to inform it. Thus, the study involved a phenomenological and narrative design.

The narrative approach is focused on exploring the life of one or more individuals because of a need to tell stories of their experiences using primarily interviews and

documents. The data is analyzed by developing themes usually using chronology to develop a narrative about the stories of those individuals. The structure of the study usually presents with an introduction, research procedures, report of stories, individuals theorizing about their lives with narrative segments and patterns of meaning identified, and a summary (Denzin, 1989a, 1989b). The narrative design in this study applied to the chronological collection of accounts from interviews with the defendant participants about their lived experiences of going through a criminal trial in the customary courts in which they did not have legal representation in a legal environment as well as court documents. These biographical accounts I have analyzed thematically and in a structural manner with a focus on the lived experiences of the defendant participants and the manner in which these experiences may have contributed to recidivism rates and prison populations.

Phenomenology centers on understanding the essence of the experience of a lived phenomenon. The data is analyzed for significant statements, textual and structural descriptions, descriptions of the essence, and meaning units; the resulting report describes the essence of the experience. The structure of the study usually presents with an introduction, research procedures, significant statements, meanings of statements, themes of meanings, and an exhaustive description of the phenomenon (Moustakas, 1994). The phenomenon the subject of the current study is the policy of denial of legal representation to some of the participants and the effect this denial on their attitudes and recidivism and prison overcrowding. The exploration involved a group of individuals who have all experienced the phenomenon, and their data were collected through face-to-face

interviews. The essence was the impact of the phenomenon on the defendant participants and the criminal justice system.

Although all five designs have aspects in common with this study, grounded theory, ethnographic research, and case study approaches did not apply to this study. Grounded theory is focused on developing a theory through a process or an action with distinct steps or phases that occur over time do not occur as the study did not seek and has not sought to develop a theory. Ethnographic research is focused on developing a complex and complete description of a group culture, with an accent on culture, the essence of how it functions, and the group's way of life. However, no cultural group nor culture was concerned in the study. The case study approach begins with the identification of a case or cases to illustrate a unique case or cases (Stake, 1995), does also not appear in my research. Accordingly, the narrative and phenomenological research approaches were the only approaches used as the most suitable methods of inquiry in this study.

Theoretical Method of Inquiry

The theoretical method of inquiry concerned in this study is qualitative. It was semi structured with open-ended interview questions. Qualitative research is a way to explore social problems by reporting views of participants and building descriptions (Creswell, 1998). Additionally, it is a method that allows the researcher to observe and interpret the world by studying phenomena in their natural settings to create meaning (Denzin & Lincoln, 2011). Qualitative research also helps empower participants to share their stories, enables researchers to write stories flexibly, and helps to understand the context or settings in which respondents deal with a problem or issue. Additionally,

qualitative research helps explain the mechanisms and linkages in causal theories that provide generalized associations, trends, and relationships without telling researchers why participants respond as they do, about the processes they are exposed to, the context in which they respond, and the deep thoughts and behaviors that determine their responses.

The qualitative method is appropriate where there is an issue to be explored, understood, and explained (Creswell, 2013). Exploration is required where there is a need to study a population or group, isolate variables that are not easily measured, or even hear voices that are otherwise silent. A further reason for using qualitative research is the need for a complex and detailed understanding of an issue. Often this detail is possible of understanding only by talking to people in their settings and in an atmosphere in which they can tell their stories uninhibited by researcher expectations. Qualitative approaches are also better where the uniqueness of individuals and their viewpoint are important features in a study (Creswell, 1998, 2013; Singleton & Straight, 2005; Strauss & Corbin, 1994).

The qualitative method of inquiry was employed in this study because the research topic required exploration, as there are no variables nor available theories to explain it. The exploration was necessary because there was a need to study the population or group of criminal defendants who are tried in the customary courts of Botswana, identify variables that cannot be easily measured, and hear the silenced voices of these defendants. There was also a need for a detailed understanding of how these defendants view the policy that denies them legal representation at their criminal trials as well as views on whether this policy causes or contributes to high rates of recidivism

and/or prison overcrowding. This detailed understanding could only be obtained by talking directly to these defendants in their setting and allowing them to give their accounts unencumbered by any researcher expectations. Thus, the qualitative method was the best fit for this study.

Sample and Population

This section of the chapter includes the population the study, the categories of participants and sample size appropriate to the study, the sampling procedures, and the strategies employed in selecting the participants. It also includes the process engaged in gaining access to the body of participants in the study.

Sampling Procedures

Sampling refers to the process of selecting participants and documents used in a scholarly study (Polkinghorne, 2005). The target population for this research consisted of criminal defendants who have been tried and convicted by a customary court in Botswana, either of a first or subsequent offense. I confined the search for the population to 2000 to 2017. I selected participants who could provide an understanding of the phenomenon being studied because qualitative studies are focused on a description and understanding of a human experience (Polkinghorne, 2005). This allowed better access to the research phenomenon (Wertz, 2005, p. 171).

It is important that the sample must be representative of the population, which is why purposive, random sampling is most appropriate in qualitative studies (Creswell, 1998; Polkinghorne, 2005). In this study, I used purposive sampling to select participants who could provide valuable information on the matters being studied and who could identify other potential informants (Goulding, 2002). I also used snowball sampling by

asking names of others who knew suitable participants (Polkinghorne, 2005). The participants included 10 criminal defendants who had been convicted and sentenced to a term of imprisonment by a customary court without legal representation on a first offense, 10 criminal defendants who had been convicted on a subsequent offense, a retired prison warder, two retired officers who presided over of customary courts, a judge of the high court who had dealt with matters from customary courts, a similarly placed magistrate, four scholarly writers associated with the criminal justice system and the phenomenon of study, and a practicing attorney who had dealt with matters in customary courts. Participants who had retired from government work were able to speak without the need to be politically correct or protective of any subsisting interest.

The strategy for purposeful random selection of participants and documents that I used included variation for diverse experiences as well as homogenous sampling, critical sampling, criterion sampling, confirmatory sampling, and extreme and deviant sampling (see Creswell, 1998). Homogenous sampling was used for the same kind of experience, extreme sampling for experience that is typical of the phenomenon, criterion sampling according to predetermined criteria of selection relevant to the phenomenon of the study, and confirmatory sampling. The sampling strategies were used to yield participants who fit the purpose of research and ensure that all selected participants were knowledgeable of the phenomena of interest in this study.

Sample Size

A sample size of 30 participants was selected for the study. I planned on reducing or increasing the number of participants based on saturation, but the need to either increase or reduce the number of participants did not arise. The random order in which I

interviewed the participants led me to decide that saturation had been reached. However, even where the participants gave similar answers to the same questions, the enthusiasm and varying emotion was unique to each individual.

The criteria for determining the sufficiency of a sample size in a qualitative study is the nature of the research questions being investigated and the "potential yield of findings" (Wertz, 2005, p. 171). However, there is no precise number of participants required to attain saturation. Participants should be interviewed until the goal of the study is achieved (Wertz, 2005). It is at this point that the data reaches saturation point and that the addition of more will not yield value that is worthwhile, as additional data ceases to be meaningful when the researcher is not learning anything new (Goulding, 2002).

Gaining Access to Participants

Some of the participants, aside from the former prison inmate ones, know me, as I have had contact with some of them previously in other contexts. Some of them I have frequent contact with through the conduct of my profession. The rest knew me because I am a high-profile lawyer who, for 6.5 years until March 2008, was special advisor to the president of Botswana. This helped me with access to government offices and assistance from government officers, making it easy to access the professional participants. The participants who have been criminal defendants were accessed through the records of the Department of Prisons and other government records. Although a semi vulnerable group, the IRB gave permission that such participants may be used (approval no. xxxx).

To gain the trust and confidence of and develop rapport with the participants, particularly the former prison inmates, I was respectful and honest with participants and explained the importance of the research subject and how therapeutic the interview might

be for them (Nachmias & Nachmias, 1987). I also personally visited each of the professional participants after making an appointment by telephone. Initial contact with the former prison inmate participants I made using information from government records. I presented myself to all the participants as a researcher of a phenomenon of the criminal justice system that may benefit policy-makers and stakeholders in the criminal justice system as well as to criminal defendants in the future. I explained to the participants the purpose of the study and why they were significant for it. All the participants were assured of anonymity and confidentiality. As to the benefits of the study, the participants were informed that because they were knowledgeable concerning the subject of the study, the latter study would give them the opportunity to anonymously get public and government attention for their views and concerns.

There was also a follow-up procedure in the event follow-up interviews were necessary, and a few were. That this might become necessary had been agreed with the participants at the time of their recruitment. Furthermore, it was explained to them that their input may have the effect of benefitting others in the future as their information, views and recommendations would contribute to the understanding of the phenomenon of study and its impact on the criminal justice system and the society. Any foreseeable risk entailed by their participation was brought to their attention. They were also informed that they would have the right, without consequence, to withdraw from participation at any time they should wish to do so. Additionally, the informed consent of each and every participant was obtained prior to the interviews as was requisite (Creswell, 1998; Patton & Sawicki, 1993). These measures built trust and confidence in me as a researcher,

established rapport between the participants and me, and achieved committed access to the participants and the interviews.

Data Collection

The data collection methods that were used in this study were face-to-face interviews, documentary sources and records, and the notes that I wrote of observations I made in the field and during the interviews. These data sets and the data collection procedures are discussed in the following sections.

Interviews

Face-to-face interviews of the knowledgeable participants were conducted and data were used in answer to the research question and sub questions that arose from it. The consent of the participants to be interviewed was solicited and obtained after I had received appropriate approval from the IRB. Prior to receiving approval, I identified but only prepared the research materials and data collection tools in readiness to commence the interview process had been given. I also formulated the appropriate procedures following receipt of approval. The choice of method, number and identity of participants, the research materials and data collection tools, and the procedures were determined by the Research Question derived from the Problem Statement.

The interview technique comprised face-to-face interviews “during which the subject matter of the interview is explored in detail” (Aaker et al., as cited in Hall & Risk, 1999, p. 298). This intensive interviewing technique enabled me to obtain in-depth and detailed data on the phenomenon of study. Even as the interview process involved putting questions in a particular sequence, it also allowed for flexibility to probe for detail, clarify ambiguities, and elicit supplementary information. The focus group techniques were

avoided in order to prevent group-think. It, therefore, was eschewed as it would add nothing. The body language of participants was observed in order to contextualize the data and included in field notes.

The face-to-face interview technique, for all its advantages and appeal, was not without disadvantages. It was costly and time-consuming, and did not yield a great deal from the will but less than enthusiastic participant (Creswell, 1998; Hall & Rist, 1999). To compensate for the latter, contingency arrangements were made to interview replacement participants. Cost and time were no object as I had made sufficient financial arrangements and had taken time off work until October 31, 2018 so that I was able to work on the research and dissertation writing full time. Thankfully, all participants were energized and enthusiastic, and the need to engage replacement participants did not arise. The detailed and rich data that was brought forth by this technique far outweighed the disadvantages of the technique. Furthermore, no cultural modifications were required as all the participants were Batswana.

The interviews were semi-structured, with certain standard questions prepared in advance in order to focus research objectives and furnish guidance to the process. Questions were, however, adapted where necessary during the interview. The questions were also open-ended in order to allow me to re-formulate them in the course of the interview according as the progress of the interview required. This was in order to ensure that the nature of the questions was participant-driven, even as the objectives of the interview were kept in view at all times. Interviews were recorded mechanically and I took detailed notes of the answers. The permission of the participants to the tape-recording had been obtained in advance. None of the participants had an objection to

being recorded for so long as his/her identity was not revealed. I also prepared a detailed account of each interview from the detailed notes taken during the interviews and perfected the account immediately following conclusion of each interview.

Documents

A desktop review of literature on recidivism and prison overcrowding and statistics maintained by the Statistics Offices of the Government were undertaken. Desktop research of other connected matters was also undertaken to the same end. The records reviewed related to the period of study, the period 2000 to 2017. Such Government data, Singleton and Straits (2005) opine, is as reasonably accurate as is possible to get, and it is well to use it. A whole host of other documentation was used. Much of it, in the form of reports of the Botswana and United States Governments, those of the Agencies of the United Nations, law books, historical accounts, case reports, scholarly and expert writing and many other documents included in the Reference section of this Dissertation, have been used. Singleton and Straits (2005) also approve the use of public documents, mass media, non-verbal and archival sources, and personal and private documents. These are the best sources of historical and legal data as they are the most original and authentic sources of the data required for the study. I certainly used all the ones which had reliable information pertinent to matters that arose during the study.

Observational Field Notes

I have, in addition to documentary sources and the interviews, kept a journal in which I daily recorded observations I made in the field. These notes I have taken into account in the analysis and recording of findings. Merriam (1998), Creswell (1998), and McReynolds, Koch and Rumrill (2001) have certified observational field notes as a

credible source of information. Merriam (1998) equates field notes to an interview transcript when the author writes that field notes are "analogous to the interview transcript" (p. 104). I did, throughout the period of the study, observe and keep notes of the settings of the interviews and of the field. The demeanor and body language of the participants was also observed and notes of it recorded as part of the field notes which, following each interview, I wrote out in full.

Method of Data Analysis

This section of the Chapter discusses the method which I used to analyze the data. The discussion includes data management, analysis, and representation.

Data Management, Analysis and Representation

In qualitative research, analysis of data technically begins when data collection starts (Goulding, 2002). Data analysis procedures are a step by step process that entails data management; reading and memoing; description, classification and interpretation; and data representation (Creswell, 1998; Stake, 1995). I collected the data, which was substantial. The data was managed by listing it, organizing it into files identified by subject, and placing it in folders. Systematic codes were used for subjects for easy identification to ease retrieval and analysis when the time came. The next stage was to read the material, which comprised transcripts of data from the interviews, documents, and field notes until total immersion was achieved. This is what Creswell (1998) describes as "*reading and memoing*".

While reading, I made notes in the margins and documented initial findings in memos in the form of what Creswell (1998) describes as "*short phrases, ideas, or key concepts that occur to the reader*" (p. 144). Initial codes were grouped into categories,

which were then applied to the research question and sub-questions to furnish understanding of the elements of the research topic.

Next, I did the actual data analysis, which is the third stage of the data analysis process. This process involved description, classification and interpretation of the data (Creswell, 1998). A systematic procedure to glean the meaning of the data was followed. The procedure entailed the development of categories and themes, the interpretation of the emerging themes and constructs, and assertions and conclusions were then made from the data based on what Creswell (1998) styles "*hunches, insights, intuition, an interpretation within social sciences constructs or ideas or a combination of personal views as contrasted with a social science construct or idea*" (p. 145).

The first two stages are common to all qualitative paradigms, but the third stage, which involves description, classification, and interpretation of the data, may differ with different paradigms (Creswell, 1998). Both Creswell (1998) and Stake (2005) say that data analysis should be grounded in '*detailed description'*, '*categorical aggregation'* (findings from multiple sources), '*direct interpretation*' (findings from single instances), '*correspondence and patterns*' (matching categories in order to establish trends or patterns), and development of '*naturalistic generalization'* (assertions and conclusions founded on the researcher's interaction with the data).

In this study, I utilized the process of '*detailed description*', presented the facts as disclosed by the data and, through the process of '*categorical aggregation*' identified ideas from different sources which I classified into categories and themes as the meanings to be gleaned from the diverse forms of data or evidence. Categories were fashioned into patterns. I then utilized coded data to aggregate the coded data into

categories and then into patterns. I then finally interpreted the data, made assertions from it, and formed conclusions founded on insights to contribute to the understanding of what the research yielded in respect of the topic of study and the lessons learnt from the research.

The next stage, the fourth stage of data analysis according to Creswell (1998), involved packaging and presenting the yield of the data. Constas (1995) criticizes the qualitative process as making data analysis inevitably subjective and private, making it imperative to find ways to make the qualitative findings trustworthy. Constas (1995) suggests two ways of enhancing trustworthiness; a two-dimensional model in the form of a table with a '*component categorization*' and '*temporal designation*', a description offered by Constas (1995). The first dimension sets out actions adopted to develop categories, a basis for justifying each category and identification of the name used for the category. The second dimension gives various stages of the process of research when a category was developed before data collection, after data collection, and iteratively, that is, during data collection. Presentation in the matrix that results enhances the credibility of the findings. These processes should, Constas (1995) assures, provide a detailed account of how the findings on contexts and dynamics of the subject of study will have been arrived at. I found no discrepant cases to isolate.

Structure of Narrative Report

In presenting the findings of the study, I followed what Creswell (1998) describes as the '*realist tradition*', which entailed providing a detailed description of the data, with quotes from participants where appropriate, followed by interpretation within the framework of the topic of research and my insights. In writing the report, I attempted to

be all things to all men-I attempted to write with multiple audiences in mind so that all who read my work should understand it. An attempt to represent the material in a manner that would generate and sustain the interest of the reader was made.

Merriam (1998) writes that while there is no standard way of presenting a qualitative report, she suggests that a proper balance between background information and analysis on the one hand, and analysis, interpretation, and discussion on the other, is ideal if it is 60% to 40% or 70% to 30%. Asmussen and Creswell (in Creswell, 1998) suggest 33% for background, 33% for themes, and 33% for interpretation, discussion and conclusion. I allowed myself to be guided by the objectives of the study. The strength of research, in my thinking, lies in the in-depth and detailed analysis of the evidence that bears upon the phenomenon of research to fill the gap existing in literature. I allowed that to determine the distribution and balance of the different components of the resulting report.

Issues of Trustworthiness

Quality research is important in all studies whatever the method of research. It is established that in the quantitative method, reliability and validity are paramount to the credibility of a study. These descriptions, it is also generally agreed, do not fit as snugly or as neatly in qualitative research as they do in quantitative research (Ely et al. as cited in Creswell, 1998). McReynolds et. al (2001) agree, and declare that the appropriate equivalents in qualitative research are '*credibility*', '*trustworthiness*', and '*validity*'. Guba and Lincoln (as cited in Trochim, 2001), advance the position that qualitative findings must be validated through the lenses of transferability, dependability, and confirmability. Although all these terms applied in quantitative and qualitative research have nuanced

differences, they all convey the same general ideal: all scientific research, to be worthy of that description and of general acceptance, must be credible. In qualitative inquiry, findings must be consonant with participant perspectives and beliefs, and must truly represent the latter. Transferability will ensure that the phenomenon of study has been described as experienced by the participants by the researcher providing an accurate detailed rendering of what was studied.

External assessment should establish that the findings will stand if transferred elsewhere. The assessment is possible only if the researcher furnishes evidence that makes it so. The same concept in quantitative research is conveyed by replicability of the study. Dependability means that the findings are dependable and bankable. Confirmability implies verifiability if the same process is followed. The researcher must, therefore, document in detail the process he followed from inception to conclusion.

The use of field notes and memos, multiple researchers, multiple sources of data, peer review or debriefing, patient and conscientious engagement in the field, guarding against and compensating for researcher bias and subjectivity, provision of rich thick description, member checking and external auditing (Creswell, 1998; McReynolds et al., 2001), are all measures which are acceptable for establishing the quality product required by the transferability, dependability, and confirmability of qualitative research findings. Creswell (1998) says any two of these strategies should assure the quality of findings. I have used as many of these techniques as I could in the research.

Role of the Researcher

I conducted the study from inception to presentation of the complete report. I interviewed all the 30 participants, collected all the documents, and collected all the

materials required to fully inform the research. I personally recruited the participants, obtained and recorded the data from them and from all other sources. I also conducted every aspect of the research and of the study. I was virtually the sole instrument of data collection. The more experienced and skillful is the researcher, the better will be the output of the research he conducts, I have come to know. I brought all my experience and skill to bear upon the research as I could muster.

Dealing with Researcher Bias

My extensive role in the study as the main instrument of data collection and analysis placed me very close to the data. I, as is any researcher, am human. Accordingly, it was essential that I should, throughout the process, remain conscious that my relationship with the data and the entire process made me vulnerable to bias and subjectivity (Goulding, 2002). I did. I had put measures in place with which to mitigate the possibility of my subjectivity. First, I remained conscious of the need to remain objective through the entire process. I subjected the research findings to member checking and peer review, and he reported every discrepant occurrence. I had identified a peer who kindly and patiently reviewed the interview transcripts, findings and recommendations for further research and his observations reflected in the report and I paid due regard to them. The peer whose agreement to conduct the review I obtained is a High Court Judge who was also previously an academic with the University and has held a PhD for many years.

Preliminary findings I shared with those of the participants who were available and their input thereon I obtained and incorporated in the report. I used, in so far as was possible, multiple sources of data to corroborate findings in order to enhance the

credibility of the outcomes of the research. I also documented the process of category development and made the process of data analysis transparent for the trustworthiness of findings. It is my hope that these measures mitigated, if they did not wholly eliminate, the dangers of my possible bias and subjectivity as the researcher.

Participants' Protection

Many of the participants, particularly the former prison inmate participants, are semi-vulnerable and needed optimum protection. The consent of each of the participants was fully informed. The purpose of the study and the use of the information that was to be obtained during the interviews were fully explained to all the participants. The participants were offered total anonymity and confidentiality as their identities were not material to the study. The data collected from the participants was kept under lock and key when not in use. Markers that distinguished the participants without revealing their identities, given and explained in the next Chapter, were used. The participants were informed that they may withdraw from participation at any stage of the research and interviews. Their consent to being recorded was obtained, and they were all informed that they should not give it if they were unsure about not minding it. None of them had an objection to being mechanically recorded. Any ramifications that their participation might have for them were fully disclosed to them.

In view of the sensitive nature of some of the questions that were asked during the interviews, I conducted the interviews with sensitivity. All identifiers of the participants were not included and codes were used in their place. The privacy of the participants was respected throughout and I let them choose the place and time of the interviews out of options I gave. These are some of the measures which reputed scholars (Nachmias &

Nachmias, 1987; Goulding, 2002; Creswell, 1998) have recommended, and they were adhered to fully and scrupulously in this research.

Summary

Chapter 3 considered the qualitative method of inquiry and the design of the study. The study constituted the only in-depth study of the phenomenon of research as none previously existed. This study was designed to explore the longstanding policy of denial of legal representation to criminal defendants tried in the customary courts of Botswana, the implications for justice for such defendants, how they felt about the denial, and whether the operation of the policy, even as it violates their constitutional rights, in any way undermines any aspect of the criminal justice system of Botswana and, in particular, whether it contributes to the high rates of recidivism and/or prison overcrowding.

The narrative and phenomenological approaches to the qualitative study were identified as the most suited to the study because they offer an in-depth perspective on the subject of research. Face-to-face semi-structured interviews with open-ended questions with each of the 30 purposively selected participants were conducted in an environment that guaranteed them full protection. Field notes were maintained and documentary sources were also utilized. The data was validated in various ways. Chapter 4, which follows next, engages data analysis and findings relative to the topic of study yielded from data obtained in answer to the research question, as well as other data.

Chapter 4: Results

Introduction

Chapter 4 presents the findings of this study. The purpose of the study was to explore ways in which the denial of legal representation to defendants who are tried by customary courts contributes to high rates of recidivism and prison overcrowding. I also sought to determine whether defendants who were tried by customary courts were aware of Section 10 of the Botswana Constitution, and whether they were upset by the fact that they were denied salutary rights. The final question was whether this sense of grievance disposes them to reoffending. Thus, the following question guided the study:

> In what way does denying defendants' right to legal representation in criminal trials conducted before customary courts impact defendants, dispose them to reoffending, and contribute to the problems of high rates of recidivism and/or prison overcrowding experienced in Botswana?

In terms of organization, the chapter briefly presents how data were generated, gathered, and recorded, as well as the process by which the meanings emerged and were followed through in the study. Finally, the findings in answer to the research question are presented.

Context of the Study

The narrative and phenomenological approaches were used as the most suitable methods to provide in-depth contextual perspectives on the subject. The findings in this chapter consist of analysis of three sets of data: documents; field notes and interviews, using sets of questions approved by the IRB; and follow-up questions in respect of the three categories of participants. Ten of the participants were former prison inmates who

had completed serving prison sentences for their first offence, and 10 were former prison inmates who had completed serving prison sentences for their subsequent offence. The last 10 participants were professionals from diverse disciplines and backgrounds.

During the period August 10, 2018 and September 30, 2018, I identified the 30 participants. The 20 former prison inmates were identified and randomly selected from official government records. Using a combination of forwarding addresses, information from some of the inmates , and the geographical location of the customary courts that had tried and convicted them, I was able to locate and contact these 20 former inmates. The professional participants were identified, located, and contacted mainly but not exclusively from Gaborone in their various offices and places of work. The unit of analysis in all cases was experience and not individuals or groups. As a result, experience and not representativeness was the selection criterion of importance (Polkinghorne, 2005).

Interviews were conducted with the 30 participants. This was the sample size initially proposed and they were all interviewed because, given the random order in which the various participants were interviewed guided by convenience, it was not possible to determine that saturation had been reached. To protect their identities from disclosure, each participant was given a code. The former inmates who had served sentences for their first offense were coded in the letters and numbers FO01 to FO10, the recidivist former inmates SO11 to SO20, and the professional participants PP21 to PP30. “FO” signified “first offender,” “SO” = “subsequent offender,” and “PP” = “professional participant.” Both first offender and recidivist former inmates were tried and imprisoned during 1998 to 2017 and the lived experiences to which they spoke related to this period.

The professional participants had the following backgrounds: two persons who, prior to their retirement, had presided over customary courts as presiding officers for a period of not less than 10 years each; a judge of the high court who had dealt with appeals against convictions entered by customary courts; an attorney of extensive legal experience; a scholarly researcher who had studied the customary court system; a retired prison officer or warder of much experience in the prison system of Botswana; a magistrate who had dealt with cases on transfer from the customary court system; and an anthropologist, a psychologist, and a sociologist, all of them with a scholarly background. A more detailed description of the participants cannot be given because it would lead to their identification. All 30 participants live in Botswana.

All 20 former inmates were asked the 30 questions approved by the IRB and the 10 professional inmates were asked the 16 questions approved by the IRB. The 16 questions overlapped with the 30. In addition, many other questions were asked of each participant as follow-up questions during the interviews. Some participants answered questions and did not engage in lengthy discussions of the issues, whereas most in each of the three categories were enthusiastic and appeared to enjoy the engagement. The shortest interview took approximately 45 minutes while most took an hour and longer.

Method of Data Analysis

Data were analyzed through detailed description, categorical aggregation, direct interpretation, development of naturalistic generalization, and correspondence and patterns (Stake, 1995). By detailed description, I furnished detailed descriptions of the data and the meanings that emerged. Through categorical aggregation impressions, instances or ideas were put together to form a meaning. The process of direct

interpretation allowed me to identify meaning as a finding from a single instance of what a participant said, an idea that appeared in a document once, or an observation made by me to identify meaning as a finding from a single instance. By naturalistic generalizations, I made assertions and formed conclusions based on insights derived from the data. The analysis and findings do not, therefore, consist only of facts because I interpreted the data to make the results understandable. However, I present the facts to allow readers to make their own assertions, form their own interpretations, and arrive at their own conclusions. The findings were based on analysis derived from these approaches to qualitative interpretation. However, not all these approaches were applied to every finding; in some cases, one or more approaches were applied to a finding.

The findings of the research were validated through multiple sources of data, thick description, member checking, and peer review. The narrative report followed the realist approach. Participants were assured of anonymity and the confidentiality of information offered by them in the study. Their privacy was also respected throughout. No events occurred during the research that could have changed the context of the study. Accordingly, each of the participants spoke from personal lived experience and their views were not affected by any external influence.

Method of Data Presentation

The research, including the questions put to all the participants, some of which questions were approved by the IRB, was designed to answer the question: Does denying defendants' right to legal representation in criminal trials conducted before customary courts dispose them to reoffending and contribute to high rates of recidivism and/or

prison overcrowding experienced in Botswana? The data in the following sections were answers to the following thematic questions:

1. Are you familiar with the customary law system of Botswana and how it works?
2. Have you interacted with the customary court system and, if you have, in what role and with what experience?
3. Is legal representation at one's criminal trial a legal right that one has?
4. If it is, are criminal defendants tried by customary courts in Botswana denied that right at their trials whether or not they ask?
5. If they are, are those who ask and are denied aggrieved by the denial of that right?
6. Would any grievance they might have arising from the denial be justified and why?
7. Does the denial of that right dispose them to repeat offending?
8. Should the denial dispose them to repeat offending?
9. Has Botswana experienced prison overcrowding?
10. If it has, does the denial of the right to legal representation contribute to the problem of prison overcrowding experienced by Botswana?
11. Has Botswana experienced high rates of recidivism?
12. If it has, does the denial of the right to legal representation contribute to the problem of high rates of recidivism in Botswana?

Questions 1 and 2 are ones of fact and were answered by all 30 participants. Question 3 is a one of law and the answer to it depends on the Botswana Constitution.

Questions 4 and 5 are ones of fact and the answers to them came from the 20 former inmate participants. Questions 6, 7, and 8 are ones of opinion from lived experience and were answered by all 30 participants. Questions 9 and 10 are factual and depend for their answers on statistics and scholarship. Finally, Questions 11 and 12 are ones of scholarly conclusion founded on fact and were best answered by statistics and scholarly literature. The legal themes that go to some of the questions have already been dealt with in the literature review section and answers to them will be summarized in this section. All findings will be discussed again in Chapter 5.

Summary of Findings

The pertinent data collected during the interview of the 30 participants are contained in a report that I prepared following the interviews. A summary of the data and findings are presented next following the order of the thematic questions, quoting from the content of the interviews where appropriate.

Sub Question 1

This question was asked to determine whether the participants were familiar with the customary court system of Botswana and its workings. Although they all had knowledge of the system, they gave the answers and their understanding of the system and how it works in ways that tended to show how they felt about the system. A few examples illustrate the point.

PP23 said, “customary courts are the courts to which only Batswana go when they have cases. Non Batswana are fortunate enough to go to better courts.” Asked to say what she meant by “better courts,” she plaintively answered, “courts of justice, meaning courts at which justice is done.” Pressed for further clarification, the participant declared:

> customary courts are not courts of justice. The guilt of accused persons is presumed, they are not permitted legal representation, and the procedures there followed are summary, rushed and unfair. The courts presided over by magistrates and judges are the true courts of justice as if only foreigners and rich Batswana are entitled to proper justice.

I was watching this participant as she spoke on this subject; she had a look of disgust on her face. She spoke at great length, and I let her vent.

Additionally, FO08 said,

> I was taken there after I had stolen money from my uncle in order to buy food. Some said I got what I deserved. Perhaps I did, but so many years in prison for stealing a small amount of money? What am I supposed to eat when there are no jobs in the country and I have no income?

FO03 said,

> the customary court is the system they dragged me to when they framed me for an offense I had not committed. It was clear I had no chance right from the start. The way the presiding officer looked at me said it all.

FO05 simply said, "Yes, I know the system and have an idea of how it works. It deals very quickly with all who go before it and promptly sends them to jail where they belong." FO07 answered, "I have experienced that terrible system," and SO13 said "who does not know it?" SO11 answered, "the system has sent me to prison a few times. So how can I not know it?" I made a note of the disdain with which the participant said this.

SO14 also retorted, "I know it all too well. I have been its subject too many times." SO16 proudly said of it "it is the system we had before the White man came. A

system that we understand because it comes from our culture and applies our traditions." PP25 said concerning his knowledge of it, "I know it as I have studied it," whereas PP21 said, "I do. I knew of it as I grew up in Tswana society. I also learnt about it and how it works at law school." PP28 said with regret in his voice, "I have had the misfortune of dealing on appeal with the problems that the system creates."

Sub Question 2

The questions relating to the interaction the participants had had with the customary court system and the roles in which they had had such interaction yielded responses that reflected the participants in the role of former first offender inmate, former subsequent offender inmate, and those participants who had worked with the system in their professional work. FO04 said, "Yes, many years ago and they sent me to prison when I was innocent." FO01 smiled sadly and said, "once yes, and I had not done it," whereas FO02 merely said, "I was criminally tried in it. Where else?" SO17 gave the answer, "Of course I have interacted with it as a person accused of multiple crimes on many occasions. It sends you back to prison without delay," and SO20 answered "that system sent me several times to prison, a place where I had food that I could not at home." SO19 said,

> it is the most unjust system that sent me to jail many times when I had done nothing wrong the first time. I then decided I might as well make crime my life. After all, they had turned me into something I was not.

Each of the professional participants described the professional role in which they had come into contact with the customary court system. All the participants knew the

customary court system and had interacted with it. The above answers were typical of each category of participant.

Sub Question 3

The answer to this question is one of law. Section 10(2)(d) of the Botswana Constitution entitles every criminal defendant in Botswana to legal representation at trial as a matter of entrenched right, and Section 10(2)(a) secures to that person the right to the presumption of innocence. The Constitution does not make persons tried in customary court exceptions in these respects. The Botswana Court of Appeal, the country's final Court, affirmed this in the case *Ntwayame v. The State*. The Court of Appeal, however, supported the customary court system's denial of the right to legal representation by further finding that it cannot be said where defendants did not state their wish to legal representation to show that they had been denied its exercise. In this way, the Court of Appeal tried to justify its approach, not addressing concerns that the denial of legal representation constitutes the denial of the right to a free trial required by the Constitution (Boko, 2000; Classens, 2009; Ditshwanelo, 2007; Gasa, 2011; *Gideon v. Wainright*, 1963; Himonga, 2011; Hinz, 2010; Lehnert, 2005; McQuoid-Mason, 1999/2013; the South African Law Commission, 1999; Soyapi, 2014; Weeks, 2011). However, the defendant's failure to assert the right through silence does not make the trial without a lawyer any fairer. Nevertheless, the approach of the Court was inevitable due to civic irresponsibility for the reasons that follow.

Finding law to the contrary would have invalidated all criminal convictions entered by the customary courts since the Constitution came into effect in 1965, which would significantly affect the justice system. This would potentially invalidate 85%

(Ditshwanelo, 2007) of all criminal convictions entered by the customary courts in Botswana since 1965. But courts are pragmatic and do not create a crisis if they can avoid it. The decision of the Court of Appeal of Botswana is conclusive of the law in Botswana on the question, as it is the highest court and the question has not again been raised. No constitutional challenge has yet been brought to what, according to Olesitse (2017), is the presumption by the customary courts of the guilt of the criminal defendant contrary to Section 10(2)(a) of the Botswana Constitution. The law is conclusive on this question, although it may be better to require courts to ask whether defendants would want to be represented by a lawyer and require customary courts to presume defendants' innocence.

Sub Questions 4, 5, and 6

The next category of questions sought to discover whether the former prison inmates had, at their respective trials, asked to be represented by a lawyer. This category of questions also sought of those who had asked to each state the response they had been given and how they felt about that response. In particular, the participants were asked to say whether the denial of legal representation aggrieved them, and whether they felt they were justified in being aggrieved.

The first part of these questions was asked only of the 20 former inmate participants because only they could speak intelligently on whether they had asked for legal representation, what responses they got, and how they felt about those responses. The question of whether the denial of legal representation could justify a sense of grievance could and was answered by all 30 participants.

FO05 said he had asked and "*I was told that I could not have one*." FO08 said he had been ignored and never received an answer. FO03 said he was told to stop wasting

everybody's time with talk about lawyers. FO01 was told "*if you want a lawyer you must go write a letter asking for the case to be transferred to a Magistrate.*" FO06 was asked in response "*can you afford a lawyer, while FO10 was told "to keep quiet so we start and finish this case*." The entire procedure was not explained to any of them, they said.

Many of the former inmates in both categories did not ask for a lawyer. SO14 rhetorically answered "*what would have been the point in asking? I was guilty each time*" while SO16 said "*why would a poor man ask for a lawyer? These courts are for poor people who cannot afford lawyers. Rich people are taken to courts where lawyers can get them off even when they are guilty*." FO04 said he did not ask because "*I knew that lawyers are not allowed in customary courts*", and FO07 did not ask because "*there was no reason to as I did not want a lawyer. He would just complicate everything for everyone as my fate had long been decided*". SO11 said he did not ask for a lawyer because "*I wanted to finish and go back home*". When he clarified his answer he said by "*home*" he meant prison. That is where he lived, he added.

It appears from the answers I got that most criminal defendants are not told of their right to a lawyer, what procedure they are to follow if they want to be represented by a lawyer at their trial, with what likely result. It seems that, on the contrary, the customary courts have a conveyer-belt attitude: they want to get on with the business of trying, convicting and sentencing hapless defendants expeditiously. That is also why when the rare defendant dares ask for a lawyer, he mostly is met with an unhelpful cynical response that suppresses his right to a lawyer secured to him by the Constitution of Botswana. It also is apparent that far from being the independent courts contemplated

by the Constitution, customary courts seem to think that their role is to rush through the process and dispose of cases rapidly.

All 30 participants were asked whether they felt that the denial of legal representation to criminal defendants tried before customary courts should aggrieve them. Their answers varied. Nine former inmates said the denial should aggrieve such defendants, six said it should not, and five said they did not know. Seven professional participants said the denial should aggrieve such defendants, two said there is no reason why it should, and one had no answer. Asked the question, PP22 said "*I have never thought about it. Now that you ask, I cannot think why*." Pressed with whether he did not know that the Constitution gave the right to legal representation to every criminal defendants, he answered "*only those who can afford lawyers have that right, and criminal defendants who come before our Setswana courts cannot*."

PP24 said "*No, I do not. Any accused person who wishes to be represented by a lawyer is at liberty to say so, in which event their case is transferred to the Magistrate's court for trial where such an accused may be represented by a lawyer. Many times accused persons who came before me and said they wanted to be represented by a lawyer have, once they followed the laid down procedure which I told them, had their case transferred to a Magistrate*."

PP28 answered "*Oh yes, I do. Customary courts try Penal Code offences no less than do Magistrates. The trial of such offenses can be complex and often requires that an accused person be represented by a lawyer. In some of the reviews with which I have dealt, I have been horrified by the manner in which the trial had been conducted by the customary court.*" The responses of the professional participants were typically "*most*

certainly not " (PP24), "*I absolutely do*" (PP25), "*I do. Everybody should have access to legal representation*" (PP27), "*I am sure it should*" (PP28), "*Absolutely, for obvious reasons*", (PP29) and "*yes, I very much do*" (PP30). And PP26 said "*I truly do not know, but some prisoners say they are innocent and would not have been convicted if they had been represented*."

Opinion amongst the former prison inmates was divided. In answer to the question whether the denial of legal representation ought to aggrieve defendants: FO01 said "*Not if they are guilty*", FO02 said "*I do not think I know*", FO04 said "*Of course it should*", and FO10 said "*Yes, the innocent ones.*" FO03 said "*it aggrieves me as I went to prison for nothing. Perhaps he would have helped me*," a viewpoint shared by FO09 but not by FO05 who said "*not at all*". FO06, FO07, and FO08 said "*I most certainly do*", "*Yes, I do*", and "*Oh yes, very much*."

The recidivist participants SO11 to SO20 held similarly divided views. SO11 said "*Not me as I was guilty. I cannot speak for others*", SO12 answered "*it is hard to say as I cannot be sure that the presence of a lawyer would make any difference*", "*I have no reason to think that*" said SO17. SO18 answered "*those who are found guilty when they are innocent yes as I have heard lawyers can help*."

In relation to whether the participants felt that unrepresented criminal defendants were able to defend themselves effectively, and whether the customary law system needed to be reformed in order to ensure that defendants before them receive fair trials, the preponderance of the views of the professional participants was predictable, as were the erratic views of the other participants. The professional participants were mostly in favor of reform while the former inmates were generally divided.

All 20 former inmates, ten as first offenders and ten as recidivist offenders, said that they did not have legal representation at their trials. Twelve altogether, eight in the category of first offenders inmates and four in the subsequent offender inmates category, had asked for it at their trials and it was denied to them. Two in the category of first offender inmates and six in the category of subsequent offenders had not asked as they already knew that legal representation was not permitted in customary courts. The ten professional participants also said during the interviews that they knew that legal representation was not allowed in the customary courts. That conclusively settles Sub Questions 4 and 5 and no further research on it would be warranted as the answer is conclusive of the matter.

On Sub Question 6 as to whether the denial of legal representation at their trials by the customary courts aggrieved them, six first offender inmates said that the denial of that right did aggrieve them, that they were justified in being aggrieved, one said it did not and three said they did not know and had not thought about it at the time. Of the recidivist former inmates, three said it did aggrieve them, while five said it did not and should not and two said they did not know. The answers of these 20 former inmates to the question are conclusive of it and no further research of it is necessary. Seven of the ten professional participants said any defendant who is denied legal representation would be justified in being aggrieved, two said they would not be and one said he had not thought about it.

Those who had asked for legal representation at their trials said they felt that they had been denied legal representation, and that they were aggrieved by the denial. FO04 said he felt "*there was no point*", FO03 said "*I went there knowing that I would be*

disadvantaged by being denied the services of a lawyer", and FO08 said he felt "*helpless*". FO06's answer was "*I felt unfairly treated because when I asked for a postponement to go write a letter that the case be transferred to a court where I could be represented, the prosecutor opposed and kgosi (the presiding officer) refused me*." SO19 felt "*that I was treated very badly*", and SO20 believes that he had "…*been treated most unjustly, although prison had its advantages, food being one example*."

An additional sample of some of the answers shows the depth of feeling. PP22 said "*there is no reason why criminals should have legal representation. The police would not arrest you for nothing. Where there is smoke there is fire. There is no reason for anyone to complain*." This answer typifies the school of thought that sees no need for legal representation in the customary courts. FO09 took a different position, as did a few other inmates. "*Although I had done it, I met many people in prison who said that they were innocent but had been found guilty because they were oppressed at their trials. They felt that if their cases had gone to the Magistrate's court, a lawyer would have helped them and they would not have gone to jail. These people were treated unjustly*."

FO10's answer was "*innocent ones have the right to legal representation and should enjoy it. Guilty ones do not and should not. It is as simple as that. Those who have no right to complain should not complain*." Very cold logic, I thought. When I asked him how the court would know who is guilty and who is not before the trial is concluded, FO10 answered "*the accused knows whether he is guilty or not. Guilty ones should not ask for a right they do not have. Lawyers are meant for those who need help, the innocent. The guilty would only cheat the system by wanting lawyers*. "

SO15 said that " *I have heard from savvy prisoners that the constitution gives everyone the right to a lawyer. But lawyers cost money, and government does not have money to waste on things like that. People do crime because they are poor and don't have money. So they can't have lawyers. So there is nothing wrong*." When I asked what about those who are innocent and are taken before the customary court, his answer was " *Police are not bad people and don't arrest innocent people*." When I told him that I knew people who had been arrested when they were innocent as a result of some mistake, he cynically retorted: "*too bad. That is how life is*."

PP28 said on the question: "*legal representation at one's trial is an inalienable right that every suspect must enjoy. Denying it is a huge travesty and must be condemned in the strongest possible terms*." PP21, for her part, said: "*The problem is a one of money. Government ought to provide legal aid to all criminal accused so they can afford legal representation. It does not help that the constitution bequeathed to us by the British requires an accused to pay for his own lawyer. What does he pay with when, most likely, he is poor and unemployed*?" And PP22 was dismissive of the matter: "*there is nothing wrong with the system, and it never denies anyone who wants legal representation. They seldom ask for it, probably because they cannot afford lawyers. So how can they complain?"*

It is to be noticed that the 2 professional participants who are of the view that the denial of legal representation ought not to aggrieve defendants tried by customary courts were former officers or judges, called presiding officers, who used to preside over such courts prior to taking retirement. Not surprisingly, they said they could not imagine why such defendants should be aggrieved by the denial of legal representation. The one

professional participant who was neutral was a retired prison officer or warder, said he had never thought about the subject, did not know enough to express a view, but had often been complained to about the denial by some prison inmates who had been convicted by the customary courts.

Boko (2000), Ditshwanelo (2007) and Olesitse (2017) did expressly say the denial ought to aggrieve such defendants, while Soyapi (2014), Classens (2009), Gasa (2011), Himonga (2011), Hinz (2010), Lehnert (2005), McQuoid-Mason (1999/2013), Weeks (2011), the South African Law Commission (1999), Ditshwanelo (2007) and Gideon v Wainright (372 U.S. 335 (1963) implied that it should.

Sub Questions 7 and 8

To the question whether the denial of legal representation disposes defendants concerned to repeat offending, five of the first offender inmate participants answered in the affirmative, one answered in the affirmative in respect of innocent defendants and in the negative in respect of guilty defendants, one answered in the negative and three said they did not know. Of the recidivist former inmate participants, five answered in the affirmative, three in the negative and two said they did not know. Seven of the professional participants expressed the view that the denial must dispose affected defendants to repeat offending, two said it did not and one said he was unable to express a view.

The five first offender inmate participants and the seven professional participants were unable to provide a scientific basis for their answer, and when pressed saying only that it was intuitive. The five recidivist participant said they were living proof. They further said that the denial of legal representation at their first trials contributed to their

recidivism. They felt that they had, in addition to other influences in their lives, been treated so unjustly and labeled as criminals after their first trials they had resigned themselves to a life of crime. A sample of their responses demonstrates their sincerity.

Their answers are of importance as they represent their knowledgeable views on the subject. FO01 said on the question: " *I was most unhappy when I went to prison. I felt that I had been treated very badly. The stigma of imprisonment was very damaging. The shame I felt when we interacted with members of the public in the course of performing extra-mural services was real. I soon learnt to accept my fate. Since I was released from prison, fitting back into society has been difficult and there are times when I have thought that my reputation was ruined forever, that I should accept that I am a criminal, commit crime and go back to jail to join those with whom I belong*."

FO03 lamented: "*Being labeled a criminal everywhere you go by everybody you meet kills your soul. It does not seem to matter to them that you have served and completed your punishment. They make you feel 'once a criminal always a criminal'. People, by the way they treat you, make you forget any thoughts of having a second chance at life outside prison. It is a wonder that I have not committed another crime and gone back to prison. Perhaps it will happen yet*."

FO08 said that he missed prison. "*I was better off in prison than I am back in my village. People whisper and point at me when they see me. I can imagine what they are saying about me. So so cruel. I was treated as more of a human being in prison, including by prison warders, than I am in my own village. Although I am grateful to my family for their love and support, I feel like I am being a liability to them because they too are*

labeled as a family that breeds criminals on account of me. I doubt that I would be able to resist committing a crime and returning to prison should an opportunity present itself."

FO09 exemplified the exceptions. "*I have no intention of returning to prison", he said. "I owe it to my wife and children. Although the stigma is tough to resist, I will not give up. I have a job and am working hard so people can see that even a former prisoner can be useful. I also participate in community work to pay back. It is working as some compassionate people appreciate my efforts on behalf of the community and are very supportive. I will stay strong*."

SO17 typifies the committed recidivist. *"Prison is my home, and inmates the only family I have*", he proudly says. "*I am in prison for the fourth time. Whenever I finish my sentence, I commit crime again so I return to prison. I miss it when I am away. It was not always like this though. Before I went to prison the first time my family loved me. I made the mistake of being with my friends when they committed an unplanned robbery. I was swept along with them and, although innocent, the customary court found me guilty and sent me to jail. 'Birds of a feather', said the customary court prison. After I completed the sentence following my first offence, my family would not accept me back. I had no place to stay, and nothing to eat. I went and stayed with friends and together we committed ourselves to a life of crime. Why not-nobody cares! And we must eat before we return to prison. It was a matter of time before we were caught and I went back to prison. Since then, I have accepted that I am a criminal and belong in prison. They waste their time and mine by releasing me. They should just let me stay in prison until I die because I have no other life, and I have no one outside prison*."

SO19 said that crime was his life, and tells his story. "*I was innocent the first time I was tried and convicted by the customary court. I had not stolen the cattle I was accused of stealing. I wanted a lawyer but was ignored. I was young and inexperienced and did not really understand what was happening at my trial. It did not seem to matter that I could not follow what was going on. The prosecutor and the kgosi (presiding officer) carried on as though the trial was not about me. When they were done, I was asked if I had something to say. I denied the offence, but was found guilty and promptly sent to prison. In prison I found kind and friendly people, both inmates and prison warders. They made me feel important, that I was a human being, and that I deserved respect. And there was plenty of food to eat. These things I do not get outside prison. I belong in prison. It is the only home I have*." Asked whether he thought the course of his life might have been different had he had a lawyer at his first trial and not been convicted, he unhesitatingly said "*yes*". He added: "*I had great plans for my life. That first treatment by the customary court and prosecutor ruined and fixed my life forever*."

SO20 said that going to prison once increases the likelihood of one going back there again and again. "*If you are treated badly by those who send you to prison, and you find good and kind people in prison, you begin to compare where you are and where you have come from. When you are released and return to society, people look at you differently from the way they did before you went to prison. That is how decisive that first treatment is. Bad people make you leave hitherto good people in your community by sending an innocent man to prison. Bad people introduce you to good people in prison. When you are released, the community are not the same anymore; they look at you in a way that says you do not belong. They shun you. They make you think of the better people*

in prison, and make you wanna go back there. You do, and keep going back every time after you are released. Who does not want to be treated with respect? Who does not want to be accorded the dignity that every human being deserves? Who wants to be looked at funny? Prison life becomes better than life outside prison. And there you get plenty of food."

PP27, who said he had done some research on the subject of recidivism, handed me a hand-written document on which he said he had recorded his views on recidivism. It read: "*Ex-prisoners and ex-convicts have difficulty finding work, finding a place to live, obtaining any government benefits or fitting back into normal society or their families. Gangs often welcome back released prisoners with open arms. Incarceration doesn't work for its original purpose of rehabilitation. In fact, it is an expensive way to make bad people worse. Prisons are graduate schools for crime. In prison, criminals learn better how to commit crimes and not get caught or they branch out into other forms of crime they learned in prison. Released prisoners retain their mental illnesses, addictions, violent nature and/or lack of remorse or lack of guilt feelings. The released prisoner has not learned his or her lesson and reverts to a life of crime because it is the only thing they know. After prison, criminals sometimes still enjoy committing crimes or feel compelled to do so. Many offenders after release from prison are still just as dumb as they were when they went to prison. That first conviction and how it happens has a decisive influence on the future of the prisoner."* We then had a detailed discussion of the matter.

For his part, PP29 contributed the following detailed analysis. It also had been written on a piece of paper. The participant said he had previously lifted it from an internet source he did not remember, and said he found it so apt it comprehensively

represented his views. When handing the piece of paper to me he said "I could not have said it better myself. " "*Recidivism is caused by a multiplicity of factors within and outside individual offenders and prison institutions. Societal reaction to imprisonment also accounts for the rise in recidivism. The attitude of the people or the people's attitude of mind towards prisoners and even the released ones is discriminatory; they are labeled and stigmatized in the society and thereby making it difficult for (re)integration into the society. Again, the prison system is a place where people of different ethnic/cultural backgrounds, behavioral patterns and personality traits are confined. That is, prison is a specially designed environment where inmates give and take both negative and positive ideologies through criminal subculture. Prison is a school of crime and breeding ground for criminal socialization. Societal and prison factors that make certain individuals to get into prison and consequently predict their eventual re-entry into prison are situational, personal, interpersonal, familial, structural, cultural, and economic, etc.*

Criminogenic needs, and they include: criminal peers, criminal history or history of antisocial behavior, social achievement, and family factors–all these have an impact on the likelihood of released inmates recidivating. Criminal companionship, antisocial attitudes, and current employment and education problems were among the strongest predictors of recidivism on the average correlations. That prison systems tend to lack resources for the procurement and establishment of the state-of-the-art correctional programs such as vocational skills and qualitative formal education system for both male and female inmates does not help to prevent first offenders recidivating. Even the few available facilities such as industrial or agricultural plant, trade and vocational trade

are moribund or so obsolete that they are incapable of motivating, reforming, mobilizing and empowering released inmates to live a crime-free life.

It makes sense to argue here that the nature or manner at which pre and post-release/follow-up programs, if any, are carried out within and outside the prison system determines whether an inmate will return to crime and criminal activities after release or to recluse over time. It amounts to no rehabilitation or reformation when released inmates are not gainfully employed in the free world resulting from lack of vocational tools and acceptable academic qualifications or skill acquisition certificates. This development has profound implications for future reoffending, recidivism. The general implication is that unstable employment and low earnings, poor prison education and skills acquisition programs, post-release deviant neighborhoods, dearth of post-release job training and educational programs, and social stigmatization in the mainstream society, are major causes of recidivism in society.

To release economically, psychologically, physically and socially demoralized inmates without proper follow-up programs and basic apparatus, such as vocational tools, certificates, etc., to enable them to become self-reliant or either secure meaningful employment in the government establishments or private sector portends a great danger. The chances of such persons relapsing into crime and criminality are exceedingly high. I maintain that poor engagement in educational and employment pursuits, which generally are pro-social activities, are risk factors for criminal recidivism. That first conviction and how it occurs have a significant influence on the course of the future life of the criminal defendant. It is best avoided if it can be, which is why the customary court system in Botswana requires substantial and urgent reform. "

Not to be outdone, PP30 offered his own take on the subject: "*What does the Government expect? They unleash an archaic criminal justice system upon vulnerable, gullible and impressionable young people. It promptly, without regard to their guilt or innocence, send them to prison where they learn life skills previously unknown to them. Those life skills work only in the dark world of crime, and then send them to prison. So they keep going back there time and time again*."

Although profoundly significant, the above evidence is not conclusive on the question whether the denial of legal representation to defendants tried by the customary courts necessarily disposes them to repeat offending, nor on that it should. Further much more detailed and specific research will have to be conducted to find the linkage if it does exist.

Sub Questions 9 and 10

The answer to the question whether Botswana has experienced prison overcrowding is also one of fact which depends on the answers of the participants for what they are worth, statistics, and scholarly analysis. Eight of the first offender inmate participants and seven of the recidivist former inmate participants said that there was, during their time in prison, overcrowding. Two of the first offender inmate participants and three participants of the recidivist category said that there was no overcrowding in prison during their time there. The inmates were in prison at different times during the period 1998 to 2017. Their answers, therefore, relate to this period. The professional participants were not asked this question as they could not give other than speculative answers.

The matter of overcrowding in Botswana prisons is the subject of national official and international statistical reports whose sources, of necessity, were Botswana Government statistics. The problem of prison overcrowding has also been the subject of public and scholarly discourse, speeches and press interviews over the period 1998 to 2017. In 2000, Botswana had 14 prison facilities whose capacity was 3,300 (U.S. Department of State, 2003; Letsatle, 2012). The number of facilities grew to 23 in 2015 with a capacity increase to 4337 in July 2016 (Institute for Criminal Policy Research, 2017). Table 1 shows the occupancy level of Botswana prisons, and the degree of overcrowding, during the period 2000 to 2016 (Institute for Criminal Policy Research, 2017).

Table 1

Botswana Prison Occupancy Level 2000 to 2016

Year	Prison capacity	Number of prison inmates	Occupancy level in percentages	Prison population rate
2000	3,300	6,742	**204.30**	381
2002	3,300	5,829	**176.64**	320
2004	3,300	6,105	**185.00**	328
2006	3,300	5,969	**180.88**	314
2008	3,300	6,300	**190.91**	325
2010	3,300	5,063	**153.42**	256
2012	3,300	4,241	**128.52**	211
2014	3,300	4,131	**125.18**	202
2016	4,337	4,376	**100.90**	210

The last available prison statistics are for 2016. However, the problem of prison overcrowding persists beyond 2016 and remains in 2018 (British High Commission, June 2018; Global Prison Trends, 2017). The question whether the denial of legal representation contributed to prison overcrowding was asked of the participants even as any answer they gave would be of limited usefulness as it would represent their views on a matter that requires scientific evidence. Six first offenders, eight repeat offenders, and six professional participants expressed their views that prison overcrowding was real. An additional answer is possible to deduce from statistics on the number of inmates convicted by customary courts as a proportion of the whole of the prison population at any given time seen in the context of the capacity of the prisons. Scholarly literature has established, not only that 85% of all criminal defendants in Botswana are tried by the customary courts (Ditshwanelo, 2007) in any one year, but also that most prison inmates in Botswana are ones convicted by the customary courts (Fombad, 1999; Malila, 2017; Otlhogile, 1993; Love & Love, 1996). In addition, there are 429 customary courts as opposed to magistrates courts in 17 cities and towns manned by 50 Magistrates (Botswana Government Statistician General, 2011; Fombad, 2004). It may be inferred from this evidence, considered as a whole, that the denial of legal representation contributed to the problem of prison overcrowding.

Sub Questions 11 and 12

The answer to the question whether Botswana has experienced high rates of recidivism is one of fact which depends on statistics and scholarly analysis. The same goes for the question whether the denial of legal representation in the customary courts is also a contributory factor to the problem of high rates of recidivism. Unfortunately, no

statistics on recidivism are kept by the Government. It is the case, not only in Botswana, but also in the rest of Africa (Bello, 2017). Because of this, the doctrinal approach whereby texts, regulations, statutes, statements made by public officials who should know and the analysis of scholarly writers and their conclusions are analyzed.

Although this question requires factual information and the personal views of participants on it are of marginal utility, it was nevertheless asked of them. Eight out of the 20 former inmates and six of the ten professional participants said there was a high rate of recidivism in Botswana. Makunga (2009), Letsatle (2009), Roy (2013) and Love (1992) said that Botswana had experienced high rates of recidivism. Mujuzi (2008) and Makunga (2009) said the problem persisted notwithstanding the application to it of measures intended to stem it. The Commissioner of Prisons, the Minister responsible for justice, the President of Botswana, and the Ambassador of the European Union to Botswana and SADC all have, on various occasions, said so in public statements they have made (Sunday Standard, 26 February 2018; Botswana Daily News, 15 December 2015; Mmegi, 16 September 2016; British High Commission, 21 June 2018). Bello (2017) has also said that "…*recidivism is seen to be the norm with African prisoners*." Fazel and Wolf (2015) have written to similar effect.

The answer to the question whether the denial of legal representation to defendants tried in the customary courts contributes to high rates of recidivism has been answered by the participants. They did so as is shown above in respect of Sub-Question (5). However, in doing so they were stating their views which are of limited usefulness as the proper answer to the question is one that is based on empirical evidence. Love (1992) said the problem of high rates of recidivism affected the male population of the ages 18 to

24. Boko (2000) said that the denial of legal representation did contribute to high rates of recidivism amongst the youthful population. It is of importance to record, as a finding, that all those, scholars and Botswana Government officials and other writers, who have spoken and written on prison overcrowding in Botswana and Africa have made what they said was an unavoidable association between prison overcrowding and recidivism (Makunga, 2009; Letsatle, 2009; Roy, 2013; Love,1992; Mujuzi , 2008; Sunday Standard, 26 February 2018; Botswana Daily News, 15 December 2015; Mmegi, 16 September 2016; British High Commission, 21 June 2018; Bello,2017; Fazel and Wolf, 2015). They all have said that recidivism contributes to overcrowding in prisons.

Conclusion

The above findings will be discussed in Chapter 5, conclusions from them drawn and recommendations for further research made. Chapter 5 will be structured thus: introduction, overview of study context, discussion and interpretation of findings, limitations of the study, implications for social change, recommendations for further research, summary and conclusion.

Chapter 5: Discussion, Conclusions, and Recommendations

Introduction

Chapter 4 featured the results and findings of the study. Chapter 5 summarizes the major findings of the study and helps consider whether the denial of legal representation to criminal defendants tried in the customary courts influences the high rate of recidivism and prison overcrowding. The closing sections of this chapter include limitations of the study and implications for social change as well as recommendations for further research. The chapter concludes with a summary and conclusion.

Discussion and Interpretation of Findings

The purpose of this study was to explore whether the denial of legal representation to criminal defendants tried in the customary courts was a factor in the high rates of recidivism and prison overcrowding that exist in Botswana. I conducted a comprehensive literature review that helped me establish facts such as 85% of all criminal defendants tried in Botswana in any 1 year are prosecuted in the customary courts (Ditshwanelo, 2007). Similarly, the literature review confirmed that officers who preside over trials conducted by customary courts do not need and often only have the minimum of education and training. This was originally because customary law had been passed on by word of mouth. Lawyers being unknown to ancient Tswana society and to custom, lawyers did not have the right of audience in the customary courts. The legal system was also inquisitorial and presumed the guilt of the criminal defendant. The literature review also showed that the rate of recidivism was high in Botswana and that its prisons were overcrowded.

Prison Overcrowding

The definitions for prison overcrowding contain most of the same essential elements (Gaes & McGuire, 1985; Harrison & Beck, 2005; Kinkade, Leone & Semond, 1995; Lawrence & Andrews, 2004; Paulus, 1988; Vaughn, 1993). Prison overcrowding is a social phenomenon that occurs when the demand for space in prisons in a territory exceeds the capacity for prisoners (Hough, Allen, & Solomon, 2008). This happens when the rate at which people are incarcerated exceeds the rate at which other prisoners are released or die, which leads to less space in the prison. There is no universally accepted standard; prison overcrowding is measured in different ways by different penal institutions in different countries (Chirwa, 2001; Foreign & Commonwealth Office, 2005; Report of European Committee on Crime Problems, 2002). One way is by the amount of personal space per prisoner. Most prisons have a capacity figure for their prisons and, once that figure is exceeded, prison overcrowding occurs. This involves a localized value judgment of what is regarded as an acceptable amount of space per prisoner (Chirwa, 2001; Foreign & Commonwealth Office, 2005; Report of European Committee on Crime Problems, 2002).

Traditionally, prison overcrowding has been determined by density. Density is the proportion of inmates to the rated capacity of a prison—that is, the ratio of single cells to multiple-person cells. There is, however, a distinction between overcrowding and density (Chirwa, 2001; Foreign & Commonwealth Office, 2005; Report of European Committee on Crime Problems, 2002). Although overcrowding is a psychological state based on a perception of insufficient space by an incarcerated person, density is a physical condition defined by the ratio of inmates to available space in a penal institution (Chirwa, 2001;

Foreign & Commonwealth Office, 2005; Paulus, 1988; Report of European Committee on Crime Problems, 2002). Density takes two forms: spatial density and social density. Spatial density, the measure commonly used in prison overcrowding research, is normally computed as the proportion of inmates in a prison system to the available space as established by the rated capacity of the institution or system (Chirwa, 2001; Foreign & Commonwealth Office, 2005; Paulus, 1988; Report of European Committee on Crime Problems, 2002). Prison authorities often consider their institutions overcrowded when they exceed 80% of the rated capacity.

Social density, on the other hand, is measured by the amount of double and triple bunking found in a correctional institution (Applegate, Otto, Surette, & McCarthy, 2004). The European Committee for the Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment has recommended 4 square meters per person as a useful measure in cells occupied by more than one person. The committee has said that 4.5 square meters was "very small" in the case of an individual cell for periods of time exceeding 2 days, and 10 square meters is a good size for individual occupation but rather small for dual occupation, though 8 to 9 square meters is a reasonable condition for individual occupation (European Committee for the Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment, 2001).

It has not been possible to ascertain what measure the Botswana Prison Service uses to determine what amounts to overcrowding in prisons in Botswana. The former prison officer interviewed, while agreeing that there was overcrowding during his time in the service prior to his retirement in 2017, did not know how the service had arrived at the prison capacity of 3,300 during the period 2000 to 2014 and 4,337 since 2015.

However, he did say that prison spatial occupancy was too dense and uncomfortable for prisoners during the earlier period, easing somewhat but not sufficiently since 2015. In so far as 9 out of 20 former inmates felt that the prison was overcrowded during their stay in it, their measure must be psychological as it was based on the perception of those particular prisoners. Regardless, by the United Nations measure of prison population rate of 144 per 100,000 persons, the Botswana rate of 381, 320, 328, 314, 325, 256, 211, 202, and 210 during the period 2000 to 2016 is rather high. The prison population rate suggests that there are more people in prison as a proportion to Botswana's population than should be the case. All who have spoken and written on conditions in Botswana's prisons, which includes Botswana's president, the minister responsible for prisons, commissioner of prisons, ambassador of the European Union, several local and international scholarly writers, and several former inmates, have all criticized overcrowding in Botswana's prisons.

High Rates of Recidivism

The concept of recidivism derives from the Latin *recidere*, which means "to fall back," though there is no consistent definition of recidivism (Barnett & Hagel, 1977). Nevertheless, many attempts have been made to offer one (Ackerly, Soothill, & Frances, 1998; Barnett & Hagel, 1977; Blumstein & Larson, 1971; Broadhurst, 2000; Broadhurst & Maller, 1991; Carney, 1977, 1983; Evans, 2007; Maltz, 1984). The main definition of recidivism is offending more than once, being convicted, and serving additional punishment. Recidivism is typically measured in terms of an action taken by the police, a prosecutor, or a judge or court such as rearrests, repeated referrals to court, reconvictions or re confinement (Blumstein & Larson, 1971). Recidivism can also be calculated using

the number of the offenders who reoffend within 3 years of their release divided by the number of offenders released (Evans, 2007), because recidivism may refer to an inmate released in a given year who is incarcerated within 3 years of release for either a new sentence or a technical violation (Kohl, Hoover, McDonald, & Solomon, 2008). Accordingly, recidivism refers to the return of a previous offender to criminal behavior following conviction, diversion, or punishment. The causes of recidivism fall outside the scope of this research.

Recidivism is one of the most common causes of prison overcrowding in that it is the most common factor where prison overcrowding is found(Pitts, Griffin & Johnson, 2013). Recidivism is a norm with African prisoners (Bello, 2017). Although no official statistics on recidivism exist in Botswana, research indicates that the rates are high (Bello, 2017; Botswana Daily News, 2015; British High Commission, 2018; Fazel & Wolf, 2015; Fombad, 2004; Letsatle, 2009; Love,1992; Makunga, 2009; Malila, 2017; Mmegi, 2016; Mujuzi , 2008; Khubamang, 2010; Prisoner Administration and Rehabilitation Office, 2010; Roy, 2013; Sunday Standard, 2018; Tkachuk & Mason, 2003). The president of Botswana, in his state of the nation address in November 2016, also pointed to its prevalence (Botswana Youth, 2016). To reduce prison overcrowding to which he said high rates of recidivism were a significant contributor, he freed many prisoners on amnesty as part of celebrating 50 years of independence in 2016 (Mmegi, 2016). The Minister of Justice, Defence and Security (Botswana Daily News, 2015) and the ambassador of the European Union to Botswana also expressed concern about recidivism and its contribution to prison overcrowding (Sunday Standard, 2018) in addition to the commissioner of prisons (Botswana Daily News, 2014; Letsatle, 2009). In

this study, 10 of the 20 former inmate participants were recidivists and at least a few of the first offender inmate participants acknowledged it.

Influence of Denial of Legal Representation on Prison Overcrowding & Recidivism

There is no conclusive evidence that establishes a cause between the denial of legal representation and prison overcrowding or high rates of recidivism. However, there is strong evidence to suggest its connection. The customary courts are now required, as a constitutional imperative, to try only offenses that are prescribed by written laws, which require legal interpretation by the courts. That is why magistrates, judges and justices of appeal who administer law in the civil courts must be trained lawyers and have the right of audience. Customary courts tend to try the more minor offenses, but the customary courts administer the same criminal law as do all the other courts, which requires the same interpretation and makes lawyers essential for a fair trial. Therefore, the denial of legal representation in the customary courts affects the quality of the justice that defendants who are tried in these courts receive.

Additionally, the Constitution of Botswana requires of all courts, to presume the innocence of criminal defendants and to insist on proof beyond a reasonable doubt. The presumption was coined in the phrase “presumed innocent until proven guilty” by Sir William Garrow, an English Barrister (Moore, 1997). This presumption, also expressed in the Latin maxim *ei incumbit probation qui dicit, non qui negat* (proof lies on him who asserts, not on him who denies; Watson, 1998), is an international human right declared by the United Nations in Article 11 of the Universal Declaration of Human Rights. The maxim was first declared by Roman law in the Digest of Justinian in the sixth century (Watson, 1998). Although attributed to the Jurist Paul who lived in the second and third

centuries, it was introduced into Roman criminal law by Emperor Antonius Pius (Bury, 1893). Furthermore, in Islam, suspicion is condemned in the hadith documented by Imam Nawawi (Riyaadus, Hadith No. 1573), who also endorsed the presumption of innocence as established in Islamic law (Nawawi, 1997). Imam Bukhari (Sahi Al-Bukhari, Hadith 90) and Imam Muslim (Sahi Muslim, Hadith 6214) have also affirmed it. In England, it was enunciated by Lord L. C. Sankey in *Woolmington v. DPP* (1935) and in the *United States in Coffin v. United States* (1895).

Literature has established that the procedures applied by the customary courts are inquisitorial and presume the guilt of the defendant. For example, policies of not requiring officers who preside over customary courts to have legal training appropriate to their judicial function and denying criminal defendants legal representation. This occurs in circumstances in which 85% (Ditshwanelo, 2007) of all criminal defendants are tried in 429 customary courts as opposed to a much smaller number of 50 magistrates in 17 centers throughout Botswana (Botswana Government Statistician General, 2011; Fombad, 2004) in any 1 year.

As is shown by the data collected from the former inmate category of participants, the conviction rate in the customary courts seems to be as high as 100%. Although 20 former inmate participants are not representative of all criminal defendants who are tried by customary courts and receive custodial sentences, it is an indication that the rate of convictions in those courts might be high. Seven out of the 10 professional participants also had concerns regarding the fairness of the prosecutions that take place before the customary courts. Considering that 85% of all criminal defendants are tried in the customary courts (Ditshwanelo, 2007), there is a concern on the impact of the customary

court system. For instance, the denial of legal representation to criminal defendants tried in the customary courts may lead to high rates of recidivism and prison overcrowding in Botswana.

There is growing concern among the public, the legal community, scholars, and international agencies regarding the variability of standards of justice observed in customary and civil courts in Botswana (Boko, 2000; Tshosa, 2001; Women and the Law in Southern Africa, 1999). These concerns revolve around trial processes and their outcomes (Ballie, as cited in Malila, 2012; Boko, 2000; Kirby, 1985). This was apparent in the lived experiences of the 20 former inmate participants. All 20 of them were convicted every time, 10 of them on more than one occasion. Twelve out of the 20 were denied legal representation when they had asked for it, whereas the rest had not asked and nobody told them that the Constitution of the country entitled them to it. Eleven out of 20 felt that their trial had not been fair, but 18 out of 20 said that the procedures in the customary courts needed to be reformed to make them fairer for better justice. Seven of the 10 professional participants were worried about the quality of justice that the customary court system dispenses.

One of the most effective ways in which disparities in intra-court and inter-court sentences may be measured is through multivariate analyses of offense and offender related factors, usually referred to as legal and nonlegal variables (Hagan, 1974; Spohn, 2009; Spohn & Welch, 1987). Many studies in the United States have shown that legal variables are reliable predictors of the sentences that the courts are likely to impose (Ashworth, 1983; Martin & Stimpson, 1997/1998). These same variables may have an influence on sentencing approaches in Botswana (Boko, 2000). The differences that exist

in the procedures and practices of the customary and civil courts in Botswana encourage the view that these differences impact sentencing patterns (Boko, 2000).

Aggregate data shows that most of the prison population in Botswana was put there by the customary court system (Fombad, 1999; Love & Love, 1996; Malila, 2017; Otlhogile, 1993). The customary courts in Botswana have a reputation for poor adherence to fair procedure rules and a penchant for conviction (Ballie, as cited in Malila, 2012; Kirby, 1985; Frimpong, 1985). The findings of past research are consistent with the 100% conviction and imprisonment rate stated by the 20 former prison inmates as well as the view of 15 out of 20 of them that there was prison overcrowding during their imprisonment. Eight of the 10 professional participants confirmed the customary court system's reputation. All the factors mentioned in this section make it probable that the denial of legal representation to criminal defendants tried by the customary courts in Botswana contributes to high rates of recidivism and prison overcrowding.

Limitations of the Study

In Chapter 1, I discussed limitations regarding the generalizability of the findings. In the paragraphs that follow, I discuss those limitations further. The keeping of statistics by the Government in Botswana is severely limited for reasons which are unclear. There are, altogether, no statistics kept on rates of recidivism, a problem common to most African countries. As a result, I had to rely on the doctrinal approach of analyzing scholarly works and the public pronouncement of official positions for information on rates of recidivism in Botswana. Periodical statistics, annual or bi-annual as with prison overcrowding, would be of greater help as they would conduce to much more precision as to, not only as to the rates of recidivism, but also on trends.

Although much more helpful, statistics on prison overcrowding have only been kept since 1998 and are available for a limited period of time. They are available bi-annually, the last such statistics relating to the year 2016 when there was a sharp reduction, not in the prison population (4,131 in 2014 and 4,376 in 2016), but in the degree of overcrowding from 125.18% in 2014 to 100.90% in 2016, no doubt because of the increase in prison capacity from 3,300 in 2014 to 4,337 in July 2015. Statistics on the number of prisoners in July 2015 would have helped determine what the degree of overcrowding in 2015 was. In particular, such statistics in respect of 2017 would have been of assistance in determining trends since prison capacity was increased in 2015. It must be said, though, that the prison population rate increased from 202 in 2014 to 210 in 2016, probably attributable to an increase in the prison population from 4,131 in 2014 to 4,376 in 2016, it being unlikely that the total population of Botswana had decreased in the intervening period. This is all the more so as no population census took place during the latter period.

Further limiting was lack of information on the causes of both high rates of recidivism and overcrowding, no investigation of this having been conducted by anybody. Were research on this available, it would have made it all the easier to determine whether the denial of legal representation to criminal defendants tried by customary courts has contributed to either high rates of recidivism or prison overcrowding or both. Most limiting was lack of research to inform on the effects and impact, if any, on the criminal justice system, including of the denial of legal representation on rates of recidivism and prison overcrowding. For the latter, I had to make do with the doctrinal approach of analyzing scholarly works and the public

pronouncement of official positions, an instrument lacking in precision. The reliability of this secondary data was, itself, limited by lack of statistics on rates and trends of recidivism.

Another limitation on the study related to purposive sampling. I was able to minimize bias by adhering to the criteria of the sampling process. Personal bias was also mitigated by having no personal connection with any of the participants, having met them for the first time when I first made contact with them for purposes of the interview. In-depth interviewing and observation also helped somewhat in diminishing personal bias.

A further limiting factor was that I had to rely on empirical data beyond the five year mark. It mostly was all that was available, which gave me no choice. Although there is no shortage of intellectuals and scholars in Botswana, there is a severe shortage of scholarship and scholarly writing. This affected the majority of the data, particularly scholarly and participant data. Still, it was better than nothing as this research will serve a useful purpose, however limited. The final limiting factor is the period of 16 years (2000 to 2016) with which the study was concerned. The scant availability of data, particularly statistical and other Government data, imposed the limit and dictated the scope of the period with which the study was concerned.

Implications for Social Change

As earlier discussed, high rates of recidivism and prison overcrowding are acute problems which attend the prison system and have serious injustice and health implications for prisoners, first offender and recidivist, as well as prison officers and their safety. The denial to criminal defendants tried before customary courts of the right to legal representation is also a problem of the criminal justice system which has dire unfair

trial consequences for 85% of all criminal defendants in Botswana in any one year. The manifest injustice, social and health implications of these problems have troubling ramifications for community safety and security as well as the human rights of the prisoners, first offender and recidivist alike, who inhabit our prisons.

The subject of high rates of recidivism, prison overcrowding and the justice implications of the denial of legal representation to criminal defendants who are tried by customary courts and any possible relationship *inter se* that may exist is an area that, while crying out for investigation, has never before been explored. An investigation of these ills will prove beneficial to the country, its population, its Government and policy makers. Whether the relationship exists or it does not, with more research, policy-makers may well be inclined to re-think the laws and procedures that make the denial possible.

Even if the outcome of this study had been that there is no relationship between high rates of recidivism and prison overcrowding on the one hand, and the denial of legal representation on the other, it would still bring to the attention of policy-makers that such denial reasonably aggrieves defendants, that it is contrary to Section 10 of the Constitution of Botswana, that it violates the right to the presumption of innocence, and that it is manifestly unjust as the legal procedures followed by the customary courts permit, intentionally or not, the customary court system to circumvent the Constitution by reason of the denial and the presumption of guilt.

Even as all former inmate participants said the prosecutors in their cases had been police officers and not lawyers from the Office of the Director of Publications, two difficulties remain. First, the law permits lawyers from the Director's office to prosecute cases before the customary courts. Secondly, it is possible even if improbable, that while

in none of the prosecutions involving the 20 former inmate participants were lawyers engaged as prosecutors, it may have occurred and may still occur in other such cases because the law permits it. Thirdly, police prosecutors receive legal training on the conduct of prosecutions.

This research has found, not only that rates of recidivism in Botswana are high and the country is and has, for some time, experienced prison overcrowding, but also that there exists a relationship, however tenuous, between these two problems on the one hand, and the denial of legal representation to criminal defendants prosecuted before the customary courts on the other. This result has implications for positive social change. Even if the relationship did not exist, the same implications for social change would still exist. The implications for social change are that the response of policy-makers may well be to reform the system. Reforming the system would also have further implications for positive social change in that the criminal justice system would provide a better justice system for those disenfranchised by the current policy and uphold their human and civil rights and reduce in some of them the tendency to re-offend. These results might positively impact the rate of recidivism and prison populations by reducing them and ameliorating the problem of overcrowding. The resulting enhancement of community safety and security would be an added implication for positive social change.

Recommendations for Further Research

As the literature reviewed and scholarly works referred to in this study have shown, prison overcrowding is a common problem, not just in Africa but also in the rest of the world. The literature has also shown that rates of recidivism tend to inversely contribute to prison populations, the higher the rate the more likely the problem of prison

overcrowding with its consequent implications for the human rights and health of prisoners. Further research could usefully determine whether high rates of recidivism are an invariable feature of prison overcrowding or not. Such research, if replicable and capable of generalization, could inform research in other countries.

The best prison population rate is zero per year. Because Emile Durkheim (1893, 1984; 1895, 1950; 1897, 1951) has authoritatively written that crime is normal, and in this pronouncement he has not been alone (Closer, 1956; Dentler & Erikson, 1959; Erikson, 1966; Cohen & Machalek, 1994). Human experience has shown that there is no country that is completely free of crime and criminals, however minimal. To enable international standards to be set for the guidance of countries even as every country must make every effort to minimize crime and prison populations, research must be conducted and delineate parameters for prison population rates. Research also needs to take place to enable world bodies to set common international standards for measures of how much minimum space in a prison cell per prisoner is acceptable to ensure the realization by the prisoner of his or her human rights and to uphold their right to minimum standards of health.

Further research in Botswana is required to identify the causes of high rates of recidivism, the precise causes of prison overcrowding, and the justice implications of the denial to criminal defendants prosecuted before customary courts of their right to legal representation at their trials and of denying them the presumption of innocence in those trials. Finally, further research needs to be conducted to determine the implications for community safety and security of high rates of recidivism, prison overcrowding, the denial of the protection afforded by the presumption of innocence, and the denial to

criminal defendants prosecuted before customary courts of their right to legal representation at their trials.

Summary and Conclusion

At its simplest, this exploratory qualitative study raised four questions for research. First, has Botswana been afflicted by high rates of recidivism during the period 2000 to 2016? Secondly, has Botswana experienced prison overcrowding during the period 2000 to 2016? Thirdly, are criminal defendants who are tried by customary courts in Botswana denied legal representation? Finally and most importantly, is there a relationship between the denial of legal representation to criminal defendants tried by customary courts on the one hand and high rates of recidivism and/or overcrowding on the other during the period 2000 to 2016? The Punctuated Equilibrium Theory propounded by Baumgartner, Jones and Mortensen (2014) and the Policy Feedback Theory composed by Mettler and Sorelle (2014) guided the study. The literature review overwhelmingly supported the research and its findings, while the data gathered in the interview process and observations were of significant benefit.

The research yielded affirmative answers to all four questions, but with varying degrees of confidence and conclusiveness or lack of it. The answer to the first question was inconclusive for want of statistics which neither the Government nor anyone else maintains, and my confidence level in that answer is somewhat weak. The observations of the Government, the President who retired on March 31, 2018, the Minister responsible for justice and prisons, the Commissioner of Prisons, scholarship and all, local and foreign, who have cared to comment on the question is united: there existed

high rates of recidivism in Botswana during the period in question. This finding is supported wholly by secondary data.

The answer to the second question is conclusive, certainly in relation to the period in question. All such evidence as exists, including that of official statistics and the data offered by officialdom and scholarship (local and international), supports an affirmative response. Government statistics constitute primary data and play a decisive role in the conclusiveness of the finding and the supreme confidence that I have in it. The same applies to the third question, which depends on the express provisions of the Botswana Constitution and the manner in which the Court of Appeal has interpreted it.

Although the answer to the fourth question is in the affirmative, it is tenuous in the extreme and the confidence I have in its correctness is weak. No primary data in support of it exists. The secondary data on which the answer is founded, while inherently and of itself is strong, assists only to the extent of resulting in the inference which lends credence to the final finding.

There is much scope for further research. The further research, if undertaken, should lend strength to the weak aspects of the above findings. The strength of the further research and the degree to which it would add to the results of this study would be much enhanced if it takes place after appropriate reforms have been made and implemented. Those reforms would include the following and concomitant benefits. The maintenance of annual statistics on rates of recidivism by Government would facilitate the

measurement of the rate of recidivism. The enactment of appropriate legislation by Government requiring the strict and unqualified compliance by customary courts with the provisions of the Constitution which entrench the right of a criminal defendant to

legal representation and the provision by Government of legal aid to support a criminal defendant who is without the requisite means to afford such representation, and of the entrenched provisions of the Constitution which secure to a suspect the presumption of innocence requiring proof beyond a reasonable doubt.

With all the above said, the study was not entirely pointless and without benefit. It constitutes a good start in an environment in which there is a dearth of research on criminal justice questions of great human and civil rights importance and which bear upon public safety and security.

References

Ackerley, E., Soothill, K., & Frances, B. (1998). When do sex offenders stop offending? *Research Bulletin, 39*, 51-57.

Akeredolu, O. (2016). *The indigenous African criminal justice system for the modern world*. Durham, NC: Carolina Academic Press.

Alverson, H. (1978). *Mind in the heart of darkness: Value and self-identity among the Tswana in Southern Africa*. New Haven, CT: Yale University Press.

Ashworth, A. J. (1983). *Sentencing and penal policy London*. London, England: Weidenfield and Nicolson.

Baumgartner, F. R., Jones, B. D., & Mortensen, P. B. (2014). Punctuated equilibrium theory: Explaining stability and change in public policymaking. In P. A. Sabatier & C. M. Weible (Eds.), *Theories of the policy process* (pp. 59-103). Boulder, CO. Westview Press.

Baputaki, C. (2005). Botswana: Prison commander decries overcrowding. *Mmegi/The Reporter*. Retrieved from Mmegi.bw

Barnett, R., & Hagel, J. (1977). *Assessing the criminal: Restitution, retribution and the legal process*. Cambridge, MA: Ballinger.

Bekker, J. C. (1989). *Seymour's customary law in Southern Africa*. Cape Town, Africa: Juta & Company.

Bello, M. (2017). Reducing recidivism in Africa and the South African model: A legal and criminological overview. *International Journal of Advanced Scientific Research in Humanities, Legal Studies & International Relations, 2*(1), 22-32. Retrieved from

http://www.internationalpolicybrief.org/images/2018/JANUARY/IJSRHLSIR/ARTICLE3.pdf

Bennett, T. W. (1995). *Human rights and African customary law*. Cape Town, Africa: Juta & Company.

Betts v. Brady, 316 U.S. 455 (1942).

Blumstein, A., & Larson, R.C. (1971). *Problems in modeling and measuring recidivism*. Cambridge, MA: Ballinger.

Boko, D. G. (2000). Fair trial and the customary courts of Botswana: Questions on legal representation. *Criminal Law Forum, 11*(2), 445-460.

Botswana Daily News. (2015, December 15). Botswana: Maximum prison congested. Retrieved from AllAfrica.com

Botswana Constitution, 1966. Retrieved from www.elaws.gov/bw/pr_export.php?id=1651

Botswana Government Statistician General. (2011). *Report on 2011 Population & Housing Census*. Gaborone, Botswana: Central Statistics Office.

Botswana Youth. (2016, December 6). State of the nation address. Retrieved from www.botswanayouth.com

British High Commission. (2018). *Information pack for British prisoners in Botswana*. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/717707/Botswana_prison_pack.pdf

Broadhurst, R. (2000). *Criminal careers, sex offending and dangerous*. London, England: Routledge.

Broadhurst, R. G., & Maller, R. A. (1991). *Sex offending and recidivism*. Perth: University of Western Australian Crime Research Centre.

Bury, J. B. (1893). *A history of the Roman Empire from its foundation to the death of Marcus Aurelius*. New York, NY: Harper.

Callison, H. G. (1983). *Introduction to community based corrections: Series in criminology and criminal justice*. Los Angeles, CA: McGraw-Hill.

Carney, L. P. (1977). *Probation and parole: legal and social dimension*. Los Angeles, CA: McGraw-Hill.

Central Intelligence Agency. (2012). *CIA: The world factbook*. Retrieved from https://www.cia.gov

Classens, A. (2009). Who told them we want this bill: The traditional courts bill and rural women, *Agenda, 23*(82), 9-22. doi:10.1080/10130950.2009.9676271

Closer, L. (1956). The functions of social conflict. *The British Journal of Sociology, 8*(3), 197-207.

Coffin v. United States, 156 U.S. 432 (1895).

Coldham, S. (2000). Criminal justice policies in Commonwealth Africa: Trends and prospects. *Journal of African Law, 44*, 218-238.

Cole, R. (2010). *Juvenile offenders and the criminal justice system in Botswana: exploring the restorative approach*. Retrieved from https://www.unicef.org/infobycountry/files/Thari_ya_bana_2010complete.pdf HQ792.B64 T43 2010F

Common Law and Customary Laws Act, 1969

Constas, M. A. (1992). Qualitative analysis as a public event: The documentation of

category development procedures. *American Educational Research Journal*, 29(2), 253-266.

Creswell, W. C. (2013). *Qualitative inquiry and research design: Choosing among five approaches*. Thousand Oaks, CA: Sage. (Reprinted from 1998).

Customary Courts Act, I § 49, Ch. 4:05 (1971)

Davis, R. K., Applegate, B. K., Otto, C. W., & McCarthy, B. J. (2004). Roles and responsibilities: Analyzing local leaders' views on jail crowding from a systems perspective. *Crime and Delinquency, 50*, 458-82. doi:10.1177/0011128704263983

Dentler, R., & Erikson, K. (1959). The functions of deviance in small groups. *Social Problems, 7*, 98-107.

Denzin, N. K. (1989a). *Interpretive biography*. Newbury Park, CA: Sage.

Denzin, N. K. (1989b). *Interpretive interactionism*. Newbury Park, CA: Sage.

Denzin, N. K., & Lincoln, Y. S. (2011). Introduction: The discipline and practice of qualitative research. In *The Sage handbook of qualitative research* (4th ed.). Thousand Oaks, CA: Sage

Ditshwanelo. (2007). *Botswana context*. In Rekha A. Kumar, Customary law and human rights in Botswana (Working Paper No. 52). Retrieved from http://www.du.edu/korpel/hrwh/working/2009/52-kumar-2009.pdf

Durkheim, E. (1984). *The division of labor in society* (W. D. Halls, Trans.). New York, NY: Free Press. (Reprinted from 1893).

Durkheim, E. (1950). *The rules of sociological method*. Glencoe, IL: Free Press. (Reprinted from 1895).

Durkheim, E. (1951). *Suicide*. New York, NY: Free Press. (Reprinted from 1897).

Erikson, K. (1966). *Wayward puritans: A study in the sociology of deviance*. New York, NY: John Wiley and Sons.

Evans, S., D. (2007). Youth sense of community: Voice and power in community contexts. *Journal of Community Psychology, 35*(6), 693-709. doi:10.1002/jcop.20173

Fazel, S., & Wolf, A. (2015). A systematic review of criminal recidivism rates worldwide: Current difficulties and recommendations for best practice. *PloS ONE, 10*(6). doi:10.1371/journal.pone.0130390

Fenrich, J., Galizzi, P., & Higgins, H. E. (eds.). *The future of African customary law*. New York, NY: Cambridge University Press.

Fombad, C. M. (2004). Customary courts and traditional justice: Present challenges and future perspectives. *Stellenbosch Law Review*, 166-192. (Reprinted from 1999).

Fombad, C. M., & Quansah, E. K. (2006). *The Botswana legal system*. Durban, Africa: LexisNexis.

Frimpong, K., & McCall-Smith, A. (1992). *The criminal law of Botswana*. Cape Town, Africa: Juta & Company.

Gaes, G. G., & McGuire, W. J. (1985). Prison violence: The contribution of crowding versus other determinants of prison assault rates. *Journal of Research in Crime and Delinquency, 22*, 41-65. doi:10.1177/0022427885022001003

Gasa, N. (2011). The Traditional Courts Bill: A silent coup? *South African Crime Quarterly, 35*, 23-30. doi:10.17159/2413-3108/2011/v0i35a866

Gideon v. Wainright, 372 U.S. 335 (1963).

Goulding, C. (2002). *Grounded theory: A practical guide for management, business and market researchers*. London, England: Sage.

Hagan, J. (1974). Extra-legal attributes and criminal sentencing: an assessment of a sociological viewpoint. Law and Society Review, 8(3), 481-515

Hall, A. L., & Rist, R. C. (1999). Integrating multiple qualitative methods (or avoiding the precariousness of a one-legged stool). *Psychology & Marketing, 16*(4), 291-304.

Harrison, P. M., & Beck, A. J. (2005, October). *Bureau of Justice Statistics Bulletin: Prisoners in 2004*. Washington, DC: Bureau of Justice Statistics.

Himonga, C. (2011). The future of living customary law in African legal systems in the twenty-first century and beyond with special reference to South Africa. In J.

Hinz, M.O. (2010). Traditional courts in Namibia: Part of the judiciary? Jurisprudential challenges of traditional justice. In M. O. Hinz (ed.), *In search of justice and peace: Traditional and informal justice in Africa*. Windhoek: Namibia. Namibia Scientific Society, 23-29

Hough, M., Allen, R., & Solomon, E. (2008). Tackling prison overcrowding: Build more prisons? Sentence fewer offenders? *The Policy Press*

Imam Nawawi. (1977). *An-Nawawi's Forty Hadith (Second Edition English Translation by Ezzedin Ibrahim)*. Damascus: Holy Koran Pub. House, Hadith No. 33

Khubamang, B. (2010). A private conversation. Sunday Standard, 8 November 2010. Retrieved from www.sundaystandard.info

Kinkade, P., Leone, M., & Semond, S. (1995). The consequences of jail crowding. *Crime and Delinquency, 41*, 150-161.

Kirby, I. S. (1985). The Criminal Justice System-A Motswana's Perspective. In K. Frimpong (Ed.), *The Law, The Convict and the Prisons*. Proceedings for the Second Botswana Prisons Service Workshop, University of Botswana, Gaborone, May 27 to June 5, 1985.

Kohl, R., Hoover, H. M., McDonald, S. M., et. al. (2008). Massachusetts recidivism study: A closer look at releases and returns to prison. *International Policy Brief*

Lawrence, C., & Andrews, K. (2004). The influence of perceived prison crowding on male inmates' perception of aggressive events. *Aggressive Behavior*, **30**, 273-283.

Lehnert, W. (2005). The role of the courts in the conflict between African customary law and human rights. *South African Journal of Human Rights*, 241-277

Letsatle, K. (2012). Community involvement in offender treatment. Resource Material Series No. 84 Paper presented at the 147th International Senior Seminar. *United Nations Asia & Far East Institute for the Prevention of Crime & Treatment of Offenders* (UNAFEI, 154-160

Love, C. (1992). Court sentencing in Botswana: A role for probation? *Journal of Social Development in Africa*, **7**(2): 5-17

Love, C., & Love, S. R. (1996). "Some observations on crime in Botswana 1980-1992", 11(2) *Journal of Social Development in Africa*, pp. 33-42

Makunga, B. (2009). The improvement of the treatment of offenders through the enhancement of community-based alternatives to incarceration. Resource Material Series No. 79 Paper presented at the 141st International Senior Seminar. *United Nations Asia & Far East Institute for the Prevention of Crime & Treatment of Offenders* (UNAFEI), 235-255

Malila, I. (2012). Severity of multiple punishments deployed by magistrate and customary courts against common offences in Botswana: A comparative analysis. *International Journal of Criminal Justice Sciences (IJCJS)-Official Journal of the South Asian Society of Criminology and Victimology (SASCV), 7*(2), 618-634.

Maltz, M. D. (1984, 2001). *Recidivism*. Originally published by Academic Press, Inc., Orlando: FL.

Martin, M. E. & Stimpson, M. (1997/1998). "Women, race and sentencing in Oklahoma: A preliminary analysis", 4 *Journal of Oklahoma Criminal Justice Consortium*

Maxwell, J. A. (2013). *Qualitative research design: An interactive approach* (3rd. ed.). Los Angeles: CA. Sage

McQuoid-Mason, D. (1999). Access to justice in South Africa. *Windsor Yearbook of Access to Justice, 230*, 1-16.

McQuoid-Mason, D. (2013). Access to justice in South Africa: Are there enough lawyers? *Oñati Socio-Legal Series, 3*(3). Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2272640

McReynolds, C. J., Koch, L. C., & Rumrill, Jr. P. D. (2001). Qualitative research strategies in rehabilitation. *Work*, 16(1), 57-65.

Merriam, S. B. (1998). *Qualitative research and case study applications in education*. USA: Jossey-Bass

Mettler, S., & Sorelle, M. (2014). Policy feedback theory in Paul A. Sabatier and Christopher M. Weible (eds), *Theories of the policy process.* Boulder: CO. Westview Press, 151-181

Mokanoki, P. (2012). Reflections from prison. *Kutlwano Magazine-Online. Vol. 50 Issue*

1 of January 2012. Retrieved from www.kutlwano.gov.bw/kut_category.php?cid=28&_mid32

Molokomme, A. (1994). Customary law in Botswana: Past, present and future. In Sue Brothers, Janet Hermans, and Doreen Nteta, *Botswana in the 21st century: Proceedings of a symposium*. Gaborone. Botswana Society, pp. 347-352

Moore, C. (1977). The Law Society of Upper Canada and Ontario's Lawyers, 1797-1997. *University of Toronto Press*.

Moroka, L. (2008). The challenges of punishment in a dual legal system in Botswana. *United Nations Asia & Far East Institute for the Prevention of Crime & Treatment of Offenders* (UNAFEI)

Moustakas, C. (1994). *Phenomenological research methods*. Thousand Oaks, CA: Sage

Mujuzi, J. D. (2008) Working with the media in the search for public support for alternative sentencing. *United Nations Asia & Far East Institute for the Prevention of Crime & Treatment of Offenders* (UNAFEI)

Nachmias, D., & Nachmias, C. (1987). *Research methods in the social sciences* (3rd. ed.). New York. St Martins Press

NationMaster, (2003). "Botswana Prison Stats". Retrieved from http://www.nationmaster.com/countryinfo/profiles/Botswana/Crime/Prisoners

Native Tribunals Proclamation of 1934. Retrieved from www.elaws.gov/bw

Nelson, R. H. (2008). Alternative sentencing in commonwealth small states in Southern Africa. *United Nations Asia & Far East Institute for the Prevention of Crime & Treatment of Offenders* (UNAFEI)

Ntwayame .v The State, 2008(1) BLR 167 (Court of Appeal).

Olesitse, K. (2017). Customary courts must explain people's legal rights-CCA. MmegiOnline. Retrieved from www.mmegi.bw/index.pnp?sid=1&aid=1262&dir=

Order-in-Council of 9 May 1891. Retrieved from www.elaws.gov.bw/docs/statutes/Bechunaland_HCP_1890_1929.pdf

Otlhogile, B. (1993). "Criminal justice and the problems of the dual legal system in Botswana", 4(3) *Criminal Law Forum*, pp. 521-533

Otlhogile, B. (1994). *A History of the higher courts of Botswana, 1912-1990*. Gaborone. Mmegi Publishing Trust

Pain, J., H. (1978). The reception of English and Roman Dutch law in Africa with reference to Botswana, Lesotho and Swaziland. *11 CILSA*, pp 138-163

Patton, C. V., & Sawicki, D. S. (1993). Basic methods of policy analysis and planning. NJ: *Volume 7 Prentice-Hall Englewood Cliffs*.

Paulus, P. B. (1988). *Prison crowding: A psychological perspective*. New York: Springer-Verlag.

Pitts, J. M. A., Griffin III, O. H., & Johnson, W. W. (2013). Contemporary prison overcrowding: Short term fixes to a perpetual problem. Contemporary Justin Review. **17**:124-139

Polkinghorne, D. E. (2005). *Language and meaning: Data collection in qualitative research*. Journal of Counselling Psychology, 52 (2), 137-145

Prisoner Administration and Rehabilitation Office. (2010). *Botswana Prison Service Draft Rehabilitation Policy*. Ministry of Justice and Security Proclamation No. 36 of 1909

Ramsay, J. (1998). The establishment and consolidation of Bechuanaland Protectorate, 1870-1910, in Edge & Lekorwe (eds.). *Botswana, politics and society*. Pretoria. Van Schaik, 62-80

Read, J. S. (1963). Criminal law in the Africa of today and tomorrow. *J. A. L. 5.* Retrieved from https://www.africabib.org/rec.php?rid=183519965

Reiman, J., & Leighton, P. (2016). *The rich get richer and the poor get prison* (10th ed.). New York: NY. Routledge

Report of European Committee on Crime Problems, 13th conference of Directors of Prison Administration, Strasbourg, November 2002. Retrieved from https:rm.coe.int/doc/090000168070097b

Report to the Portuguese Government on the visit to Portugal carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 19 to 30 April 1999, Strasbourg, July 2001. Retrieved from https://rm.coe.int/168069796b1

Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 5 to 16 December 1999, Strasbourg, March 2001. Retrieved from https://rm.coe.int/16806ed493

Review for Criminal Policy Research. (2017). World Prison Brief Data on Botswana. Retrieved from prisonstudies.org

Riyaadus Shaaliheen. Hadith No. 1573. *Holy Koran Publishing House.* Retrieved from

https://modwestmuse,wordpress.com/probable_islamic_influence_on_the_presumption_o

f_innocence

Roy, N. (2013). Ten African solutions to the problem of prison overcrowding in Africa. *Penal Reform International*

Sahih Al-Bukhari (English Version), Vol. 8, Book 73, Hadith 90. *Holy Koran Publishing House*. Damascus Sahih Muslim (English Version), Book 32, Hadith 6214. *Holy Koran Publishing House*. Damascus

Samanyanga, I. (2016). The role of rehabilitation programs in curbing recidivism in Zimbabwe prisons: A cognitive behavior therapy perspective. *Global Journal of Advanced Research*, **3**(9), 818-825

Schapera, I. (1938). *A handbook of Tswana law and custom*. London. Frank Cass and Company Limited

Schapera, I. (1984). *A handbook of Tswana law and custom*. London. Frank Cass and Company Limited

Seitshiro, K. (2016). Prison commissioner calls for victim-offender. *Sunday Standard,* 04, December 2016

Seitshiro, K. (2017). Commissioner of Prisons "unlocks" the second prison. *Sunday Standard,* 06, August 2017

Silverstone (Pty) Limited v Lobatse Clay Works (Pty) Limited, 1996 BLR 190

Singleton, R. A., & Straits, B. C. (2005). *Approaches to social research* (4th ed..). New York. Oxford University Press

South African Government Statistician. (2012). *2011 Population Census Report*.. Pretoria, South Africa: Statistics South Africa.

South African Law Commission. (1999). The harmonization of the common law and

indigenous: Traditional courts and the judicial functions of traditional leaders (Discussion paper 82).

Retrieved from salawreform.justice.gov.za/reports/r_prj90_conflict_1999sep.pdf

Soyapi, C. B. (2014). Regulating traditional justice in South Africa: A comparative analysis of selected aspects of the Traditional Courts Bill. *Potchefstroomse Elektroniese Regsblad*, **17**(4)

Spohn, C., and Welch, S. (1987). "The effect of prior record on sentencing research: an examination that any measure is adequate", 4 *Justice Quarterly*, pp. 286-304

Spohn, C. (2009). *How do judges decide: the quest for fairness and justice in punishment*. Thousand Oaks, CA: Sage Publications

Stake, R. (1995). *The art of case study research*. Thousand Oaks, CA: Sage.

Strauss, A., & Corbin, J. (1990). *Basics of qualitative research: Grounded theory procedures and techniques*. Newbury Park, CA: Sage Publications

Strauss, A., & Corbin, J. (1994). *Basics of qualitative research: Grounded theory procedures and techniques*. Newbury Park, CA: Sage Publications

Tefo, P. (September 16). Khama to free prisoners. *Mmegi Online*.

Tkachuk, B., & Mason, B. (2003). Needs Assessment Report: Botswana Prisons Service. *International Centre for Criminal Law and Reform and Criminal Justice Policy*. Vancouver: Canada

Tlou, T., & Campbell, A. (2013). *History of Botswana*. Gaborone, Botswana: Macmillan Boleswa.

Trochim, W. M. K. (2001). *The research methods knowledge base* (2nd Ed.). USA. Atomic Dog Publishing

Tshosa, O. (2001). *National Law and International Human Rights: Cases of Botswana, Namibia and Zimbabwe*. Aldershot: Ashgate Dartmouth

United Nations Human Settlements Program. (2007). Enhancing urban safety and security: Recidivism rates in Botswana. *Global Report on Human Settlements*

United Nations. (1995). *Basic education in prisons*. Hamburg, Germany: United Nations Educational, Scientific and Cultural Organization Institute for Education.

United Nations. (2011). *World population prospects*. Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat.

U.S. Department of State Bureau of Democracy, Human Rights, and Labor. (2003). *2002 human rights report: Botswana*. U.S. Department of State Diplomacy in Action

U.S. Department of State Bureau of Democracy, Human Rights, and Labor. (2011). *2010 human rights report: Botswana*. U.S. Department of State Diplomacy in Action.

Vaughn, M. S. (1993). Listening to the experts: A national study of correctional administrators' responses to prison overcrowding. *Criminal Justice Review, 18*, 12-25.

Viljoen, F. (2005). Special Rapporteur on prisons and conditions of detention in Africa. *Human Rights Quarterly, 27*(1), 125-171. doi:10.1353/hrq.2005.0010

Watson, A. (Ed.). (1985; 1998). The Digest of Justinian 22.3.2. Philadelphia: University of Pennsylvania Press.

Weeks, S. M. (2011). The Traditional Courts Bill: Controversy around process, substance and implications. *South African Crime Quarterly*, 3-10

Wertz, F. J. (2005). Phenomenological research methods for counseling psychology. *Journal of Counselling Psychology*, 52(2), 167-177

Woolmington v. DPP (1935) AC 462; (1935) UKHL 1

Wolcott, H. F. (1994b). *Transforming qualitative data: Description, analysis, and interpretation*. Thousand Oaks, CA: Sage

Women and the Law in Southern Africa. (1999). Chasing the Mirage: Women and the Administration of Justice. Gaborone. WLSA Research Trust.

Appendix A: Interview Protocol

Relationship Between Denial of Legal Representation and Recidivism, Prison Overcrowding in Botswana

Time of interview: …………………………..

Date: ……………………2018

Place: …………………………..

Interviewer: Sidney Pilane

Interviewee: …………………………...

Position of interviewee: ……………………………

Brief description of Study: …………………………...

Questions:

Research: Face-to-Face Interviews

Former Inmate Participants

1. Please state whether you have any knowledge of the customary court system of Botswana?
2. Describe your understanding of the customary court system of Botswana.
3. Have you had any interaction with the customary court system?
4. If you have, in what role?
5. Have you ever appeared before a customary court as a party?
6. If you have, were you represented by a lawyer?
7. Had you asked to be represented by one?

8. What response had you been given?
9. Were you told what you had to do if you wanted to be represented by a lawyer?
10. If you were a party in a criminal case, was the Prosecutor a lawyer sent by the Director of Public Prosecutions?
11. If you were denied legal representation, were you told why?
12. How did you feel concerning the denial?
13. What was the outcome of the trial?
14. Did you feel that your trial by the customary court was fair?
15. Please explain and say why you felt the way you did.
16. What impact do you think the denial of legal representation had on the fairness of the trial?
17. Do you think that the denial of legal representation ought to aggrieve criminal defendants tried by customary courts?
18. Do you think that criminal defendants tried in customary courts are able to effectively defend themselves?
19. Do you think that such denial disposes such defendants to repeat offending?
20. Do you think that anything should be done about the denial of legal representation?
21. How do you feel about the fairness of the procedures followed in criminal trials conducted by customary courts?
22. Have you ever discussed the fairness of the procedures followed in customary courts with anyone?

23. If you have, how did they feel about the fairness of such procedures?
24. Have you anything else you wish to say concerning procedures followed in customary courts and the denial of legal representation?
25. During the period of your imprisonment, did you feel that the prison was overcrowded?
26. If you did, why did you feel so?
27. Have you any views on the causes of high rates of recidivism and overcrowding in prisons?
28. Have you anything to add to what you have said on the subjects we have been discussing?
29. Are there any questions you wish to ask me?
30. Do you wish to have my contact details so that if anything of importance should occur to you which you wish to add or ask of me you are able to do so?

Research: Face to Face Interviews

Professional Participants

1. Please state whether you have any knowledge of the customary court system of Botswana?
2. Describe your understanding of the customary court system of Botswana.
3. Have you had any interaction with the customary court system?
4. If you have, in what role?
5. Are you aware that criminal defendants tried by customary courts are denied legal representation at their trial?
6. Do you think that the denial of legal representation ought to aggrieve criminal defendants tried by customary courts?
7. Do you think that criminal defendants tried in customary courts are able to effectively defend themselves?
8. Do you think that such denial disposes such defendants to repeat offending?
9. Do you think that anything should be done about the denial of legal representation?
10. How do you feel about the fairness of the procedures followed in criminal trials conducted by customary courts?
11. Have you ever discussed the fairness of the procedures followed in customary courts with anyone?
12. If you have, how did they feel about the fairness of such procedures?
13. Have you anything else you wish to say concerning procedures followed in customary courts and the denial of legal representation?

14. During the period of your imprisonment, did you feel that the prison was overcrowded?
15. If you did, why did you feel so?
16. Have you any views on the causes of high rates of recidivism and overcrowding in prisons?
17. Have you anything to add to what you have said on the subjects we have been discussing?
18. Are there any questions you wish to ask me?
19. Do you wish to have my contact details so that if anything of importance should occur to you which you wish to add or ask of me you are able to do so?