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Judicial Case Management and the Complexities of Competing Norms Occasioned by Law Reforms

The Experience in Respect of Criminal Proceedings in Botswana

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Abstract

The Botswana judicial and legal system has undergone a wave of reforms over the past few years. These reforms include judicial case management, which was introduced to reduce unnecessary delays and backlog in the hearing of cases. The introduction of judicial case management necessitates a revision of the rules of court. While the rules of the courts principally relate to civil proceedings, criminal proceedings are principally regulated by the Criminal Procedure and Evidence Act. However, the revised rules of court contain provisions that seek to bring criminal proceedings in line with judicial case management. A number of these provisions are inconsistent with the Criminal Procedure and Evidence Act. This presents problems for the implementation of these rules as the Criminal Procedure and Evidence Act is superior to the rules in the hierarchy of laws. Consequently, the implementation of judicial case management in criminal proceedings may prove to be an arduous task, and urgent harmonisation of the competing provisions is required.

Keywords: case management, Botswana, criminal proceedings, law reform, subpoena.

A. Introduction

Law reform is an arduous task, and the amending or introduction of new legislation may create a domino effect. The past half a decade has witnessed a wave of reforms geared towards attaining a more efficient judicial system in Botswana. These reforms include the introduction of electronic methods for the keeping of

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court records, the creation of special courts such as small claims courts[1] and stock theft courts,[2] and the introduction of legal aid.[3] Judicial case management represents one of the most significant reforms in the judicial system. It is meant to secure more efficient trials by giving the judicial officer greater control of trials through case management conferences.[4] Judicial case management conferences enable the parties to agree on measures that shorten trials.[5] These measures include the admission of evidence, the setting of firm and credible trial dates,[6] separating out contentious issues from issues that are admitted,[7] and the possibility of securing settlements.[8] The introduction of case management was facilitated by the re-enactment of the rules of the High Court in 2008[9] and the rules of the magistrates' courts in 2011.[10] These Rules extensively revised their previous counterparts and contain specific provisions geared towards efficiency and reduced delays in criminal proceedings. However, some of these provisions create inconsistencies with existing norms in the criminal justice system. This is due to the fact that the Criminal Procedure Act, the principal legislation relating to criminal procedure, was not considered in the law reform process. This has resulted in competing norms in respect of certain procedures in the criminal justice system and presents a burden of reconciling competing and conflicting norms.

This article sets out to highlight some of the inconsistencies between the Rules and the Criminal Procedure and Evidence Act. While the Rules set out to incorporate judicial case management into the criminal justice system, their mode of enactment and their impact on existing legislation ought to be considered. While judicial case management enhances fair trial in some instances, this should

1 Small Claims Court Act Cap 04:08. The small claims courts are meant to ensure swift disposal of cases and easy access to the courts in respect of litigants with small monetary claims. Pleadings are simple and may be handwritten. The procedures are simple and are not subject to technical legal rules, and lawyers have no right of audience. Proceedings are swift and generally take place and are disposed of in a single sitting. *See Montshioa v. Dipate and Others*, [2010] 3 BLR 884; *Botswana Railways' Organisation v. Setsogo and Others*, [1996] BLR 763 (CA).

2 Stock theft courts cater for the swift prosecution of stock theft cases. Cattle are a major income earner, and the rise in stock theft resulted in public pressure on the Government to tackle such offences. Cattle owners constantly complain that owing to the busy schedule of the courts, the prosecution of stock theft is inordinately delayed. The stolen stock that forms part of the evidence is often lost or perishes before the conclusion of the trial. Consequently, the prosecution of several stock theft cases is abandoned owing to insufficient evidence. Other recent reforms include the introduction of legal aid and judicial case management.

3 The legal aid regime operates on a mixed model. Pending the establishment of a legal aid board legal aid is administered by the Attorney-General's Department. A legal aid act was recently passed. *See* Legal Aid Act No. 18 of 2013.

4 *See, e.g., Miles and Another v. South East District Council and Another*, [2010] 3 BLR 242.

5 *See, e.g., Arab Contractors v. Sebego and Another*, [2010] 3 BLR 285.

6 *Ibid.*

7 *See, e.g., Monchusi and Another v. Motshwane*, [2010] 3 BLR 544 (CA); *Charumbira v. Charumbira*, [2010] 3 BLR 148.

8 South African Law Commission, *A More Inquisitorial Approach to Criminal Procedure – Police Questioning, Defence Disclosure, the Role of Judicial Officers and Judicial Management of Trials*, Fifth Interim Report on Simplification of Criminal Procedure, Project 73, 2002, p. 115.

9 Statutory Instrument No. 40 of 2008.

10 Statutory Instrument No. 13 of 2011.

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not cast a shadow on occasions where it produces the opposite effect. Thus, the article provides solutions to the harmonisation of the competing rules in a manner that enhances judicial case management, while bearing in mind the overriding demand for fair trials.

B. The Notion of Judicial Case Management

Case management represents one of the most ingenious reforms adopted to tackle delays in judicial systems. As early as 1906, Roscoe Pound, the father of court reforms in America, noted a widespread feeling that the courts were inefficient.[11] According to him, this inefficiency was related to archaic judicial organisation and procedure, which resulted in uncertainty, delay and expense that created a desire in the public to keep away from the courts whether they were "right or wrong".[12] Pound went on to influence the creation of the first court reform organisation, the American Judicature Society, in 1913.[13] Most of the organisation's activities were, however, focused on issues such as judicial selection and tenure rather than court operations. However, since the 1970s, the American courts have developed a set of principles and techniques that involve a set of actions that courts take to monitor and control the progress of cases from inception throughout the trial until final disposal.[14] Judicial case management not only seeks to address backlogs and delays, but also forms the essence of general court management.[15] It includes judicial oversight and control of the pace of litigation, as well as early court intervention in cases.[16] Therefore, even in the absence of backlog, courts require effective case management programmes as a key component of a successful overall court management.[17]

The introduction of judicial case management in Botswana resulted in the introduction of rules and procedures that were intended to hasten the pace of liti-

11 R. Pound, 'The Causes of Popular Dissatisfaction With the Administration of Justice', *American Bar Association Judicature Society*, Vol. 29, 1906, p. 395.

12 *Ibid.*

13 D.C. Steelman, J.A. Goerdt & J.E. McMillan, *Caseflow Management: The Heart of Court Management in the New Millennium*, National Center for State Courts, Williamsburg, VA, 2000, p. xii.

14 *Ibid.*

15 *Ibid.*

16 "A system that can't be managed must be lead. Leadership among autonomous players requires the application of influence and in the justice system that requires moral authority. Without a leader, cooperation is less likely to happen and is unlikely to become the norm. Some judges are uncomfortable with an active role in case management. A judge must, above all else, be above all else. The judge is the impartial apex of the adversarial system's triangle, deciding guilt or innocence in each case without regard to external considerations. But in our adversarial system, judges have the independence and authority to lead the other players. In short, their impartiality gives judges a unique opportunity to lead effective case management." *Guiding Principles for Effective Case Management*, Department of Justice Canada, 2013, p. 2, <www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/eff/toc-tdm.html>; S.S. Gensler, 'Judicial Case Management: Caught in the Cross Fire', *Duke Law Journal*, Vol. 60, 2010, pp. 669, 671.

17 Steelman *et al.*, 2000, at xii; E. Bell, 'Judicial Case Management', *Judicial Studies Institute Journal*, Vol. 2, 2009, pp. 76, 77.

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gation and cut down on procedural excesses. A classic example is the ascertainment of all witnesses at the commencement of the trial and the immediate issuing of subpoenas for their attendance. This obviates unnecessary delays encountered in obtaining witnesses, particularly those of the accused, during the course of the trial. The main measure used to ensure reduction of delays and inefficiency is early judicial intervention and control of the process by the issuing of case management orders.[18] This has resulted in the introduction of judicial case management conferences. Such conferences employ effective use of the rules and procedures and possibly discretionary measures that contribute to the elimination of delays. Early judicial intervention and oversight is meant to ensure that cases are resolved at the earliest possible time, and in the least costly manner.[19] Thus, case management conferences seek to establish trial readiness; the availability of counsel and their attendance at trial; the setting of firm and credible trial dates; the admission of evidence by consent of both parties to the dispute; discovery, possible early settlement of disputes, particularly in civil trials; early subpoenaing of witnesses; and the removal of cases from the system by referral to arbitration or mediation,[20] or by dismissal of claims that are not pursued in a timely manner. Case management is also a useful tool for the enhancement of fair trial rights. The witnesses of the accused are subpoenaed by the court, thus enhancing equality of arms.[21] Further, the accused's rights to adequate time and facilities to prepare her defence is ensured[22] in that judicial officers in magistrates' courts have a

18 *Motswasele v. DPP*, [2010] 1 BLR 584; Gensler, 2010, at 671.

19 Committee on Court Administration and Case Management, *Civil Litigation Management Manual*, 2001, p. 5, available at <https://public.resource.org/scribd/8763686.pdf>; Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO), Stationery Office, London, 1995, p. 9. It has been argued however, that early judicial case management is actually associated with increased costs to the litigant. *See* Bell, 2009, at 77.

20 Court annexed mediation is expected to be introduced, and training of court staff concluded.

21 This principle provides that neither party to court proceedings should be placed at a substantial disadvantage vis-à-vis her opponent. However, it has been argued that judicial case management leads to unfairness owing to the possible inconsistency in the use of judicial discretion. *See* M. Zander, 'The Government's Plan on Civil Justice', *Modern Law Review*, Vol. 61, 1998, pp. 382, 387; M. Zander, *The State of Justice – The Hamlyn Lectures, 1999*, Sweet & Maxwell, London, 2000, pp. 44-45; S. Moloney, 'A New Approach to Civil Litigation? The Implementation of the "Woolf Reforms" and Judicial Case Management', *Judicial Studies Institute Journal*, Vol. 2, 2001, pp. 98, 104.

22 Section 10(2)(c) of the Constitution provides that "Every person who is charged with a criminal offence [...] shall be given adequate time and facilities for the preparation of his or her defence". The courts have interpreted this provision to require that the prosecution discloses statements and other documents it intends to use at the trial. *See Attorney-General v. Ahmed*, [2003] 1 BLR 158 (CA); *Motshwane and Others v. The State*, [2002] 2 BLR 368. *See also* R.J.V. Cole, 'Recognising the Centrality of Disclosure to the Realisation of Equality of Arms in Botswana in Criminal Proceedings', *South African Journal of Criminal Justice*, Vol. 23, No. 3, 2010, p. 327. The European Court of Human Rights and the European Commission on Human Rights have reached similar conclusions in their interpretation of Art. 6(3)(b) of the European Convention of Human Rights. *See, e.g., Can v. Austria*, (1985) 7 EHRR 421; *Edwards v. United Kingdom*, (1993) 15 EHRR 417; *Bendenoun v. France*, (1994) 18 EHRR 54; *Jespers v. Belgium*, (1981) 27 DR 61.

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duty to ensure that the prosecution discloses to the accused all documentary evidence that the prosecution intends to use during the trial.[23]

C. Substantive Competing Norms

I. Securing the Attendance of Witnesses in Court

Botswana generally follows the Anglo-American adversarial tradition[24] in that the duty to call witnesses lies with the parties.[25] In terms of the Criminal Procedure and Evidence Act, the parties may compel unwilling witnesses to testify by obtaining subpoenas from the Registrar of the High Court or the Clerks of the magistrates' courts.[26] In terms of the Act, where an accused is unable to subpoena a witness for financial reasons, the Registrar may issue a subpoena if the accused satisfies the Registrar that she is unable to pay the necessary costs and that the witness is necessary and material for her defence.[27] Where the Registrar is not satisfied that it is necessary to call the witness or that the accused is unable to pay the costs of issuing and serving a subpoena, the Registrar upon request of the accused, should refer the application to the judicial officer presiding over the case. The judicial officer may grant or refuse the application.[28] Also, state witnesses are entitled to allowances.[29] However, the situation is different in relation to the payment of allowances to the witnesses of the accused. Allowances are not payable to witnesses of the accused except where the presiding officer so directs.[30]

The Rules of the High Court have altered the onus of subpoenaing witnesses, thus creating a different regime relating to the subpoenaing of witnesses. In terms of the Rules, the duty to issue subpoenas to witnesses lies with the court. Thus, the officer who serves the indictment on an accused should at the time of service, enquire from the accused whether she requires witnesses to be subpoenaed at the trial, and at the expense of the state.[31] Further, the Director of Public Prosecutions and the accused or her counsel should within three days after the case is first called in court, inform the Registrar of witnesses required to be sub-

23 Such a provision is not necessary in the High Court since the indictments emanating from such courts are served with summaries of evidence and other relevant documentary evidence.

24 *George v. The State*, [2010] 3 BLR 127; *Segabo and Others v. The State*, [2009] 2 BLR 109 (CA); *Moaro v. Selato*, [2009] 1 BLR 197; *Rotkin v. First National Bank of Botswana*, [2008] 3 BLR 165 (CA); *State v. Mpelegang*, [2007] 3 BLR 706; *State v. Basutli Alias Emmanuel*, [2007] 2 BLR 477; *Ragolekwang v. The State*, [2005] 1 BLR 238; *Ahmed v. Attorney-General*, [2002] 2 BLR 431; *Mogatusi v. Elma Building Construction (Pty) Ltd and Another*, [1998] BLR 554; *Macheng v. The State*, [1985] BLR 533.

25 R.J.V. Cole, 'Between Judicial Enabling and Adversarialism: The Role of the Judicial Officer in Protecting the Unrepresented Accused in Botswana in A Comparative Perspective', *University of Botswana Law Journal*, Vol. 11, 2010, pp. 81, 83.

26 Section 198(1) Criminal Procedure and Evidence Act.

27 Section 198(2) Criminal Procedure and Evidence Act.

28 Section 198(3) Criminal Procedure and Evidence Act.

29 Section 209(1) Criminal Procedure and Evidence Act. However, the presiding officer has the discretion to direct that part of the allowance, or the entire allowance should not be paid.

30 Section 209(2) Criminal Procedure and Evidence Act.

31 Order 68 Rule 6(b)(i) Rules of the High Court.

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poenaed, and the Registrar should issue such subpoenas. Where the Registrar considers the accused's request to issue a subpoena to be unreasonable, the Registrar should refer the request to the judge for direction.[32] The rationale of placing the burden on the court for subpoenaing witnesses and the fact that this is done at the earliest possible time is to prevent unnecessary delays in trials by ensuring that all witnesses are notified and secured timeously. It also ensures that insufficiency of funds on the part of the accused in securing her witnesses does not result in postponements and unnecessary delays.

The rules relating to the subpoena of witnesses create irreconcilable norms. In terms of the Criminal Procedure and Evidence Act, the onus of calling witnesses to testify lies with each party. In terms of the Rules, the witnesses are subpoenaed by the court. This results in two competing procedures relating to the calling of witnesses. In the event of a contest in court as to which procedure should be followed, owing to the hierarchy of laws, the courts might be bound to follow the Criminal Procedure and Evidence Act, thus defeating the purpose and intent of the Rules, being to reduce unnecessary delays. Further conflicts exist in relation to securing the attendance of witnesses. In terms of the Criminal Procedure and Evidence Act, the accused is entitled to assistance from the court only if she is unable to pay the necessary costs for service of the subpoena and if the witness is necessary and material for her defence. In terms of the Rules, on the other hand, the court should issue subpoenas for the witnesses of the accused as a matter of course. However, the Registrar may decline to issue a subpoena for an accused's witness if she is of the view that it is unreasonable to do so. Thus, the Registrar may request the accused to satisfy her that it is reasonable to subpoena a witness at the expense of the state.[33] The test of reasonability in the Rules clearly differs from the criteria of financial incapacity and material nature of the witness' evidence in respect of the Act. The Act clearly sets out specific underlying conditions for issuing a subpoena at state expense. In respect of the Rules, the question is one of whether the request is unreasonable. The question of 'reasonability' in respect of the Rules has not been subjected to judicial determination. Perhaps the criteria set out in the Act may well satisfy the test of 'reasonability' provided for by the Rules. In the absence of judicial determination, the matter remains open to speculation.

Another varied rule in relation to the issuing of subpoenas is in respect of reference to the judicial officer for determination in the event that the Registrar declines to accede to the request to issue one. In terms of the Act, where the Registrar rejects an application to issue a subpoena; "he [the Registrar] shall, upon request of the accused, refer the application to the officer presiding over the court who may grant or refuse such application [...]"[34] In terms of the Rules, where the Registrar is of the view that the request is unreasonable, she should refer the matter to the judicial officer for direction as a matter of course. In this regard, there is an immediate obligation under the Rules to refer the matter to the judi-

32 No such provision exists in relation to witnesses of the prosecution.
33 Order 68 Rule 7 High Court Rules; Order 68 Rule 5(1) High Court Rules.
34 Section 198(3) Criminal Procedure and Evidence Act.

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cial officer. Under the Act, a request for referral must be made by the accused. Thus, should the Registrar elect to apply the Act, she may come to the conclusion that she has no further obligation after rejecting the request to issue a subpoena. In practical terms, this may cause serious delays where an accused does not pursue the matter and assumes that the Registrar has referred the matter to the judicial officer in terms of the Rules. Also, in terms of the Act, upon referring the matter to the judicial officer, the judicial officer makes a decision that is in effect a court order. On the other hand, the judicial officer issues directions under the Rules.

II. Postponing the Plea

Section 141 of the Criminal Procedure and Evidence Act provides that the accused should be required to make a plea on the date of trial unless the prosecution or the accused requests a postponement, or the court of its own motion decides to postpone the plea where it is necessary to do so in the interest of justice.[35] The Rules of the Magistrates' Courts, on the other hand, provide that upon arraignment, the magistrate should read and explain the charges to the accused and ask the accused to plead.[36] Further, the magistrate "shall, on good cause shown by the prosecution, reserve the accused's plea".[37] Thus, there exists a polarity between the Act and the Rules in relation to deferral of the plea. These two provisions provide different tests for the postponement of the plea, thereby creating competing norms. In terms of the Act, the plea must be postponed if that is necessary in the interest of justice. Further, a request must be made by the prosecutor, or the accused, or the court may *suo moto* make the decision to postpone. While the Act recognises the need to postpone the plea in the interest of justice, and permits judicial discretion, the Rules actually bar postponement of the plea, unless the prosecutor shows good cause.[38] Thus, postponement under the Rules is made in limited circumstances, and the standard required to satisfy a postponement appears to be higher. These two provisions potentially create dilemmas for magistrates in the event that opposing sides in a trial insist on the application of either one of them. These two competing norms create differing justifications, standards and requirements of persuasion in obtaining a postponement. Significantly, the Rules deny the accused the opportunity to request a postponement, a right that exists under the Act. Having regard to the hierarchy of laws, the Act should trump the Rules. But this is not necessarily a satisfactory solution to the dilemma. The Rules limit the possibility of postponement as opposed to the Act.

35 *Mmatli and Another v. The State*, [1999] 1 BLR 4 (CA); *State v. Ngwato*, [1990] BLR 563; *Stephen v. Director of Public Prosecutions*, [2010] 1 BLR 476; *Rakgole v. The State*, [2008] 1 BLR 139 (CA); *Rankalo v. The State*, [2000] 2 BLR 164 (CA); *Ramatebele v. The State*, [2003] 1 BLR 120; *Surtee and Others v. The State*, [2007] 1 BLR 355 (CA).

36 Order 51 Rule 2(1) and (2) Rules of the Magistrates' Courts. *See Kamogelo v. The State*, [1985] BLR 490; *State v. Keboletse*, [1979-1980] BLR 74; *Mmatli and Another v. The State*, [1999] 1 BLR 4 (CA).

37 Order 51 Rule 3(2)(3) Rules of the Magistrates' Courts.

38 There is no reported case law on the determination of what amounts to 'the interests of justice' or what amounts to 'good cause' in this context.

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This is intended to avoid unnecessary delays in line with the object of judicial case management. The possibility that the Act can supplant the Rules essentially limits the effective application of judicial case management. Thus, the efficiency of the Rules depends on relevant amendments to the Act to ensure that the Act is not in conflict with the Rules in so far as case management is concerned.

III. Advising the Accused of the Right to Legal Representation

The Constitution of Botswana guarantees the accused the right to legal representation at her own expense.[39] The courts have noted that this constitutional right imposes a duty on judicial officers to advise the accused of this right. While it is clear that a right is of no use to an accused if she is unaware of its existence, the courts have also held that the duty to advise the accused of such a right is not mandatory but a mere salutary practice.[40] Therefore, the question whether the failure to advise an accused of her right to legal representation will vitiate the proceedings will depend on whether the irregularity resulted in prejudice to the accused, with each case depending on its peculiar facts and circumstances.[41] The Rules of the Magistrates' Courts provide that the magistrate should inquire as to whether the accused will engage legal representation at the time of arraignment.[42] The purpose of this inquiry is to prepare for case management. Should the accused indicate that she intends to engage a lawyer, the magistrate should order that she appears with the lawyer at the case management conference.[43] Thus, the demand that the accused be advised of her right to legal representation and the inquiry as to whether she will secure one, operate side by side. In my view, the accused should be advised of the right to legal representation in terms of the constitutional demand. Having done so, the magistrate should also inquire whether she will secure counsel, in satisfaction of the Rules of the Magis-

39 Section 10(2)(d) Constitution of 1966. *See Moroka v. The State*, [2001] 1 BLR 134 (CA); *Chanda v. The State*, [2007] 1 BLR 400 (CA). For articulations of the right to legal representation in Botswana, *see* N. Nsereko, 'Legal Representation in Botswana', 1988 *Israel Year Book on Human Rights*, p. 211; B. Molatlhegi, 'The Right to Legal Representation in Criminal Proceedings in Botswana: More Than a Court-Room Right for the Knowledgeable Suspect?', *South African Journal of Human Rights*, Vol. 13, 1997, p. 458; R.J.V. Cole, 'The Right to Legal Representation and Equality Before the Law in Criminal Proceedings in Botswana', *Stellenbosch Law Review*, Vol. 22, No. 1, 2011, p. 94.

40 *Moroka v. The State*, [2001] 1 BLR 134 (CA); *Matlapeng v. The State*, [2001] 1 BLR 161 (CA); *Bojang v. The State*, [1994] BLR 146; *Rakgole v. The State*, [2008] 1 BLR 139 (CA); *Phologolo v. The State*, [2007] 1 BLR 61; *Masango v. The State*, [2001] 2 BLR 616; *Ramogotho v. Director of Public Prosecutions*, [2007] 1 BLR 334 (CA); *Chanda v. The State*, [2007] 1 BLR 400 (CA). For an in-depth discussion of this issue, *see* Cole, 2011, at 103-106; Cole, 'Between Judicial Enabling and Adversarialism', 2010, at 81, 94-95.

41 *Bojang v. The State*, [1994] BLR 146; *Leow v. The State*, [1995] BLR 564; *Rakgole v. The State*, [2008] 1 BLR 139 (CA), at 145; *Phologolo v. The State*, [2007] 1 BLR 61.

42 Order 51 Rule 3(1)(a) Rules of the Magistrates' Courts. Similar provisions do not appear in the Rules of the High Court. Perhaps this was not seen as necessary since, until recently, only capital offences were heard at first instance in the High Court for which legal representation is always provided by the state. However, it must be noted that a judge was recently assigned to try corruption cases in the High Court.

43 Order 51 Rule 3(2)(c) Rules of the Magistrates' Courts.

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trates' Courts. The question arises as to the consequences of failure by a magistrate to make the advice or inquiry. As has been stated, the courts have held that the advice is not mandatory and the consequences of failure to do so depend on whether this results in a failure of justice. The inquiry, on the other hand, is mandatory having regard to the direct and peremptory provisions of the Rules. Thus, should a magistrate fail to inquire whether an accused will secure legal representation, and then proceeds to conduct a judicial case management conference, a fatal error would have occurred. In this regard, where a judicial officer fails to bring the question of legal representation to the attention of the accused, the latter will probably suffer prejudice in that she might not have had the opportunity of a lawyer to participate in the judicial case management conference.[44] This will especially be the case where it is shown that the absence of legal representation prejudiced her rights at the judicial case management conference, which consequently affects the fairness of the trial. Thus, the Rules create a duty to bring the issue of legal representation to the attention of the accused. Consequently, the constitutional demand to advise the accused of her right to legal representation should change in complexion due to the demand of the Rules, as far as the Magistrates' Courts are concerned. Owing to the inquiry required by the Rules of the Magistrates' Courts, prejudice would occur if the issue of legal representation were not addressed by a judicial officer. Thus, by inadvertence, the Rules appear to have elevated the demand to advise the accused of her right to legal representation from one of a salutary practice to one of a constitutional imperative. While the inquiry provided by the Rules of the Magistrates' Courts does not relate to fair trial rights, it creates further demands on the constitutional imperative to inform an accused of her right to legal representation. Thus, with the inquiry, the requirement to advise an accused of her right to legal representation may well have moved beyond the veil of a salutary practice.

IV. Judgment in the Presence of the Accused

In terms of Order 49 Rule 3 of the Rules of the Magistrates' Court, a judgment may be read in the absence of an accused who fails to appear in court on the date scheduled for judgment. One of the components of the constitutionally protected

44 Also, with the recent introduction of legal aid, the demand to be informed of legal representation becomes more compelling.

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right to a fair trial[45] is that the accused be tried in her presence.[46] The Constitution lays emphasis on the presence of the accused during trial for the purpose of defending herself.[47] This provision is echoed by the Criminal Procedure and Evidence Act, which provides that criminal trials shall take place in the presence of the accused unless she conducts herself in a manner that renders her presence impracticable.[48] Section 290(1) of the Act provides that all judgments in criminal trials should be pronounced in open court.[49] The section further provides that the judgment should be pronounced either immediately upon termination of the trial or at some subsequent time, notice of which should be given to the parties.[50] Sec-

45 "In terms of section 10 of our Constitution a person accused of a criminal offence must receive a fair trial before an impartial court within a reasonable time." C.J. Nganunu, *in Bosch v. The State*, [2001] 1 BLR 71, 104E-F (CA); "An accused person has in terms of s 10(1) of the Constitution an entitlement to a fair trial. In my view, a fair trial cannot be realized where an accused person does not understand the import of the criminal proceedings which he is facing nor have a rudimentary idea as to how not only to present his case but to conduct his defence by way of putting the essential elements of his defence to the prosecution witnesses." J. Lesetedi, *in Rabonko v. The State*, [2006] 2 BLR 166, 168 C-E. For some cases of the European Court of Human Rights relating to the right to a fair trial, *see Kraska v. Switzerland*, (1994) 18 EHRR 188; *Khan v. United Kingdom*, (2001) 31 EHRR 1016. For some European scholarly work on fair trial rights, *see, generally,* R. Clayton & H. Tomlinson, *The Law of Human Rights I*, Oxford University Press, Oxford, 2000; S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, Oxford, 2005; O. Jacot-Guillarmod, 'Rights Related to Good Administration of Justice (Article 6)', *in* J. Macdonald, F. Matscher & H. Petzold (Eds.), *The European System for the Protection of Human Rights*, Martinus Nijhoff, Dordrecht, 1993; A. Ashworth, 'Article 6 and the Fairness of Trials', 1999 *Criminal Law Review*, p. 261; D.J. Harris, M. O'Boyle & C. Warbick, *Law of the European Convention on Human Rights*, Butterworths, London, 1995.

46 *Mmereki and Others v. The State*, [2009] 2 BLR 350; *Mmusi v. The State*, [2009] BLR 386; *Mafunye v. The State*, [1990] BLR 474; *Lekgotla v. The State*, [1990] BLR 445; *Tshupo and Others v. The State*, [1991] BLR 230. *See also* Section 178(1) Criminal Procedure and Evidence Act.

47 Section 10(2)(f) of the Constitution provides: "Every person who is charged with a criminal offence [...] shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge, and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence." *See also* Section 6 of the Magistrates' Courts Act Cap 04:04; *Moyo v. The State*, [2009] 2 BLR 116 (CA); *Mmesetse v. The State*, [2001] 1 BLR 505; *Kelebetse v. The State and Others*, [2008] 2 BLR 256; *State v. Segana Ntibi*, [1968-1970] BLR 330; F. Cassim, 'The Rights of Child Witnesses Versus the Accused's Right to Confrontation: A Comparative Perspective', *Comparative and International Law Journal of Southern Africa*, Vol. 36, No. 1, 2003, p. 65; F. Cassim, *Meaningful and Informed Participation in the Criminal Process*, 2003, p. 273 (unpublished thesis submitted for the Doctor of Laws degree at the University of South Africa).

48 Section 178(1) Criminal Procedure and Evidence Act; *Mafunye v. The State*, [1990] BLR 474; *Lekgotla v. The State*, [1990] BLR 445; *Tshupo and Others v. The State*, [1991] BLR 230. *See also* the South African cases of *R v. Pauline* 1928 TPD 643; *S v. Maoka* 1985(1) SA 350 (O); *see* further, the English cases of *R v. Cunningham*, (1988) *Criminal Law Review*, p. 543; *R v. Morley*, [1988] 2 All ER 396; for similar cases by the European Court on Human Rights, *see Colozza v. Italy*, (1985) 7 EHRR 516; *Monnell and Morris v. United Kingdom*, (1985) 7 EHRR 579; *Zana v. Turkey*, (1999) 27 EHRR 667; *Brandsetter v. Australia*, (1993) 15 EHRR 378. Further *see* F. Cassim, 'The Right to Be Present: A Key to Meaningful Participation in the Criminal Process', *Comparative and International Law Journal of Southern Africa*, Vol. 38, No. 2, 2005, p. 285.

49 *See State v. Morapedi and Others*, [1996] BLR 1003.

50 *Ibid.,* 1007.

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tion 290(2) specifically provides that the accused is required to attend court to hear the judgment delivered and that she should be brought before the court if she is in custody.[51] However, the judgment may be read in the absence of the accused where the court has dispensed with her attendance and "the sentence is one of fine only or he is acquitted".[52]

Order 49 Rule 3 of the Rules of the Magistrates' Courts was meant to overcome the ever-increasing situations of accused persons who would sometimes stand their trial and then abscond after the matter is adjourned for judgment, thereby frustrating the finality of the proceedings. The Rules of the Magistrates' Courts differ from the Act in that it empowers the court to automatically proceed to deliver judgment and sentence in the absence of the accused unless good cause is shown. While the Act provides that judgments will not be deemed invalid by reason of the fact that they are delivered in the absence of the accused,[53] this does not overcome the fact of the glaring normative differences between the Rules of the Magistrates' Courts and the Act.

D. Reconciliation of Competing Norms

I. Statutory Interpretation

The interpolation of case management in the criminal process through the revised rules of the High Court and Magistrates' Courts has created divergent normative effects. The variances created by different norms relating to the same situation create differences in interpretation and application. The wording of statutory provisions clothes each provision with specific content, scope and application. Different legal provisions that apply to the same procedures are capable of fundamentally contradictory effects even where they contain minute variations. Consequently, it might not be long before the courts are called upon to determine the applicability of competing legal provisions. This might compel the courts to apply various rules of statutory interpretation as well as pay homage to the hierarchy of laws.

In the application of competing statutes, the *lex specialis* generally takes precedence over the *lex generalis* in the event of competition.[54] However, the Rules as well as the Criminal Procedure and Evidence Act are both *lex specialis* relating specifically to the conduct of trials. Unfortunately, the Rules cannot benefit from the fact that they are latter legislations which should override any inconsistencies in previous legislations relating to the same matter. It is a principle of law that in the event of conflict between two pieces of law relating to the same subject, the latter statute overrides the previous one. However, this argument does not come in aid to the present situation as the two provisions are not of the same normative hierarchy. The Criminal Procedure and Evidence Act is higher in the hierarchy of laws.

51 *Ibid.*
52 Section 290(2) Criminal Procedure and Evidence Act. *See State v. Pinto*, [2003] 1 BLR 600.
53 Section 290(3) Criminal Procedure and Evidence Act.
54 *See* Section 32 Interpretation Act Cap 01:04.

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In the hierarchy of laws, the Rules are subordinate to the Criminal Procedure and Evidence Act. In effect, all provisions of the Rules that are inconsistent with the Act may potentially be trumped by the Act. Subordinate legislation usually provides for detailed regulatory or procedural provisions that are not covered by the parent legislation under whose aegis they are made. The Rules of the High Court and Magistrates' Courts fall under this category. The scope of the powers of those empowered to make subsidiary legislation is usually provided in the parent Act. A departure from their mandate may result in the subsidiary legislation being declared null and void to the extent of the inconsistency.[55] The Rules contain extensive provisions relating to judicial case management in civil and criminal proceedings. By applying judicial case management to the criminal process, the Rules regulate certain processes that were hitherto in the preserve of the Criminal Procedure and Evidence Act and the Magistrates' Courts Act. The application of the hierarchy of laws undermines the effective application of the Rules as all inconsistencies will be resolved in favour of the Act. This state of affairs is unsatisfactory as it leaves the effective application of the Rules in a state of uncertainty and inconsistency. The inconsistency and uncertainty arise because the Rules are applicable unless they are subsumed in favour of the Criminal Procedure and Evidence Act by the courts. Further, until the superior courts of judicature arrive at a finalised legal position, differing judicial approaches may compound the inconsistency and uncertainty in approach. This may potentially lead to reversals in the decisions of trial courts on appeal, thereby throwing the judicial system into disarray. This runs counter to the philosophies of certainty and efficiency that judicial case management represents. Clearly, therefore, statutory interpretation does not provide a satisfactory resolution to the conflict.

II. Legislative Harmonisation

While new legislative provisions often seek to produce better legal outcomes, a number of problems are inherent with the process of codification. These include the creation of inconsistencies with existing laws, the limitations of draftsmanship and the interpretation of new legislation.[56] Evidently, judicial case management represents the current legal and judicial ideology of Botswana. Moreover, its openness and swiftness serve the best interests of the prosecution and accused. Effectively, judicial case management should take mainstream thinking in the criminal justice system and cannot be compromised. Therefore, the Rules should remain intact. Rather, the Criminal Procedure and Evidence Act and any other law with which the Rules conflict should be amended to create consistency. Despite being subordinate in the hierarchy of laws, the Rules represent the current direction that the judiciary intends to take in reducing backlog and attaining efficiency. The Rules represent significant reform in the system. However, reform does not take place in a vacuum and the Criminal Procedure and Evidence Act

55 D.D. Ntanda Nsereko, *Constitutional Law in Botswana*, Pula Press, Gaborone, Botswana, 2002, p. 48; *see* Section 5(2) Statutory Instruments Act Cap 01:05. *Kandu and Others v. Director of Veterinary Services and Another*, [1996] BLR 618; *Molefe v. State President and Others* 1987 (4) SA 745.

56 M. Zander, *The Law-Making Process*, 5 edn, Butterworths, London, 1999, p. 438.

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cannot remain outside the equation of judicial case management. The need to harmonise the Act with the Rules cannot be overstated. Consequently, a stocktaking of all legislation that contain aspects of criminal procedure and identification of provisions that run counter to the Rules and the principles of judicial case management is imperative. In view of the paramount importance of judicial case management, relevant Acts that are inconsistent with the Rules will have to be amended to bring them in line with the latter. This will form part of the reform process relating to the implementation of judicial case management.

III. Judicial Harmonisation

Judicial responsibility in harmonising the Rules and the relevant statutes that they implicate forms part of the recipe for the resolution of the conflict. The possibility of reading the Criminal Procedure and Evidence Act and the Rules as composite documents would present a solution of rationalising both documents. Elsewhere,[57] practice suggests that the reference to Acts does not generally include reference to subordinate documents.[58] Thus, it has been suggested that the question whether reference to an Act will include subordinate legislation will depend on the context.[59] To avoid confusion as to whether reference to enactments is intended to include subordinate legislation, the practice of defining Acts, with definitions that expressly include or exclude subordinate legislation, applies in the United Kingdom.[60] However, the Botswana legal system provides an opportunity for the rationalisation of the present problems, as statute appears to provide a clear picture of the relationship between legislation and subordinate legislation. Thus Section 31(2) of the Interpretation Act of Botswana provides that an Act and its subsidiary legislation shall be construed as one.[61] However, a difficulty lies in Section 31(1), which provides that subordinate legislation shall be construed "subject to the Act under which it is made". A further problem lies in the fact that the High Court Rules and Rules of the Magistrates' Courts are subordinate legislations of the High Court Act and Magistrates' Courts Act respectively and not the Criminal Procedure and Evidence Act. Consequently, Section 31(2) provides a legal basis for the rationalisation of the Rules with the High Court Act and Magistrates' Courts Act and not the Criminal Procedure and Evidence Act.

The courts should be proactive and innovative and attempt to rationalise the Rules with the Criminal Procedure and Evidence Act, employing formulas founded on the interests of justice and the right to a fair trial. These formulas may take two forms. First, the courts may engage in some form of 'judicial supplementing'. The rationalisation of the Criminal Procedure and Evidence Act and the Rules of court can be justified on the ground that they regulate the same subject matter. Thus, portions of the Act can be supplemented by the Rules where the effect of the application of the Rules ensures a fair trial. Judicial supplementing

57 Under the English common law system.
58 D. Greenberg, *Craies on Legislation*, 9th edn, Sweet & Maxwell, London, 2008, p. 4.
59 *See Rathbone v. Bundock*, [1962] 2 QB 260.
60 Greenberg, 2008, at 5.
61 Cap 01:04.

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can be demonstrated by reference to the service of subpoenas on witnesses of the accused. While the Act places conditions on the service of subpoenas on the witnesses of the accused, the Rules make such service a matter of course. Thus, the courts (especially the High Courts) must be able to apply the Rules as an extension of the Criminal Procedure and Evidence Act. Thus, while the Criminal Procedure and Evidence Act places restrictions on the service of subpoenas on the accused witnesses, it does not proscribe it. From a fair trial perspective, it is in the interest of justice that the witnesses of the accused are able to testify. Since the Criminal Procedure and Evidence Act permits the issue of subpoenas to witnesses of the accused where the accused is unable to do so, for financial reasons and where the witness is material, the courts are at liberty to apply the Rules on those very bases. Thus, by supplementing the Act with the Rules, the more restrictive provisions of the Act are overcome.

Second, the courts may engage in 'judicial discardment'. In this regard, the courts may disregard legal provisions that tend to compromise the interests of justice and the fairness of trials. For instance, in relation to postponing the plea, the courts may simply disregard the Rules, which are restrictive, and apply the Act, which is broader in application. While accused persons sometimes unnecessarily cause delays in proceedings, occasions may arise where they may have genuine desires for postponing the plea, such as the opportunity to seek legal advice. Denying the accused this opportunity might be prejudicial as she might be ill-advised as to her options in relation to what plea to make. The benefit of judicial harmonisation is that it serves as an immediate intervention and seeks to resolve the inconsistencies while future legislative measures aimed at reconciling the competing norms are contemplated.

E. Conclusion

The recent Rules of the High Court and Magistrates' Courts were intended to incorporate case management into the legal system of Botswana. However, some of their provisions are at odds with provisions in other legislation with which they overlap. The High Court and Magistrates' Courts Acts and their Rules mostly regulate civil procedure while criminal procedure is principally regulated by the Criminal Procedure and Evidence Act. Thus, rather than incorporating criminal procedures into the Rules, the criminal procedural aspect relating to case management should have been dealt with by amending the Criminal Procedure and Evidence Act. By providing for criminal procedure, the Rules have stepped into the domain of the Criminal Procedure and Evidence Act. This article has highlighted inconsistencies between the Rules and the Criminal Procedure and Evidence Act, the principal legislation regulating criminal proceedings. Owing to the hierarchy of laws, the provisions of the Rules may be rendered nugatory if tested in the courts. However, case management is a very useful tool in reducing backlog in the courts. It also fosters fair trial rights by putting the accused on notice on what the state's case is while also giving the state an inclination of the accused's defence. Judicial case management forms the underlying philosophy of the present dis-

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pensation. Thus, other norms that are at variance with the Rules ought to be refined in line with the latter. In this regard, the courts are in a position to play a proactive role of harmonising the various competing provisions. The courts might employ formulas that serve the interest of a fair trial as well as the tenets of case management. Thus, the courts may seek to give prominence to provisions of the Rules that are at variance with the Criminal Procedure and Evidence Act by supplementing provisions of the Criminal Procedure and Evidence Act with provisions of the Rules. Similarly, provisions of the Rules that gravely limit the right to a fair trial may be disregarded. This exercise will inevitably put the courts in a tight role of choosing between the efficiency of judicial case management and the accused's right to a fair trial. Further, ultimate harmonisation lies with legislative reform. The Criminal Procedure and Evidence Act with which the Rules are at odds enjoys normative superiority. Thus, harmonisation can only be conclusively sought by legislative stocktaking and aligning the provisions of the Criminal Procedure and Evidence Act to meet the requirements of judicial case management.