

CHAPTER 04:05 CUSTOMARY COURTS

ARRANGEMENT OF SECTIONS

SECTION

1. Short title
2. Interpretation
3. Application of the Act
4. Appointment and functions of the Director of Tribal Administration
5. Deputy Director of Tribal Administration
6. Assistant Directors of Tribal Administration
7. Establishment and recognition of customary courts
8. Constitution of courts
9. Suspension and dismissal of members
10. Sessions
11. Civil jurisdiction
12. Criminal jurisdiction
13. Cases excluded from the ordinary jurisdiction of customary courts
14. Personal interest
15. Laws to be administered
16. Minister may empower customary courts to enforce specified laws
17. Recognizance
18. Punishments
19. Binding over
20. Discharge without proceeding to conviction
21. Rules of procedure to be observed
22. When execution of sentence shall be suspended
23. Imprisonment
24. Suspended sentences
25. Recovery of fines, damages or other money penalties
26. Part of fine as compensation
27. Reimbursement of messengers' fees
28. Contempt of court
29. Power to summon persons
30. Practice and procedure
31. Reports of cases to be submitted to the Director of Tribal Administration or administrative officer
32. Right of audience
33. Adjudication without authority
34. Members of customary courts taking rewards
35. Taking reward for influencing customary courts
36. Penalty for false evidence
37. Transfer of cases
38. Procedure on transfer from customary court to magistrate's court
39. Revisory powers of the magistrates' court
40. Supervisory powers by Chief
41. Courts of appeal
42. Appeals
43. Appeals out of time

- 44. Power of appeal
- 45. Review as of course
- 46. Execution of orders of High Court, magistrates' courts or other customary courts
- 47. Indemnity of officers acting judicially for official acts done in good faith, and of officers executing warrants and orders
- 48. Court of appeal
- 49. Power to make rules
- 50. Laws inapplicable to certain proceedings under this Act

Proc. 19, 1961,
HMC Order 1, 1963,
L.N. 84, 1966,
Act 57, 1968,
Act 6, 1972,
S.I. 71, 1975,
Act 2, 1977,
S.I. 12, 1977,
Act 25, 1986,
Act 13, 1997,
Act 1, 2002,
Act 7, 2005,
Act 1, 2006.

An Act to consolidate and amend the law relating to Customary Courts.

1. Short title

This Act may be cited as the Customary Courts Act.

2. Interpretation

(1) In this Act, unless the context otherwise requires-

"administrative officer" means the administrative officer in charge of the district concerned and includes any administrative officer acting under his directions;

"customary court" means-

- (a) a lower customary court; or
- (b) a higher customary court,

established or recognized under the provisions of this Act;

"customary law" means, in relation to any particular tribe or tribal community, the customary law of that tribe or tribal community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice;

"law of Botswana" means the common law and statute law from time to time in force in

Botswana but does not include customary law;

"tribal community" means any community which is living outside a tribal territory but is organized in a tribal manner;

"tribesman" means any member of a tribe or tribal community of Botswana or of any other country in Africa prescribed by the Minister by order in the *Gazette* for the purposes of this Act.

(2) For the purposes of this Act a person who has at any time claimed to be a tribesman for the purpose of enjoying any right or privilege thereof shall be deemed to be a tribesman unless it is proved to the contrary.

3. Application of the Act

The provisions of this Act shall not extend to informal proceedings of an arbitral nature before a body (not established or recognized as a customary court under this Act) constituted under customary law, where such body does not purport to exercise any power to enforce its decisions or compel attendance before it.

4. Appointment and functions of the Director of Tribal Administration

(1) The Minister may, by notice in the *Gazette*, appoint an officer in the public service to be Director of Tribal Administration for the purposes of this Act.

(2) The functions of the Director of Tribal Administration shall include-

- (a) the advising of the Minister in respect of the constitution, jurisdiction and membership of customary courts;
- (b) subject to the general and special directions of the Minister, the guidance and supervision of customary courts;
- (c) such other powers and duties as may from time to time be assigned to him by the Minister.

5. Deputy Director of Tribal Administration

(1) The Minister may by notice published in the *Gazette* appoint an officer in the public service to be Deputy Director of Tribal Administration.

(2) The Deputy Director of Tribal Administration shall-

- (a) act as the Director of Tribal Administration when the latter is unable to carry out his duties or perform his functions under this Act; and
- (b) discharge such duties, under this Act, as the Director may from time to time delegate.

6. Assistant Directors of Tribal Administration

(1) The Minister may, by notice in the *Gazette*, appoint officers in the public service to be

Assistant Directors of Tribal Administration for the purposes of this Act.

(2) An Assistant Director of Tribal Administration shall discharge such of the functions of the Director of Tribal Administration under this Act as the Director of Tribal Administration may, from time to time by writing under his hand, direct, and references in this Act to the Director of Tribal Administration shall be construed to include an Assistant Director of Tribal Administration when acting in accordance with such direction.

7. Establishment and recognition of customary courts

(1) Every Chief may submit for the consideration of the Minister recommendations for the recognition, establishment, abolition or variation in jurisdiction of customary courts within his area.

(2) The Minister may, by warrant under his hand, recognize or establish in Botswana such customary courts as he thinks fit, and shall define in each warrant the jurisdiction as to causes of action and the local limits of jurisdiction to be enjoyed by that court.

(3) The Minister may, by order in the *Gazette*, suspend, cancel or vary any warrant issued by him under subsection (2).

(4) A summary of every warrant shall be published in the *Gazette*.

8. Constitution of courts

(1) Subject to the provisions of subsection (2), a customary court shall be constituted in accordance with customary law.

(2) Where the Minister thinks fit, he may, in the warrant establishing or recognizing the court, prescribe the constitution of any customary court, the order of precedence among the members, or powers and duties of any persons acting as assessors thereto.

9. Suspension and dismissal of members

The Minister may dismiss or suspend for any period he may deem fit any member of a customary court who appears to have abused his power or to be unworthy or incapable of exercising the same justly, or for other sufficient reason. On such dismissal or for the period of his suspension the member shall be disqualified from exercising any powers or jurisdiction as a member of the court unless he is expressly reinstated by the Minister.

10. Sessions

A customary court shall hold sessions at such times and places as may be necessary for the convenient and speedy despatch of the business of the court:

Provided that the Minister may direct sessions to be held at such times and places as he shall think fit.

11. Civil jurisdiction

(1) Subject to the provisions of section 13, and of subsection (2), a customary court shall have and may exercise civil jurisdiction over causes and matters in which-

- (a) the matter is justiciable under any law administered by the court under section 15;
- (b) the defendant is ordinarily resident within the area of jurisdiction of that court, or the cause of action arose wholly therein; and
- (c) the claim or value of the matter in dispute does not exceed the maximum amount thereof set out in its warrant.

(2) Notwithstanding the provisions of subsection (1), a customary court shall have jurisdiction to hear and determine suits for the recovery of liquid civil debts due to the State or any town or district council.

12. Criminal jurisdiction

(1) Subject to the provisions of section 13, a customary court shall have and may exercise criminal jurisdiction to the extent set out in its warrant in connection with criminal charges and matters in which the charge relates to the commission of an offence committed either wholly or partly within the area of jurisdiction of the court.

(2) No customary court shall sentence a person to a period of imprisonment in excess of the period of imprisonment authorised in its warrant.

(3) In the exercise of the jurisdiction under the provisions of this section customary courts may be guided by the provisions of the Penal Code.

(4) In any prosecution in a customary court the prosecutor may be either the person who has a right to bring such prosecution under customary law or the Director of Public Prosecutions or any person authorized thereto by the Director of Public Prosecutions.

(5) Notwithstanding the provisions of subsection (2), the President may, by order under his hand, authorize an increased jurisdiction in criminal cases to be exercised by any customary court to the extent specified in the order.

(6) No person shall be charged with a criminal offence unless such offence is created by the Penal Code or some other written law.

13. Cases excluded from the ordinary jurisdiction of customary courts

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

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

- (i) treason, riot or any offence involving the security or safety of the State,
- (ii) an offence in consequence of which death is alleged to have occurred,
- (iii) bigamy,
- (iv) any offence under Division II of Part II (Offences against the Administration of Lawful Authority) of the Penal Code with the exception of offences under sections 108, 119, 123, 125 and 128 of the said Division,
- (v) bribery,
- (vi) an offence concerning counterfeit currency,
- (vii) robbery, where the person accused is of or above the age of 21 years,
- (viii) extortion by means of threats,
- (ix) an offence against insolvency law or company law,
- (x) rape,
- (xi) contravention of prohibitions relating to precious stones, gold and other precious metals,
- (xii) such other offences as may be prescribed;
- (b) any cause or proceeding whereby divorce or a declaration of nullity of marriage or an order for judicial separation is sought where such marriage has been contracted other than in accordance with customary law;
- (c) any cause or proceeding-
 - (i) arising in connection with a testamentary disposition of property,
 - (ii) arising in connection with the administration of a deceased estate to which any law of Botswana applies,
 - (iii) arising under the law relating to insolvency, or
 - (iv) involving matters of relationships to which customary law is inapplicable;
- (d) cases relating to witchcraft without the general or special consent of the Director of Public Prosecutions.

14. Personal interest

No member of any customary court shall adjudicate upon any matter or thing in which he is pecuniarily or personally interested.

15. Laws to be administered

Subject to the provisions of this Act and any other written law a customary court shall administer-

- (a) customary law;
- (b) the provisions of any written law which the court may be authorized to administer by any written law (including an order under section 16),

and in so doing shall give effect to the provisions of section 10 of the Constitution of Botswana read with section 32 of this Act.

16. Minister may empower customary courts to enforce specified laws

The Minister may, by order in the *Gazette*, authorize any customary court to administer any written law specified in the order.

17. Recognizance

- (1) Where any criminal proceedings before a customary court are-
 - (a) adjourned for any reason other than the failure of the person charged to appear on the day set for the hearing of the case;
 - (b) suspended under the provision of subsection (1) of section 37; or
 - (c) transferred under the provision of subsection (3) of section 37;

the customary court concerned may take from the person charged a recognizance with or without sureties conditioned for his appearance to answer the charge against him, at the time and place of trial and as often as may be necessary thereafter until final judgment in his case has been given, and may, instead of taking a recognizance in accordance with this section, fix the amount of the recognizance with a view to it being taken subsequently by any police officer above the rank of inspector or the police officer in charge of any police station or the person in charge of any place of detention to which the person charged is committed by the customary court.

(2) If on any day appointed for the hearing of the case, the person charged does not appear after he has been three times called by name in or near the court premises, the court may issue a warrant for his apprehension and may also call the person charged and his sureties (if any) upon their recognizance, and, in default of his appearance the same may then and there be declared forfeited; and any such declaration of forfeiture shall have the effect of a judgment on the recognizance for the amounts therein named against the person charged and his sureties respectively.

(3) A customary court may further add to a recognizance taken under subsection (1) any conditions which it may deem necessary as to-

- (a) times and places at which and persons to whom the person charged shall present himself;
- (b) places where he is forbidden to go;
- (c) prohibition against communications by him with any named person or persons;
- (d) any other matters relating to his conduct.

(4) Where it appears to the customary court that default has been made in any condition of a recognizance taken by it, the court may issue a warrant for the apprehension of the person charged and an order declaring the recognizance for the amounts therein named against the person charged and his sureties respectively.

18. Punishments

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

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

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

Provided that this subsection shall not apply to-

- (a) any offence in respect of which a minimum punishment is by law imposed; and
- (b) any conspiracy, incitement or attempt to commit any offence referred to in paragraph (a).

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

19. Binding over

(1) A person convicted of an offence before a customary court, a higher customary court, a customary court of appeal or the High Court under the provisions of this Act may, instead of, or in addition to, any punishment to which he is liable be ordered to enter into his own recognizance, with or without sureties, in such amount as the court thinks fit, on condition that he shall keep the peace and be of good behaviour for a term not exceeding three years to be fixed by the court and may be imprisoned until such recognizance, with sureties, if so directed, is entered into, but so that the imprisonment for not entering into the recognizance shall not extend for longer than three months, and shall not, together with the fixed terms of

imprisonment, if any, extend for a term longer than the longest term for which he might be sentenced to be imprisoned for the offence.

(2) When a person is convicted for any offence under the provisions of this Act a customary court, a higher customary court, a customary court of appeal or the High Court may, instead of passing sentence, discharge the offender upon his entering into his own recognizance, with or without sureties, in such sum as the court may think fit, to keep the peace and be of good behaviour for a term not exceeding three years to be fixed by the court on condition that he shall appear to receive judgment at some future sitting of the court or when called upon.

20. Discharge without proceeding to conviction

(1) Where in any criminal proceedings under the provisions of this Act before any customary court, a higher customary court, a customary court of appeal or the High Court, the court thinks that the charge is proved but is of the opinion that having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances in which the offence was committed, it is inexpedient to inflict any punishment, the court may, without proceeding to conviction, make an order dismissing the charge.

(2) An order made under this section shall, for the purpose of revesting or restoring any stolen property, and enabling the court to make any order restoring the property in respect of which the offence was committed or property seized for production in the trial have the like effect as a conviction.

21. Rules of procedure to be observed

No customary court shall impose upon any person any punishment unless a criminal trial has been held in accordance with the provisions of the Customary Courts (Procedure) Rules.

22. When execution of sentence shall be suspended

(1) The execution of the sentence of a customary court shall not be suspended by reason of an appeal against conviction unless the sentence is one of corporal punishment in which case the sentence shall not be executed until the appeal has been heard and decided:

Provided that where a person sentenced to corporal punishment, after having been informed of his right of appeal in accordance with the provisions of rule 23 of the Customary Courts (Procedure) Rules, states that he does not intend to appeal, then, subject to the provisions of subsection (2), the sentence of corporal punishment may be carried out notwithstanding that the time within which an appeal may be lodged has not expired.

(2) Notwithstanding anything contained in subsection (1) no sentence of corporal punishment of more than four strokes shall be carried out unless the sentence has been confirmed by an administrative officer.

23. Imprisonment

(1) Subject to the provisions of this Act, no person who has been sentenced by a customary court to imprisonment shall be detained in consequence of such sentence except upon the authority of a warrant in the prescribed form.

(2) No person shall be detained in accordance with the provisions of subsection (1) in any place other than a prison except while his removal to a prison is being arranged or effected.

(3) No person may be detained for a period in excess of seven days in any prison in accordance with the provisions of this section unless the warrant authorizing his detention has been countersigned by the administrative officer, and no warrant shall be so countersigned unless the administrative officer has satisfied himself that the sentence imposed is within the jurisdiction of the court which imposed it.

(4) An administrative officer shall, within 14 days of the presentation to him of a warrant for endorsement under the provisions of subsection (3), review the proceedings of the customary court in the matter and shall have, for that purpose, the powers vested in an administrative officer under the provisions of section 39:

Provided that the provisions of this subsection shall not apply in a case where the proceedings are reviewable as of course in accordance with the provisions of section 45, but in such a case the administrative officer shall within the period specified notify the Customary Court of Appeal of the name of the person convicted and the nature of the sentence imposed.

(5) For the purposes of this section "prison" means a prison established under Part II of the Prisons Act.

24. Suspended sentences

(1) Whenever a person is convicted before the Customary Court of Appeal or any customary court of any offence the court may in its discretion postpone for a period not exceeding three years the passing of sentence and release the offender on one or more conditions (whether as to compensation to be made by the offender for damage or pecuniary loss, good conduct or otherwise) as the court may order to be inserted in recognizance to appear at the expiration of the period, and if at the end of such period the offender has observed all the conditions of the recognizance, the court may discharge the offender without passing any sentence.

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

(3) The period during which any order for the suspension of a part of a sentence, made under subsection (2) and affecting a sentence of imprisonment shall run, shall commence on

the date upon which the person convicted was lawfully discharged from prison in respect of the unsuspended portion of such sentence, or if not then discharged because such person has to undergo any other sentence of imprisonment, such period shall commence upon the date upon which such person was lawfully discharged from prison in respect of such other sentence. If any portion of such other sentence is itself suspended, the periods of suspension of all such sentences shall, in the absence of any order to the contrary, run consecutively in the same order as the sentences.

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

- (a) where the convicted person is not serving another sentence, from the date from which the sentence wholly suspended was expressed as taking effect, or took effect; and
- (b) where the convicted person is serving another sentence, from the date of expiration of that sentence including any period thereof which may be subjected to an order of suspension.

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

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

25. Recovery of fines, damages or other money penalties

(1) A customary court shall direct that any fine, damages or other payment which it imposes or awards shall be paid within such time as it thinks just:

Provided that nothing in this subsection shall preclude a customary court from authorizing the payment of any fine, damages or other payment in instalments if the time within which such instalments shall be paid is specified.

(2) Subject to the provisions of subsection (3), a customary court shall express and collect all fines it imposes in money, but, in its discretion, may express and order payment of any damages or other compensatory payment it awards in money or in kind.

(3) The Minister may, on the application by a Chief or, in any area in which there is no Chief by the District Commissioner of such area, by order published in the *Gazette*, vary the provisions of subsection (2) in so far as they relate to customary courts within the area of the Chief or District Commissioner, as the case may be.

(4) Where any fine, or any damages or compensatory payment expressed in terms of money, is imposed or awarded by a customary court, and the person concerned defaults in making payment of the amount imposed or awarded or of any instalment thereof, the amount of the same may be levied by the attachment and sale of any property belonging to that

person and situate within the area of jurisdiction of the court in accordance with rules made under section 49.

26. Part of fine as compensation

A customary court may direct that any fine, or such part thereof as it shall deem fit, be paid to the person injured or aggrieved by the act or omission in respect of which such fine has been imposed, on condition that such person, if he shall accept the same, shall not have or maintain any suit for the recovery of damages for the loss or injury sustained by him by reason of such act or omission.

27. Reimbursement of messengers' fees

In any area in which, in terms of a rule made under section 48, court messengers' fees are payable, a customary court in giving judgment may give such directions regarding the reimbursement, by any party to the proceedings, of any messengers' fees paid or to be paid in pursuance of those proceedings by any other party thereto, as it may think just.

28. Contempt of court

Any person subject to the jurisdiction of a customary court who omits to produce or deliver up a document on the lawful order of that court, or who refuses to answer any question lawfully asked by the court or to sign any statement lawfully required by the court, or who intentionally insults the court or any member thereof, or who intentionally interrupts the proceedings thereof at any stage, shall be guilty of contempt of court and shall be liable to a fine not exceeding P100 or to imprisonment for a term not exceeding three months, or to both.

29. Power to summon persons

(1) Subject to the provisions of this section, every customary court shall have power to summon any person before the court as a defendant or accused or for the purpose of giving evidence.

(2) Every summons shall be in the prescribed form and served in the prescribed manner.

(3) Any person who without reasonable excuse fails to obey a valid summons served on him under this section shall be guilty of an offence and liable to a fine not exceeding P50 or to imprisonment for a term not exceeding one month, or to both.

(4) Nothing in this section shall be deemed to affect the power of a customary court to warn persons to attend court.

30. Practice and procedure

Subject to such rules as may be made under section 49 the practice and procedure of a customary court shall be regulated in accordance with customary law.

31. Reports of cases to be submitted to the Director of Tribal Administration or

administrative officer

A customary court shall, at such times and in such form as the Minister may direct, submit to the Director of Tribal Administration or the nearest administrative officer, a report of all cases tried in the court.

32. Right of audience

Notwithstanding anything contained in any other law, no advocate or attorney shall have a right of audience-

- (a) in any customary court; or
- (b) in any magistrate's court in any criminal proceedings or in any civil proceedings which fall to be determined by customary law, taken under the provisions of sections 37, 39 and 42 except with the special permission of such court.

33. Adjudication without authority

Subject to the provisions of section 3, any person who exercises or attempts to exercise judicial powers within the area of jurisdiction of a duly constituted customary court, except in accordance with the provisions of this Act or any other law in force in Botswana, or who shall knowingly sit as a member of such a court without due authority shall be guilty of an offence and liable to a fine not exceeding P100 or to imprisonment for a term not exceeding 12 months, or to both.

34. Members of customary courts taking rewards

Whoever, being or expecting to be a member of a customary court, accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any reward, whether in money or otherwise, for corruptly or illegally doing or forbearing to do any act as a member of the court or showing or forbearing to show, as a member of the court, favour or disfavour to any person, shall be guilty of an offence and liable to a fine not exceeding P200 or to imprisonment for a term not exceeding two years, or to both.

35. Taking reward for influencing customary courts

Whoever accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any reward, whether in money or otherwise, for inducing by corrupt or illegal means or by personal influence any customary court, or any member thereof, to do or to forbear to do any act which the court or member is authorized or required to do in the exercise of lawful jurisdiction, or to show favour or disfavour to any person, shall be guilty of an offence and liable to a fine not exceeding P100 or to imprisonment for a term not exceeding 12 months, or to both.

36. Penalty for false evidence

Whoever in any proceeding before a customary court gives evidence, whether upon oath or

otherwise, which he knows to be false, or believes to be false, or does not believe to be true, shall be guilty of an offence and liable to a fine not exceeding P100 or to imprisonment for a term not exceeding 12 months, or to both.

37. Transfer of cases

(1) Where in any proceedings before a customary court any party thereof demands that the case be transferred to some other court the proceedings shall be suspended forthwith and the matter reported to the Customary Court of Appeal.

(2) If any person who is a party to a dispute which would ordinarily be heard by a customary court considers that such court-

- (a) is unreasonably delaying adjudication of that dispute; or
- (b) has unreasonably refused to hear and adjudicate upon that dispute,

he may report the matter to the Customary Court of Appeal.

(3) If the Customary Court of Appeal receives a report under subsection (1) or (2) it shall make such enquiry as it may deem necessary and-

- (a) if it considers that it would be in the interests of justice so to do, transfer the case for hearing and determination by some other customary court or a magistrate's court of competent jurisdiction;
- (b) notify the party and court concerned that it declines to exercise its powers under this section in relation to that case, whereupon any suspension of proceedings under subsection (1) shall cease.

(4) If proceedings are transferred from a customary court to another customary court or to a magistrate's court under the provisions of this section that other court shall commence proceedings *de novo*.

(5) If any court exercises or attempts to exercise judicial authority contrary to subsection (1), the person presiding over such court and every person sitting as a member thereof shall be guilty of an offence and liable to the penalties prescribed in section 33.

38. Procedure on transfer from customary court to magistrate's court

(1) When a case is transferred from a customary court to a magistrate's court, whether for trial or re-trial, by an order under section 37 or 44, that customary court shall forward the record of the case to the magistrate's court, and thereupon the magistrate's court shall proceed to the trial or re-trial of the case as though, in a criminal proceedings, a complaint of facts constituting the offence had been made to the court and, in a civil proceedings, as though a plaint therein has been made or filed in the court.

(2) In any case heard by a magistrate's court under subsection (1) the magistrate's court concerned may summon to its assistance one or more persons to sit and act as assessors in

an advisory capacity. It shall be the duty of the assessor or assessors to give, either in open court or otherwise, such assistance and advice as the officer presiding over the magistrate's court may require, but the decision shall be vested exclusively in the presiding officer. The agreement or disagreement of the assessor or assessors with the decision of the presiding officer shall be noted on the record.

39. Revisory powers of the magistrate's court

(1) Any administrative officer in his capacity as a magistrate, shall at all times have access to any customary court within his jurisdiction and to the records thereof, and on the application of any such customary court or of any person concerned or of his own motion may, for reasons which he shall record in writing-

- (a) revise any of the proceedings of a customary court whether of the first instance or appellate, and make such order or pass such sentence as the customary court could itself have made or passed:

Provided that-

- (i) an administrative officer shall not substitute a conviction for an acquittal or increase any sentence of fine or imprisonment or other sentence or make any order in any civil proceeding to the prejudice of any party thereto, without first giving the accused or such party, as the case may be, an opportunity of being heard, and
- (ii) if a conviction is substituted for an acquittal, or if a sentence is increased, or if, in a civil proceedings, an order to the prejudice of any party thereto is made, the accused or such party may within 30 days from the date of such order or sentence appeal therefrom to the High Court;
- (b) order any case to be re-tried either before the same customary court or before any other customary court of competent jurisdiction;
- (c) transfer any cause or matter, whether civil or criminal, either before trial or at any stage of the proceedings, to any magistrate's court of competent jurisdiction.

(2) The powers conferred upon the administrative officer under subsection (1) shall also be exercised by the Customary Court of Appeal.

40. Supervisory powers by Chief

(1) Any Chief may have access to the customary courts in the area of his jurisdiction and may send for and examine the record of any proceedings before a court for the purpose of satisfying himself as to the correctness, legality or propriety of any judgment, sentence or order, recorded or passed, or as to the regularity of any proceedings in any such court.

(2) If any Chief acting under subsection (1) considers that any finding, sentence or order of a customary court is illegal or improper he shall forward the record with such remarks thereon

as he thinks fit to the court to which an appeal lies from that customary court.

(3) A court to which a record has been forwarded under subsection (2) shall forthwith examine the record with a view to satisfying itself as to the correctness, legality or propriety of the proceedings and may make any such order thereon by way of revision as such court would be empowered to make if the proceedings came before the court on appeal.

41. Courts of appeal

(1) The Minister may, by warrant under his hand, appoint customary courts of appeal to hear and determine such cases as he specifies in the warrant.

(2) A customary court of appeal may sit with assessors whenever the court deems it necessary to do so.

(3) A customary court of appeal shall consist of three persons of whom one shall be appointed, by the Minister, to be the president.

(4) The Minister may, by warrant under his hand appoint a panel of three other persons to be alternate members of each customary court of appeal.

(5) Where because of illness or absence out of the country or because of a personal or pecuniary interest in the matter or thing a member of a customary court of appeal is unable to attend a sitting of the court, the president of the court may nominate a person from the panel of alternate members to sit in place of the member who is absent, and such alternate member shall be a member of the said court until the member in whose place he was appointed to sit is able to resume his seat.

42. Appeals

(1) Any person aggrieved by any order or decision of a lower customary court may within 30 days from the date of that order or decision appeal therefrom to a higher customary court, or, if there be no higher customary court, to the customary court of appeal.

(2) Any person aggrieved by any order or decision of a higher customary court may within 30 days from the date of that order appeal to a customary court of appeal.

(3) Any person aggrieved by any order or decision of a customary court of appeal may within 30 days of that order or decision appeal therefrom to the High Court:

Provided that-

- (i) an appeal to the High Court under this subsection shall lie only in cases where the status of any person is at issue or where the amount of the judgment exceeds P200 or where sentences of imprisonment for a period exceeding six months or of corporal punishment exceeding eight strokes has been imposed; or
- (ii) notwithstanding the provisions of paragraph (i) any judge of the High Court sitting in chambers may on the application of any court or person concerned grant special

leave to appeal against any order or decision made or given by a customary court under this Act.

43. Appeals out of time

Leave to appeal out of time to any court referred to in section 42 may be given by that court upon such terms as to that court seem just.

44. Power of appeal

A higher customary court, a customary court of appeal, a magistrate's court, or the High Court, in the exercise of its jurisdiction in any cause or matter under sections 37, 39 and 42, may summon such persons as assessors as the court shall think fit, and may-

- (a) make any order or pass any sentence which the court of first instance could have made or passed in the cause or matter;
- (b) order any cause or matter to be re-heard before the court of first instance or before any other customary court or before any magistrate's court of competent jurisdiction.

45. Review as of course

(1) All sentences in criminal cases tried in the customary courts in which the punishment awarded is imprisonment exceeding six months or a fine exceeding P200 shall be subject in the ordinary course to review by the Customary Court of Appeal; but without prejudice to any right of appeal which may exist under the provisions of this Act.

(2) Whenever a customary court imposes upon any person convicted of an offence any sentence which is reviewable under the provisions of subsection (1), it shall transmit to the Customary Court of Appeal within two weeks after the determination of the case, the record of the proceedings in the case together with such remarks, if any, as the court President may desire to append thereto, and any written statements or arguments which the accused may within three days after the sentence supply to the court President.

46. Execution of orders of High Court, magistrates' courts or customary courts

(1) A lower customary court shall carry into execution any decree or order of the High Court, of any magistrate's court, of a customary court of appeal or a higher customary court and shall execute all warrants and serve all processes issued by any court as aforesaid and directed to that court for execution or service, and shall generally give such assistance to any of the aforesaid courts as may be required.

(2) The provisions of subsection (1) shall apply to a higher customary court in relation to any decree, order, warrant, process or instruction of the High Court, or any magistrate's court or a customary court of appeal and shall apply to a customary court of appeal in relation to any decree, order, warrant, process or instruction of the High Court or of any magistrate's court.

47. Indemnity of officers acting judicially for official acts done in good faith, and of

officers executing warrants and orders

No person shall be liable to be punished in any court for any act done or ordered to be done by him in the exercise of jurisdiction conferred by this Act, whether or not within the limits of his jurisdiction, if at the time of such act or order he believed in good faith that he had jurisdiction to do such act or to make such order; and no officer of any court or other person bound to execute lawful warrants or orders issued or made in the exercise of jurisdiction conferred by this Act shall be liable to be punished in any court for the execution of any warrant or order which he would be bound to execute if the person issuing the same had been acting in the exercise of lawful authority.

48. Court of appeal

The provisions of sections 14, 23, 25 to 36, 39 and 49 shall apply to a customary court of appeal as if in those sections the term customary court means a customary court of appeal.

49. Power to make rules

The Minister may make rules-

- (a) prescribing anything which under this Act is to be, or may be, prescribed;
- (b) prescribing the fees to be charged in customary courts;
- (c) prescribing fees or expenses payable to persons giving evidence under this Act;
- (d) regulating the disposal and application of fines and fees received by customary courts;
- (e) regulating the practice and procedure of customary courts;
- (f) relating to the employment of messengers in customary courts and providing for the payment of fees to messengers by persons requiring the service of process and the performance of other functions in connection with civil proceedings and civil appeal proceedings therein;
- (g) regulating the infliction of corporal punishment;
- (h) regulating the detention of persons pending their trial in a customary court;
- (i) generally for the carrying into effect of the provisions of this Act.

50. Laws inapplicable to certain proceedings under this Act

Except where the context otherwise requires, the provisions of any other law in force in Botswana relating to evidence or procedure in civil or criminal proceedings shall not have any application to the proceedings of a customary court or to proceedings transferred to a magistrate's court under section 37, to revisory proceedings in a magistrate's court under

section 39 or appellate proceedings therein under section 42.