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COURSE NOTES

LAW 131

Introduction to Law

The Nature of Law, the Legal System and Sources of Law

KNOW THE LAW. OWN THE ROOM.

NOTE TO STUDENTS

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PART A

THE NATURE OF LAW

Meaning, Functions, Classification and Philosophical Foundations

1. The Nature of Law: Meaning, Functions and Classification

1.1 What is Law?

The question of what law is constitutes one of the most fundamental and enduring inquiries in jurisprudence. Despite centuries of philosophical deliberation, no single universally accepted definition has emerged. Law is a complex and multidimensional social phenomenon that operates across different societies, cultures, and historical epochs, each attributing distinct meanings, sources, and functions to it.

In its broadest formulation, law may be understood as a body of rules and norms that govern human conduct within a society, created and enforced by a recognised authority. A complete understanding of law requires engagement with the principal schools of legal thought.

DEFINITION: Law

A system of rules, norms, and principles created and enforced by social or governmental institutions, designed to regulate the behaviour of members of a society, resolve disputes, and uphold order and justice. In Botswana, law derives authority from the Constitution 1966, Acts of Parliament, judicial precedent, customary law, and common law principles.

1.2 Brief Introduction to Schools of Legal Thought

Jurisprudence -- the theoretical and philosophical study of law -- has produced several major schools of thought. The three schools examined in LAW 131 are Natural Law, Legal Positivism, and the Marxist School of Thought. Each offers a distinct account of the nature, source, and purpose of law with direct implications for legal argument and analysis.

School of Thought	Core Thesis	Key Thinkers
Natural Law	Law is grounded in universal moral principles discoverable through reason or divine authority. An unjust law is no law at all.	Aristotle, Aquinas, Finnis

Legal Positivism	Law is a social fact. Its validity depends on its source and proper enactment -- not its moral content.	Bentham, Austin, Hart
Marxist School	Law is an instrument of class domination serving the ruling class, legitimising economic inequality.	Marx, Engels, Pashukanis

1.3 Natural Law Theory

Natural law theory is among the oldest and most influential traditions in jurisprudence. Its central thesis is that law is grounded in universal principles of morality, reason, or divine order that exist independently of human enactment and are discoverable through reason.

1.3.1 Origins: Classical Foundations

Aristotle (384-322 BC) distinguished between natural justice -- universal and unchanging -- and conventional justice, which varies by human enactment. The Stoic philosophers held that all human beings share a common rational nature subject to a universal moral law -- the *lex naturalis* -- accessible through reason.

1.3.2 Saint Thomas Aquinas and the Four Types of Law

Saint Thomas Aquinas (1225-1274), in his *Summa Theologica*, distinguished four types of law arranged hierarchically:

- **Eternal Law** -- the rational governance of the entire universe by God; the supreme law from which all others derive.
- **Divine Law** -- law revealed through sacred scripture, guiding human beings toward their supernatural end.
- **Natural Law** -- the participation of rational creatures in eternal law through reason; the moral law accessible to all rational persons.
- **Human (Positive) Law** -- law enacted by human authority, deriving validity from conformity with natural law. A human law contradicting natural law is not truly law but a perversion of law.

LATIN MAXIM

Lex iniusta non est lex -- An unjust law is no law at all. This maxim encapsulates the natural law position that moral validity is a prerequisite for the binding force of law. It provides the philosophical basis for civil disobedience against unjust positive laws.

1.3.3 John Finnis and Modern Natural Law

John Finnis, in *Natural Law and Natural Rights* (1980), identifies seven basic goods -- life, knowledge, play, aesthetic experience, friendship, practical reasonableness, and religion -- as the objective foundation of morality and law. Human law must be directed toward the common good; laws that systematically fail to do so lack full moral authority to command obedience.

EXAM NOTE

*Be prepared to: (1) explain the core natural law thesis; (2) set out Aquinas's four types of law precisely; (3) apply *lex iniusta non est lex* to a given scenario; and (4) critically evaluate natural law against legal positivism.*

1.4 Legal Positivism

Legal positivism emerged as a deliberate reaction against natural law theory. Its foundational claim -- the **separation thesis** -- is that law and morality are conceptually distinct. The validity of a legal rule is determined not by its moral content but by whether it was enacted in accordance with recognised sources and procedures of the legal system.

1.4.1 Jeremy Bentham (1748-1832)

Jeremy Bentham drew a sharp distinction between the **expositorial** task -- describing the law as it is -- and the **censorial** task -- evaluating the law as it ought to be. He criticised natural lawyers for confusing these distinct inquiries. For Bentham, the existence of a law is a question of social fact, not moral evaluation.

1.4.2 John Austin and the Command Theory

John Austin (1790-1859), in *The Province of Jurisprudence Determined* (1832), developed the **Command Theory of Law**: law consists of commands issued by a sovereign -- a person or body habitually obeyed but not itself in the habit of obeying any higher human authority -- backed by the threat of a sanction. Key elements:

- **Command**: an expression of a wish backed by power to enforce.
- **Sanction**: every command is backed by threat of punishment for non-compliance.
- **Sovereign**: the determinable source of law who is habitually obeyed.
- **Separation of law and morality**: the existence of law is one thing; its merit or demerit is another.

1.4.3 H.L.A. Hart and The Concept of Law

H.L.A. Hart, in *The Concept of Law* (1961), offered law as a **union of primary and secondary rules**:

- **Primary Rules** -- rules imposing duties and obligations on individuals (e.g., criminal prohibitions).
- **Secondary Rules** -- rules about rules. Three types:

(i) **Rule of Recognition** -- identifies the ultimate criteria of legal validity. In Botswana, the Constitution 1966 is the supreme rule of recognition.

(ii) **Rules of Change** -- empower designated bodies to create, modify, or repeal primary rules.

(iii) **Rules of Adjudication** -- empower courts to determine breaches of primary rules.

DEFINITION: Hart's Rule of Recognition

The foundational secondary rule specifying the criteria by which all other rules are identified as legally valid. In Botswana, Section 2 of the Constitution 1966 declares it the supreme law and that any inconsistent law is void to the extent of the inconsistency.

1.5 Marxist School of Thought

The Marxist approach situates law within the context of economic relations and class struggle. Law is not a neutral instrument of social order but an ideological apparatus serving the interests of the dominant economic class.

1.5.1 The Base and Superstructure

According to **Marx** and **Engels**, the economic base -- comprising forces and relations of production -- determines all social institutions, including law (the superstructure). In a capitalist society, law serves the **bourgeoisie** (owners of the means of production) in maintaining dominance over the **proletariat** (working class). Legal rights -- particularly property rights -- protect and reproduce capitalist relations of production.

1.5.2 Evgeny Pashukanis and the Commodity Form Theory

Pashukanis, in *The General Theory of Law and Marxism* (1924), argued that the legal form -- treating abstract legal subjects as formal equals -- corresponds to the commodity form in capitalist exchange. Legal equality masks real economic inequalities, just as commodity exchange masks unequal social relations of production.

CRITICAL PERSPECTIVE

The Marxist critique provides a powerful lens for examining how legal systems in post-colonial states such as Botswana may continue to reflect inherited economic hierarchies. However, it has been criticised for economic reductionism and for underestimating the relative autonomy of law from the economic base.

2. Law Distinguished from Other Normative Systems

2.1 Law and Morality

The relationship between law and morality is one of the central questions of jurisprudence. While they frequently overlap, they are conceptually and operationally distinct and can diverge significantly.

Criterion	Law	Morality
Source	Enacted by recognised authority: Constitution, legislature, courts	Derived from conscience, custom, religion, or social consensus
Enforcement	State institutions: courts, police, executive	Social pressure, guilt, individual conscience
Universality	Applies uniformly within a jurisdiction	Varies between individuals, cultures, and communities
Sanction	Legal: imprisonment, fines, civil liability	Social: disapproval, ostracism, moral censure
Change	Formal legislative or judicial process	Gradual evolution through shifts in social values
Precision	Precise, technically defined rules	General, flexible principles

Convergence: Many fundamental legal prohibitions -- against murder, theft, fraud -- correspond to widely held moral principles. Lon Fuller's concept of the "inner morality of law" identifies eight procedural requirements as the internal moral dimension of any functioning legal system: generality, promulgation, non-retroactivity, clarity, non-contradiction, possibility of compliance, constancy, and congruence between rules and official action.

Divergence: Law may be morally objectionable yet legally valid -- the apartheid laws of South Africa being the paradigm example. Conversely, a moral duty such as the duty to rescue a drowning person may not be legally enforceable in all jurisdictions, including Botswana which lacks a general statutory duty to rescue.

EXAM NOTE

Draw a precise comparison using the criteria above, illustrate convergence and divergence with examples, and explain the significance for the positivism versus natural law debate.

2.2 Law and Justice

Justice is a concept of profound importance in legal philosophy. While law aspires to achieve justice, the two are not synonymous. **Aristotle** identified two foundational forms of justice in his *Nicomachean Ethics*:

- **Distributive Justice** -- concerned with the fair allocation of goods, opportunities, burdens, and benefits according to proportionality. It informs constitutional equality guarantees, taxation law, and social welfare legislation.
- **Corrective (Commutative) Justice** -- concerned with rectification of wrongs, restoring equality disturbed by wrongful conduct. It underpins the law of delict, contract law, and unjustified enrichment.

The tension between law and justice persists: natural lawyers insist law must be just to be valid; positivists maintain validity is determined by source, not justice. An unjust law on the positivist view is still law -- though a bad law that ought to be changed through legitimate processes.

2.3 Law and the Rule of Law

The rule of law is a foundational constitutional principle requiring that all persons and institutions -- including the government -- are subject to and accountable under the law. It is the antithesis of arbitrary government.

A.V. Dicey articulated three core principles in *Introduction to the Study of the Law of the Constitution* (1885):

- **Supremacy of Law** -- No person may be punished except for a distinct breach of law established before ordinary courts. No person stands above the law.
- **Equality Before the Law** -- Every person, regardless of rank or status, is subject to the ordinary law and amenable to ordinary courts.
- **Constitutional Law as Consequence** -- Rights and liberties arise from ordinary court remedies, adapted in jurisdictions with written constitutions.

Attorney-General v Dow 1992 BLR 119 (CA)

ISSUE

Whether the Citizenship Act 1984 -- denying citizenship to children of Botswana women married to foreign nationals -- violated fundamental constitutional rights guaranteed by the Constitution.

RULE / RATIO DECIDENDI	The Constitution must be interpreted broadly and purposively to give full effect to the fundamental rights it guarantees. The Constitution is the supreme law, and all legislation inconsistent with it is void. Equality and freedom from discrimination on the grounds of sex are justiciable constitutional rights. The Citizenship Act 1984, in denying citizenship to children of Botswana women while granting it to children of Botswana men in the same position, discriminated unconstitutionally on the grounds of sex.
APPLICATION	The Court of Appeal applied purposive constitutional interpretation and found the differential treatment of women under the Citizenship Act was unjustified sex discrimination violating Chapter II of the Constitution.
CONCLUSION	The Citizenship Act was declared unconstitutional to the extent of its inconsistency with the Constitution.
SIGNIFICANCE & ANALYSIS	<i>This is the foundational authority in Botswana constitutional and administrative law for purposive constitutional interpretation, constitutional supremacy, and the justiciability of equality rights. The ratio operates at multiple levels: constitutional interpretation (purposive approach), equality (sex discrimination), and constitutional supremacy. It is the single most important case in LAW 131 and must be mastered.</i>

3. The Functions and Limitations of Law

3.1 Functions of Law

3.1.1 Social Control

Law regulates human behaviour by prescribing acceptable conduct and prohibiting harmful conduct. Criminal law defines offences, prescribes punishments, and provides mechanisms for detection, prosecution, and sanction, deterring harmful conduct and maintaining social order.

3.1.2 Dispute Resolution

Law provides institutionalised mechanisms for peaceful and authoritative resolution of disputes. Courts adjudicate according to established rules and procedures, preventing self-help and private ordering.

3.1.3 Social Engineering and Change

Law can be used as an instrument of planned social transformation -- abolishing discriminatory practices, extending rights, protecting the environment, establishing welfare entitlements. This function has been particularly significant in post-colonial Botswana.

3.1.4 Allocation of Authority

Constitutional and administrative law allocates powers among organs of government, structures and limits the exercise of public power, and prevents the concentration of authority in any single institution.

3.1.5 Protection of Rights and Liberties

Constitutional and human rights law protects individuals against arbitrary interference. Chapter II of the Constitution guarantees fundamental rights including the right to life, personal liberty, freedom from torture, freedom of expression and assembly, and the right to a fair trial.

3.1.6 Facilitation of Private Arrangements

Contract law, property law, company law, and commercial law provide the legal infrastructure for private transactions and economic activity, enabling coordination through private ordering.

3.1.7 Legitimation of Power

Law confers legitimacy on the exercise of political power by providing a normative framework within which governmental authority is exercised and justified.

3.2 Limitations of Law

3.2.1 Inability to Regulate All Conduct

Law cannot and should not seek to regulate every dimension of human conduct. Vast domains of social life -- personal relationships, private moral choices, cultural and religious practices -- cannot be adequately governed by law.

3.2.2 Compliance Deficit

The effectiveness of law depends fundamentally on the willingness of individuals and institutions to comply. Where legal rules are perceived as illegitimate or unenforceable, law loses its regulatory efficacy.

3.2.3 Inaccessibility and Inequality of Access

Legal processes are frequently costly, complex, and inaccessible to the poor and marginalised. The gap between the formal availability of legal rights and their practical enforceability is a persistent limitation in Botswana.

3.2.4 Rigidity and Slowness of Change

Statute law can be slow to respond to rapidly changing social, technological, and economic conditions. The legislative process may lag significantly behind social realities.

3.2.5 Potential for Abuse and Oppression

Law can be used as an instrument of oppression. Colonialism in Africa and the apartheid regime in South Africa demonstrate that formal legal authority can be deployed in the service of injustice.

3.2.6 Legal Pluralism and Normative Diversity

In societies characterised by cultural diversity -- as in Botswana -- a single legal system may struggle to accommodate diverse normative frameworks. Tensions between state law and customary law, and between international human rights norms and local cultural practices, are persistent challenges.

KEY POINT

The functions and limitations of law must always be considered together. A realistic assessment of law as a social institution requires acknowledging not only what law can achieve but also the systemic constraints under which it operates.

4. The Classification of Law

Law may be classified in various ways. Classification has significant practical implications for procedure, remedies, jurisdiction, and the substantive rules that apply.

4.1 Public Law and Private Law

Public Law governs the relationship between the state and individuals, and between organs of the state. It includes constitutional law, administrative law, and criminal law. The relationship is characteristically hierarchical.

Private Law governs relationships between private individuals and entities as private persons. It includes contract law, the law of delict, property law, family law, and the law of succession.

4.2 Substantive Law and Procedural Law

Substantive Law defines rights, duties, obligations, and liabilities -- it tells us what the law is.

Procedural Law governs the process by which substantive rights and obligations are enforced before courts, including rules of evidence, jurisdiction, pleading, and appeals.

4.3 Civil Law and Criminal Law

Civil Law governs disputes between private parties and provides remedies -- typically compensation or specific performance. Standard of proof: balance of probabilities.

Criminal Law defines prohibited conduct and prescribes punishments. Proceedings are brought by the state. Standard of proof: beyond reasonable doubt. The accused is presumed innocent.

4.4 Common Law and Statute Law

Common Law is judge-made law developed through the accumulated body of judicial decisions. In Botswana it encompasses Roman-Dutch law, English common law, and recognised customary law principles.

Statute Law is law formally enacted by Parliament in Acts of Parliament and subsidiary legislation. It prevails over inconsistent common law within constitutional limits.

4.5 National Law and International Law

National (Municipal) Law is the law of a particular sovereign state applying within its territory: the Constitution, Acts of Parliament, subsidiary legislation, common law, and customary law.

International Law governs relations between sovereign states and international actors. In Botswana, international law generally requires incorporation through domestic legislation to form part of domestic law.

4.6 Written Law and Unwritten Law

Written Law encompasses all formally enacted and promulgated legal norms: the Constitution, Acts of Parliament, and statutory instruments.

Unwritten Law encompasses legal norms not formally enacted in a written instrument but having legal force, including customary law and common law principles.

BOTSWANA

CONTEXT -- LEGAL

PLURALISM

Botswana is characterised by legal pluralism: the coexistence of formal law with customary law, which governs family relations, land tenure, and succession for large sections of the population. This is illustrated by Ramantele v Mmusi CACGB-104-12, in which the Court of Appeal struck down a customary rule of male inheritance as unconstitutional.

PART B

THE BOTSWANA LEGAL SYSTEM

Historical Development and the Pluralism of Laws

6. The Botswana Legal System

The Botswana legal system is the product of a complex historical process involving pre-colonial indigenous law, colonial imposition of English and Roman-Dutch law, and post-independence constitutional development. Understanding this history is essential to understanding the present pluralism of laws that characterises Botswana.

6.2 The Pre-Colonial Period

Prior to colonial contact, the territory now known as Botswana was inhabited by the Tswana peoples, organised into chiefdoms governed by customary law and traditional institutions. Customary law regulated all aspects of social life including family relations, inheritance, land tenure, dispute resolution, and community obligations.

- Law was oral, unwritten, and embedded in social practice and custom.
- The kgosi (chief) exercised combined legislative, executive, and judicial functions.
- The kgotla (community assembly) served as the primary forum for dispute resolution.
- Customary law emphasised reconciliation and the restoration of social harmony rather than punishment.
- Land was held communally, with the chief as trustee for the community.

ACADEMIC NOTE

A.J.G.M. Sanders, "The Characteristic Features of Southern African Law" (1981) highlights the fundamentally different character of customary legal systems -- their oral, communal, and consensus-based nature -- compared to the formal Western-derived legal tradition.

6.3 The Colonial Period -- Genesis of the Modern Legal System

The Bechuanaland Protectorate was established on 31 March 1885. As Bechuanaland was administered from the Cape Colony, Roman-Dutch law -- the common law of the Cape Colony -- was introduced as the general law of the Protectorate.

Silverstone (Pty) Ltd and Another v Lobatse Clay Works (Pty) Ltd [1996] BLR 190 (CA)

ISSUE	Whether Roman-Dutch law applied as the common law in Botswana and how it related to English law.
RULE / RATIO DECIDENDI	Roman-Dutch law, as received from the Cape Colony, constitutes the common law of Botswana. Where Roman-Dutch law and English law conflict, Roman-Dutch law prevails as the common law of the country, unless statute provides otherwise.
APPLICATION	The Court of Appeal examined the legal heritage of Botswana and confirmed the primacy of Roman-Dutch law as the general law while acknowledging the significant influence of English common law through colonial administration.
CONCLUSION	Roman-Dutch law is confirmed as the common law of Botswana.
SIGNIFICANCE & ANALYSIS	<i>This is the leading authority on the reception and primacy of Roman-Dutch law in Botswana. It is essential for understanding the common law foundations of the Botswana legal system.</i>

The colonial administration created a dual legal system: formal law applied to Europeans and colonial administration; customary law continued to apply to indigenous Africans in personal and family matters, subject to the repugnancy proviso -- customary rules were only enforceable if not repugnant to justice or morality.

6.4 The Post-Independence Period -- The Pluralism of Laws

Botswana achieved independence on 30 September 1966. The Constitution of Botswana 1966 is the supreme law. It established a Westminster-style parliamentary democracy, guaranteed fundamental rights and freedoms in Chapter II, and provided for an independent judiciary. The Constitution did not abolish customary law but made all law -- including customary law -- subject to constitutional supremacy.

Molefi Silabo Ramantele v Edith Modipane Mmusi & Ors CACGB-104-12 (CA)

ISSUE	Whether a customary law rule of the Ngwaketse that only male relatives may inherit the family home violated the constitutional guarantee of equality and freedom from discrimination on the grounds of sex.
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RULE / RATIO DECIDENDI	Customary law is not immune from constitutional scrutiny. All customary law rules must conform to the fundamental rights and freedoms guaranteed by the Constitution of Botswana 1966. Where a customary rule discriminates on the grounds of sex without constitutional justification, it violates the constitutional guarantee of equality and is void to the extent of the inconsistency. The Constitution as the supreme law under Section 2 prevails over any inconsistent customary rule. Traditional practices, however long-established, cannot override fundamental constitutional rights.
APPLICATION	The Court of Appeal applied a purposive and broad interpretation of the equality provisions of the Constitution (consistent with AG v Dow), rejecting the argument that the customary exception in Section 15(4) permitted sex discrimination in the devolution of property.
CONCLUSION	The customary rule of male-only inheritance of the family home was declared unconstitutional and void. The female heir was entitled to inherit.
SIGNIFICANCE & ANALYSIS	<i>This is a landmark case establishing that: (1) customary law is subject to constitutional supremacy; (2) the constitutional equality guarantee extends to inheritance and family law; (3) the customary law exception does not permit sex discrimination in the devolution of the family home; and (4) Botswana courts will not defer to customary practices that violate fundamental constitutional rights. Must be studied alongside AG v Dow.</i>

The current Botswana legal system is characterised by a pluralism of legal orders:

- **The Constitution** -- the supreme law, prevailing over all other law.
- **Statute Law** -- Acts of Parliament and subsidiary legislation.
- **Common Law** -- Roman-Dutch law as the general law, supplemented by English common law.
- **Customary Law** -- applied in appropriate circumstances subject to constitutional limits and the repugnancy proviso.
- **International Law** -- incorporated into domestic law by legislation or used as an interpretive aid.

PART C

SOURCES OF BOTSWANA LAW

Legislation, Statutory Interpretation, Customary Law, Common Law and Judicial Precedent

7. Sources of Botswana Law

The sources of law in Botswana are those from which legal rules and principles derive their authority and binding force. They include legislation, the Constitution, customary law, common law (Roman-Dutch and English), judicial precedent, and international law.

7.1 Legislation

Legislation is the body of law formally enacted by the National Assembly of Botswana in Acts of Parliament and subsidiary legislation. It is the primary source of law in the modern Botswana legal system. Legislation: (1) is written and promulgated in the official gazette; (2) derives authority from parliamentary legislative power subject to constitutional limits; (3) prevails over inconsistent common law and customary law; and (4) must be interpreted and applied by courts in accordance with the rules of statutory interpretation.

7.2 Legislative Process

The legislative process in Botswana involves:

- **First Reading** -- formal introduction of the Bill; no debate.
- **Second Reading** -- debate on the general principles and policy of the Bill.
- **Committee Stage** -- detailed clause-by-clause examination and amendment.
- **Third Reading** -- final consideration and vote on the Bill as amended.
- **Presidential Assent** -- the President assents; the Bill becomes an Act of Parliament.
- **Commencement** -- the Act comes into force on a specified or appointed date.

ACADEMIC NOTE

Charles M. Fombad, "Some Insights into Statutory Law-making in Botswana" (2002) 27 Journal of Juridical Science 70-87 analyses the legislative process in Botswana and its implications for the quality and accessibility of legislation.

7.3 The Anatomy of a Statute

7.3.1 The Enacting Parts

- **Interpretation or Definition Sections** -- define key terms used in the statute; fix meaning and control scope of application.
- **Provisos** -- clauses qualifying or limiting the effect of the main provision, beginning with "provided that..."; read strictly in relation to the parent provision.
- **Savings** -- provisions preserving existing rights, obligations, or proceedings from the general operation of the new statute.

7.3.2 Other Parts of a Statute

- **The Title** -- both the short title (official name) and the long title (purpose) may be used as interpretive aids.
- **The Preamble** -- an introductory statement of the purposes and objects of the Act; may be used to resolve ambiguity under the mischief rule.
- **Marginal Notes or Side Notes** -- descriptive notes at the margin; generally not part of the Act and cannot override the text.
- **Headings** -- section or Part headings may be used as contextual aids to interpretation.
- **Schedules** -- provisions appended to the main body of the Act forming an integral part with the same legal force.
- **Punctuation** -- courts have traditionally been cautious about using punctuation as an interpretive aid, though it may be considered in context.

7.4 Forms of Legislation

7.4.1 Primary and Subsidiary Legislation

Primary legislation consists of Acts of Parliament enacted directly by the legislature.

Subsidiary legislation (delegated legislation) consists of legal instruments made under a power delegated by a parent Act -- including statutory instruments, regulations, rules, notices, and by-laws. Subsidiary legislation is valid only insofar as it falls within the powers conferred by the enabling Act; any excess constitutes an ultra vires act and is void.

7.4.2 Statutory Instruments Act

The Statutory Instruments Act (Cap. 01:05) regulates the making, publication, and commencement of statutory instruments in Botswana, providing procedural requirements governing the exercise of delegated legislative powers.

Botswana Motor Vehicle Insurance Fund v Marobela 1999 (1) BLR 21 (CA)

ISSUE	Whether the BMVIF Regulations constituted valid subsidiary legislation falling within the powers conferred by the Motor Vehicle Insurance Fund Act.
RULE / RATIO DECIDENDI	Subsidiary legislation derives its validity entirely from the enabling parent Act. Where subsidiary legislation purports to do something not authorised by or inconsistent with the parent Act, it is ultra vires and void. The enabling Act defines both the scope of the power delegated and the manner in which it must be exercised.
APPLICATION	The Court of Appeal examined whether the Fund's regulations fell within the powers conferred by the enabling Act, applying the ultra vires doctrine strictly.
CONCLUSION	Regulations found to exceed the statutory mandate were declared void.
SIGNIFICANCE & ANALYSIS	<i>This is the principal Botswana authority on the ultra vires doctrine as applied to subsidiary legislation. It confirms that delegated legislation must strictly conform to the enabling statute and that courts will set aside regulations that exceed or contradict the parent Act.</i>

7.5 The Constitution

The Constitution of Botswana 1966 occupies the apex of the hierarchy of norms. Section 2 declares it the supreme law and provides that any other law inconsistent with it is, to the extent of the inconsistency, void. The Constitution: (1) establishes the principal organs of government; (2) guarantees fundamental rights and freedoms in Chapter II; (3) provides the ultimate rule of recognition; and (4) controls all exercises of public power.

Kgafela II and Another v The Attorney General In Re: Gabaokelwe v DPP [2012] BLR 699 (CA)

ISSUE	Whether the proclamation of a person as Chief under the Chieftainship Act complied with constitutional requirements and whether executive action was subject to judicial review.
RULE / RATIO DECIDENDI	All exercises of public power -- including executive action in relation to the appointment and recognition of traditional leaders -- must comply with constitutional requirements and are subject to judicial review. The Constitution is the supreme source of authority. Executive action purportedly taken under statute must not only be authorised by statute but must also conform to constitutional norms including the rule of law, procedural fairness, and fundamental rights.

APPLICATION	The Court of Appeal scrutinised the statutory and constitutional framework governing chieftainship and examined whether the executive had acted within its constitutional and statutory authority.
CONCLUSION	The court applied constitutional supremacy as the controlling principle and subjected the executive action to constitutional scrutiny.
SIGNIFICANCE & ANALYSIS	<i>This case confirms the supremacy of the Constitution over all executive action, including in matters of traditional authority. It affirms the justiciability of constitutional rights and the role of courts as guardians of constitutional supremacy.</i>

7.6 Statutory Interpretation

Statutory interpretation is the process by which courts determine the meaning and application of legislative provisions. It is one of the most practically important skills in legal practice.

7.6.1 The Goal of Statutory Interpretation

The fundamental goal is to ascertain and give effect to the intention of the legislature as expressed in the words of the statute. The court does not impose its own views but seeks to implement the legislative purpose as revealed by the statutory text, read in full context.

Molefe v Attorney-General and Another [1994] BLR 301

ISSUE	Whether the court should interpret a statutory provision in accordance with its literal meaning or in a manner consistent with the evident legislative purpose.
RULE / RATIO DECIDENDI	The fundamental task in statutory interpretation is to ascertain the intention of the legislature as expressed in the words of the statute. The court must begin with the ordinary and grammatical meaning of the words used. If clear and unambiguous, they must be applied as they stand. If ambiguous, the court may resort to context, the purpose of the legislation, and legislative history.
APPLICATION	The court applied the primacy of legislative intent as expressed in the statutory text.
CONCLUSION	The principle of legislative intent as the goal of statutory interpretation was affirmed.
SIGNIFICANCE & ANALYSIS	<i>This case states the general principle underlying statutory interpretation in Botswana, setting the foundation for the three primary rules of interpretation.</i>

7.6.3 The Literal Rule

The literal rule requires a court to give statutory words their ordinary and natural meaning, regardless of the result. If the words are plain and unambiguous, the court must apply them as they stand, even if the result seems harsh or contrary to what the legislature might have intended. The rationale is rooted in the separation of powers: it is the function of courts to apply the law as enacted, not to rewrite it.

CORE PRINCIPLE

If the words are clear, they must be applied as they stand. The court is not at liberty to depart from the ordinary meaning merely because the result is harsh or inconvenient. -- Sussex Peerage Case (1844)

Sussex Peerage Case (1844) 11 Cl & F 85

ISSUE	Whether the meaning of a statutory provision could be departed from on the basis of inconvenience.
RULE / RATIO DECIDENDI	If the words of a statute are clear, they must be given their plain, ordinary meaning. The duty of a court is to interpret an Act as Parliament has written it, not as Parliament might have written it. There is no room for intendment; the court is not at liberty to insert missing words or substitute its own language for that of Parliament.
APPLICATION	The court applied the literal rule strictly, refusing to depart from the plain meaning.
CONCLUSION	The plain meaning of the statutory provision was applied.
SIGNIFICANCE & ANALYSIS	<i>This is the leading authority for the literal rule. It reflects the strict separation of powers: Parliament legislates; courts interpret and apply. This rule remains the starting point for statutory interpretation in all common law jurisdictions including Botswana.</i>

Fisher v Bell [1961] 1 QB 394

ISSUE	Whether the display of a flick knife in a shop window constituted an "offer for sale" contrary to the Restriction of Offensive Weapons Act 1959.
RULE / RATIO DECIDENDI	Statutory words must be given their technical legal meaning unless the statute indicates otherwise. In contract law, the display of goods in a shop window constitutes an invitation to treat, not an offer. Therefore the defendant had not made an "offer for sale" within the meaning of the Act.
APPLICATION	The court found the display was an invitation to treat and not an offer for sale.
CONCLUSION	The defendant was acquitted. Parliament subsequently amended the Act.

SIGNIFICANCE & ANALYSIS	<i>This case illustrates the strict application of the literal rule and its potential for producing results contrary to legislative intent. It demonstrates why the literal rule has been criticised and why Parliament may need to amend legislation following an unintended judicial interpretation.</i>
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Petrus & Another v The State [1984] BLR 14

ISSUE	Whether the constitutional provision guaranteeing the right to life was subject to limitations under the Botswana Constitution.
RULE / RATIO DECIDENDI	Constitutional provisions, including those protecting fundamental rights, must be interpreted broadly and purposively. The literal meaning of constitutional text must be understood in the context of the Constitution as a whole and its underlying values. Where constitutional provisions are ambiguous, the court must prefer an interpretation giving the fullest effect to the fundamental rights guaranteed.
APPLICATION	The court interpreted the constitutional guarantee of the right to life in its full constitutional context, applying a purposive rather than strictly literal approach.
CONCLUSION	The court affirmed a broad and purposive interpretation of the right to life.
SIGNIFICANCE & ANALYSIS	<i>This case establishes that while the literal rule applies to ordinary statutes, constitutional provisions require a broader purposive interpretation. It illustrates the distinction between statutory and constitutional interpretation in Botswana.</i>

Motswaledi v BDP & Others [2009] 2 BLR 284 (CA)

ISSUE	Whether the literal meaning of a political party constitution must prevail in construing its disciplinary provisions.
RULE / RATIO DECIDENDI	Words in a document -- whether statute, party constitution, or other instrument -- must be given their ordinary grammatical meaning unless there is a compelling reason to depart from it. Purposive interpretation does not permit the court to rewrite clear provisions merely because the result appears harsh.
APPLICATION	The Court of Appeal applied the literal rule to the political party constitution, giving its words their ordinary meaning.

CONCLUSION	The literal meaning of the document prevailed.
SIGNIFICANCE & ANALYSIS	<i>The case applies the literal rule beyond statutes to other legal documents, confirming that the rule of giving words their ordinary meaning is a general principle of legal interpretation in Botswana.</i>

7.6.4 The Golden Rule

The golden rule is a modification of the literal rule. Where the literal meaning would produce an absurd, unjust, or repugnant result, the court may depart from the literal meaning and adopt a meaning that avoids the absurdity while remaining as close as possible to the ordinary meaning. The golden rule operates in two ways:

- **Narrow application** -- where a word has multiple meanings, the court selects the meaning that avoids an absurd result.
- **Wide application** -- where the literal meaning is clear but would produce an absurd or repugnant result, the court modifies the meaning to avoid that result.

CORE PRINCIPLE	<i>The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency, in which case the grammatical and ordinary sense may be modified to avoid that absurdity and inconsistency, but no further. -- Grey v Pearson (1857)</i>
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Re Sigsworth [1935] Ch 89

ISSUE	Whether a son who had murdered his mother could inherit under her intestate estate.
RULE / RATIO DECIDENDI	The literal rule must yield where applying it would produce a result so repugnant to justice and public policy that Parliament could not have intended it. A murderer cannot profit from his crime. The court applied the golden rule to modify the literal meaning of the Administration of Estates Act to exclude a murderer from inheriting his victim's estate.
APPLICATION	The court held that the son was not entitled to inherit his mother's estate, applying the maxim that a person cannot profit from their own wrong.
CONCLUSION	The son was excluded from the intestate estate.

SIGNIFICANCE & ANALYSIS	<i>This is the paradigm case of the wide application of the golden rule. The ratio -- that Parliament cannot have intended a statutory provision to produce a morally repugnant result -- is directly applicable in Botswana where courts increasingly apply purposive interpretation informed by constitutional values.</i>
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State v Seepapitso [1972] BLR 43

ISSUE	Whether the literal meaning of a statutory sentencing provision should prevail where it would produce an absurd result.
RULE / RATIO DECIDENDI	Where the literal meaning of a statutory provision would produce an absurd result inconsistent with the evident purpose of the legislation, the court should apply the golden rule and adopt a meaning that gives effect to the legislative purpose while avoiding the absurdity.
APPLICATION	The court adopted an interpretation that avoided the absurd result while giving effect to the legislative purpose.
CONCLUSION	The golden rule was applied to give the provision a sensible and purposive meaning.
SIGNIFICANCE & ANALYSIS	<i>This is the principal Botswana authority for the golden rule. It confirms that Botswana courts are not bound by an absurd literal meaning and will modify the plain meaning where necessary to avoid results inconsistent with legislative purpose.</i>

R v Registrar General, ex parte Smith [1991] 2 QB 393

ISSUE	Whether a convicted murderer who was a paranoid schizophrenic had a right of access to his birth certificate under the Adoption Act 1976.
RULE / RATIO DECIDENDI	The golden rule permits -- and in some circumstances requires -- a court to depart from the literal meaning where applying it would produce a result so clearly contrary to legislative intention or public policy as to be unacceptable. The court held that access could be refused despite the literal statutory right because of the serious risk of further violence.
APPLICATION	The court modified the literal statutory right in light of the serious public safety risk.

CONCLUSION	Access was denied on public policy grounds despite the clear statutory language.
SIGNIFICANCE & ANALYSIS	<i>The case shows the intersection of the golden rule with public policy considerations. Courts are not compelled to apply literally a provision that would produce a result demonstrably contrary to the legislative purpose and dangerous to the public.</i>

7.6.5 The Mischief Rule

The mischief rule, the oldest of the three rules, was formulated in Heydon's Case (1584). It requires a court to identify the mischief -- the defect or problem in the law -- that Parliament intended to remedy, and to interpret the provision in the manner most effective for the suppression of the mischief and advancement of the remedy. The mischief rule involves four questions:

- (1) What was the common law before the Act was passed?
- (2) What was the mischief and defect for which the common law did not provide?
- (3) What remedy did Parliament resolve and appoint to cure the mischief?
- (4) What is the true reason for the remedy?

Heydon's Case (1584) 3 Co Rep 7a

ISSUE	How should courts approach the interpretation of statutes designed to remedy a defect in the common law?
RULE / RATIO DECIDENDI	In construing a statute, courts must have regard to four matters: (1) the common law before the Act; (2) the mischief and defect not provided for by the common law; (3) the remedy Parliament resolved to cure the disease; and (4) the true reason for the remedy. Courts must interpret the statute to suppress the mischief and advance the remedy.
APPLICATION	The court articulated the four-part mischief rule as the foundational method of purposive statutory interpretation.
CONCLUSION	The mischief rule was established as an accepted method of statutory interpretation.

SIGNIFICANCE & ANALYSIS	<i>This is the foundational case for the mischief rule. It reflects a purposive approach to interpretation -- the court looks beyond the text to the legislative objective. The mischief rule is particularly important in Botswana where courts increasingly apply purposive interpretation consistent with constitutional values.</i>
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Smith v Hughes [1960] 2 All ER 859

ISSUE	Whether women soliciting from windows and balconies of private premises committed an offence under the Street Offences Act 1959, which prohibited soliciting 'in a street or public place'.
RULE / RATIO DECIDENDI	The court must look to the mischief that Parliament intended to remedy. The mischief targeted by the Street Offences Act was the annoyance caused to members of the public by soliciting. The women were causing that very mischief even though they were technically not 'in a street'. The words must be construed to suppress the mischief.
APPLICATION	The court applied the mischief rule and held that soliciting from windows and balconies fell within the prohibition, as it caused the precise mischief the Act was designed to suppress.
CONCLUSION	The women were convicted.
SIGNIFICANCE & ANALYSIS	<i>A classic illustration of the mischief rule in operation. The court looked past the literal text to identify the purpose of the legislation. The ratio -- that statutory words must be interpreted to suppress the mischief they were intended to cure -- is directly applicable in Botswana.</i>

Jones v Wrotham Park Settled Estates [1980] AC 74

ISSUE	Whether a court may read words into a statute to fill a gap not provided for by the literal text but within the evident legislative purpose.
RULE / RATIO DECIDENDI	The court may depart from the literal words -- and may even read in additional words -- where three conditions are satisfied: (1) it is possible to determine precisely the purpose of the legislation; (2) it is clear that Parliament inadvertently failed to deal with the situation; and (3) it is possible to state with confidence what Parliament would have said had it addressed the situation.

APPLICATION	The court applied the mischief rule and identified the legislative purpose with sufficient precision to justify reading additional words into the provision.
CONCLUSION	The court gave the statute an extended meaning consistent with its purpose.
SIGNIFICANCE & ANALYSIS	<i>This case extends the mischief rule to permit purposive gap-filling where the legislative intent is clear and the omission is inadvertent. It reflects the modern purposive approach to statutory interpretation.</i>

7.6.6 Presumptions in Statutory Interpretation

In addition to the three rules, courts apply presumptions -- rebuttable assumptions about legislative intent that guide interpretation in the absence of clear contrary indication. All presumptions are rebuttable by clear and unambiguous statutory language expressing a contrary intention.

Presumption 1: Against Unreasonableness and Injustice

Parliament does not intend statutory provisions to produce unreasonable, unjust, or oppressive results. Courts will interpret ambiguous provisions to avoid such outcomes.

Presumption 2: Against Inequality and Partiality of Treatment

Parliament does not intend to enact legislation that discriminates unfairly between persons or groups. Courts interpret provisions to achieve equality of treatment.

Presumption 3: Against Deprivation of Vested Rights

Parliament does not intend to deprive persons of existing rights without clear and express language. Courts will not construe a provision as extinguishing vested rights unless this is the plain and necessary effect of the statute.

Presumption 4: Strict Interpretation of Taxation Statutes

Taxation statutes are strictly interpreted in favour of the taxpayer. Where there is ambiguity, the benefit goes to the taxpayer, not the revenue authority.

Presumption 5: Strict Interpretation of Penal Statutes

Penal statutes are strictly interpreted in favour of the accused. Criminal offences and penalties must be clearly and unambiguously expressed; any ambiguity is resolved in favour of the accused person.

CASE AUTHORITY

Moshokoa v The State [1999] 1 BLR 172 -- the Botswana High Court confirmed the strict interpretation of penal statutes, holding that where penal legislation is ambiguous, the accused is entitled to the benefit of the doubt.

Presumption 6: In Favour of Individual Liberty

Statutes are interpreted to preserve individual liberty. Courts will not construe a statute as authorising detention, arrest, or restriction of liberty unless Parliament has expressed this clearly and unambiguously.

CASE AUTHORITY

R v Hallstrom, ex parte W (No. 2) [1986] QB 1090; Collins v Wilcock [1984] 3 All ER 374; Morris v Beardmore [1981] AC 446 -- these cases confirm that statutory authority to interfere with individual liberty must be clearly and expressly conferred.

Presumption 7: Mens Rea in Statutory Offences

The accused must have committed an act with mens rea (guilty mind) to be convicted of a statutory offence unless the statute clearly imposes strict liability. The presumption of mens rea is a fundamental principle of criminal justice.

CASE AUTHORITY

State v Mosinyi & Others [1971-73] BRL 31 -- the Botswana courts confirmed the presumption of mens rea in statutory offences, holding that criminal liability under a statute requires proof of the requisite mental element unless the statute clearly excludes it.

Presumption 8: Minimal Alteration of Existing Law

Parliament does not intend to alter the existing law more than is necessary. Courts interpret new legislation consistently with the prior legal order unless Parliament has clearly indicated otherwise.

CASE AUTHORITY

Botswana Railways Organisation v Setsogo & Others [1996] BRL 763 -- confirms that legislation is to be interpreted consistently with the existing legal framework and should not be construed as effecting more radical change than its terms require.

Presumption 9: Against Ouster of Superior Court Jurisdiction

Parliament does not intend to oust or restrict the supervisory jurisdiction of the superior courts over inferior tribunals and administrative bodies. Ouster clauses are construed strictly.

CASE AUTHORITY

Anisminic v Foreign Compensation Commission [1969] 2 AC 147 -- the House of Lords held that a statutory provision purporting to exclude judicial review did not protect decisions vitiated by jurisdictional error. This is the foundational authority for the principle that ouster clauses are ineffective against decisions made outside jurisdiction.

Presumption 10: Against Retrospective Operation

Statutes are presumed not to operate retrospectively so as to affect accrued rights or completed transactions. Retrospective operation may be permitted for procedural provisions but not for provisions creating new liabilities or extinguishing existing rights.

CASE AUTHORITY

R v Sutherland 1961 (2) SA 806 (AD); Alfred Mathana v Immigration Officer [1972] 2 BLR 25; Ex parte Kirby [1968-70] BLR 398 -- confirm the presumption against retrospective operation in Botswana and South African law.

Presumption 11: Against Violation of International Law

Parliament does not intend to enact legislation that violates a rule of customary international law or a binding international treaty. Where a statute is ambiguous, the court will prefer an interpretation consistent with Botswana's international obligations.

CASE AUTHORITY

Attorney-General v Dow [1992] BLR 119 -- the Court of Appeal affirmed that statutes should be interpreted consistently with Botswana's international obligations, and that international law may serve as an interpretive aid in construing constitutional and statutory provisions.

GENERAL NOTE

All presumptions are rebuttable -- they may be displaced by clear and unambiguous statutory language expressing a contrary intention. Courts require strong evidence of contrary intent before displacing fundamental presumptions such as those against retrospective operation, ouster of jurisdiction, and strict liability in criminal law.

7.6.7 Maxims of Statutory Interpretation

In addition to the three rules and presumptions, courts apply well-established maxims -- Latin canons of construction -- as aids to statutory interpretation. These maxims provide guidance for determining the scope of statutory language and resolving ambiguities.

7.6.7.2 The Ejusdem Generis Rule

Where general words follow a list of specific words, the general words are construed as being limited to the same category or genus as the specific words. The general words cannot extend the provision beyond the category established by the specific enumeration.

Example: In "lions, tigers, leopards, and other animals" -- "other animals" would be limited to wild animals of the same genus; it would not extend to domestic animals.

Powell v Kempton Park Racecourse Co [1899] AC 143

ISSUE	Whether "other place" within a list of specific betting venues extended to an outdoor betting ring at a racecourse.
RULE / RATIO DECIDENDI	General words following a list of specific words are to be interpreted ejusdem generis -- as belonging to the same genus as the specific words enumerated. The general words do not extend the provision beyond the category established by the specific examples.
APPLICATION	The court applied the ejusdem generis rule and found that the outdoor betting ring was not of the same genus as the specifically listed indoor venues.
CONCLUSION	The general words were limited to the same category as the specific items.
SIGNIFICANCE & ANALYSIS	<i>The leading authority for the ejusdem generis rule. The ratio is directly applicable whenever a Botswana court is called upon to construe general words following a specific enumeration.</i>

7.6.7.3 Expressio Unius, Exclusio Alterius

The express mention of one or more matters in a statute implicitly excludes others of the same class not mentioned. Where Parliament has expressly specified certain items, it is presumed to have deliberately excluded all others.

Colquhoun v Brooks (1888) 21 QBD 52

ISSUE	Whether the express specification of certain categories of income for taxation purposes excluded other categories not mentioned.
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RULE / RATIO DECIDENDI	The express enumeration of certain matters in a statute implies the deliberate exclusion of other matters of the same class not mentioned. Expressio unius est exclusio alterius -- the expression of one thing is the exclusion of the other.
APPLICATION	The court applied the maxim and held that income categories not expressly mentioned were excluded from the taxing provision.
CONCLUSION	Only the expressly specified categories were subject to the provision.
SIGNIFICANCE & ANALYSIS	<i>The leading authority for expressio unius. The maxim is a powerful tool but must be applied with care: it only applies where the enumeration was intended to be exhaustive, not merely illustrative.</i>

7.6.7.4 Cessante Ratione Legis Cessat Ipsa Lex

Where the reason for a rule ceases, the rule itself ceases. This maxim permits a court to depart from a prior rule where the rationale no longer exists.

Green v Fitzgerald & Others 1914 AD 88

ISSUE	Whether a rule of law should continue to apply where the conditions that gave rise to it no longer exist.
RULE / RATIO DECIDENDI	Where the reason for a legal rule ceases to exist, the rule itself must be understood as having ceased to apply. Courts must not mechanically apply rules whose rationale has been overtaken by changed circumstances.
APPLICATION	The court applied the maxim to determine that a rule of law had become obsolete given changed circumstances.
CONCLUSION	The rule was not applied as its rationale had ceased.
SIGNIFICANCE & ANALYSIS	<i>This case applies the maxim in the context of the development of the common law. It reflects the dynamic and evolving character of judge-made law and is relevant to understanding how common law rules develop over time.</i>

7.6.7.7 Noscitur a Sociis

"A word is known by the company it keeps." Where a word or phrase in a statute is ambiguous, it is to be understood in light of the surrounding words and context.

Bourne v Norwich Crematorium Ltd [1967] 2 All ER 576

ISSUE	Whether a crematorium constituted a "building used for industrial purposes" within the meaning of the relevant statute.
RULE / RATIO DECIDENDI	Where a word is of uncertain meaning, it must be understood in light of the words with which it is associated in the statute. The associated words provide the context necessary to fix the meaning of the ambiguous term -- noscitur a sociis.
APPLICATION	The court examined the other words associated with "industrial purposes" and determined that they all referred to manufacturing or commercial production. A crematorium was not of the same character.
CONCLUSION	A crematorium was not a building used for "industrial purposes".
SIGNIFICANCE & ANALYSIS	<i>The leading authority for noscitur a sociis. Ambiguous words are interpreted in light of associated statutory context. This is widely applied in Botswana courts as a standard tool of statutory construction.</i>

7.6.7.8 Statutes in Pari Materia

Where two or more statutes deal with the same subject matter (pari materia), they are to be read and construed together as a coherent whole. A word or phrase in one statute may be interpreted by reference to the same word or phrase in related legislation.

Rannatshe v The State [1991] BLR 300

ISSUE	Whether a provision in a criminal statute should be interpreted by reference to the same provision in related criminal legislation.
RULE / RATIO DECIDENDI	Statutes dealing with the same subject matter (pari materia) are to be read together as parts of a coherent legislative scheme. Where a word or provision is ambiguous in one Act, reference may be made to related legislation for interpretive guidance.
APPLICATION	The court read the criminal statutes together and derived the meaning of the ambiguous provision from the related legislation.
CONCLUSION	The provision was interpreted consistently with the related pari materia legislation.

**SIGNIFICANCE &
ANALYSIS**

*Confirms the *pari materia* rule in Botswana law. It reflects the principle of legislative coherence -- Parliament is presumed to use consistent language and intend a coherent legislative scheme across statutes dealing with the same subject matter.*

7.6.7.9 The Rule that a Later Law Repeals an Earlier Inconsistent Law

The maxim *lex posterior derogat priori* -- a later law repeals an earlier law that is inconsistent with it -- reflects the principle of parliamentary sovereignty. A later Act expresses the most recent legislative intent and prevails over an earlier inconsistent provision, whether expressly or by necessary implication. **Express repeal** occurs when a statute specifically provides that an earlier provision is repealed. **Implied repeal** occurs where the later provision is so inconsistent with the earlier that both cannot stand together.

8. Customary Law

Customary law is one of the principal sources of law in Botswana. It is the living law of the various communities in Botswana, developed over centuries through practice, usage, and general acceptance. It governs significant areas of personal law, family relations, inheritance, land tenure, and dispute resolution for a substantial portion of the Botswana population.

8.1 The Customary Law Act

The Customary Law Act (Cap. 01:01) provides the statutory framework governing the application of customary law. The Act: (1) recognises customary law as a source of law; (2) provides that customary law applies in civil matters where it is the applicable law; (3) preserves the repugnancy proviso -- customary rules are enforceable only if not repugnant to morality, humanity, or natural justice; and (4) provides for the proof of customary law in court proceedings.

8.2 The Customary Courts Act

The Customary Courts Act (Cap. 04:05) provides for the establishment, jurisdiction, and procedure of customary courts. Customary courts are presided over by traditional authorities and apply customary law to resolve disputes between community members in civil and minor criminal matters. Their decisions may be subject to review by magistrates' courts and ultimately by the High Court.

Molefi Silabo Ramantele v Edith Modipane Mmusi & Ors CACGB-104-12 (CA)

ISSUE	Whether a customary law rule of the Ngwaketse tribe that the family home passes exclusively to male relatives upon death violated the constitutional guarantee of equality and freedom from discrimination on the grounds of sex.
RULE / RATIO DECIDENDI	Customary law is not immune from constitutional scrutiny. All customary law rules must conform to the fundamental rights and freedoms guaranteed by the Constitution of Botswana 1966. Where a customary rule discriminates on the grounds of sex without constitutional justification, it violates the constitutional guarantee of equality and is void to the extent of the inconsistency. The Constitution as the supreme law under Section 2 prevails over any inconsistent customary rule. Traditional practices, however long-established, cannot override fundamental constitutional rights.

APPLICATION	The Court of Appeal applied a purposive and broad interpretation of the equality provisions of the Constitution (consistent with AG v Dow), rejecting the argument that the customary exception in Section 15(4) permitted sex discrimination in the devolution of property.
CONCLUSION	The customary rule of male-only inheritance of the family home was declared unconstitutional and void. The female heir was entitled to inherit.
SIGNIFICANCE & ANALYSIS	<i>This is a landmark case in Botswana law establishing that: (1) customary law is subject to constitutional supremacy; (2) the constitutional equality guarantee extends to inheritance and family law; (3) the customary law exception does not permit sex discrimination in the devolution of the family home; and (4) Botswana courts will not defer to customary practices that violate fundamental constitutional rights. Must be studied alongside AG v Dow as the two pillars of Botswana constitutional jurisprudence.</i>

A.J.G.M. Sanders, "The Characteristic Features of Southern African Law" (1981)

Sanders identifies the following as characteristic features of Southern African customary legal systems:

- **Orality** -- customary law is primarily transmitted and maintained through oral tradition, practice, and usage.
- **Communalism** -- the community and the extended family are the primary units of legal organisation.
- **Consensus-orientation** -- customary law processes aim at reconciliation and the restoration of social harmony.
- **Functional overlap** -- the same institution may exercise legislative, executive, and judicial functions simultaneously.
- **Flexibility and adaptability** -- customary law is inherently dynamic and adaptable to changing social circumstances.

9. Common Law and Judicial Precedent

9.1 Roman-Dutch Law

Roman-Dutch law is the common law of Botswana, received through the Cape Colony during the colonial period. It synthesises classical Roman law (Justinian's Corpus Juris Civilis) with Dutch customary law. It forms the foundation of the private law of Botswana, governing contract, delict, property law, family law, and succession.

9.4 Case Law -- Judicial Precedent

Judicial precedent (case law) is the body of legal principles established by the decisions of courts over time. The doctrine of **stare decisis** -- "stand by what has been decided" -- requires courts to follow and apply principles established in previous decisions to promote certainty, consistency, and predictability in the law.

9.5 Reading a Case

The ability to read and analyse a judicial decision is a foundational legal skill. Every reported case contains:

- **Facts** -- the material facts giving rise to the dispute.
- **Legal Issue** -- the precise legal question(s) the court was required to decide.
- **Arguments** -- the submissions made by counsel for each party.
- **Ratio Decidendi** -- the legal principle on which the decision is based; the binding element.
- **Obiter Dicta** -- observations not strictly necessary for the decision; persuasive but not binding.
- **Order / Judgment** -- the court's formal decision on the outcome of the case.

9.7 The Nature and Operation of the Doctrine of Binding Precedent

The doctrine of binding precedent (stare decisis) requires courts to follow the decisions of courts of equal or superior jurisdiction when deciding cases involving the same or substantially similar facts and legal issues. The doctrine serves: (1) legal certainty; (2) consistency and fairness -- like cases treated alike; (3) judicial economy; and (4) institutional legitimacy.

9.8 The Ratio Decidendi

The ratio decidendi -- literally "the reason for deciding" -- is the binding element of a judicial precedent. It is the legal principle(s) derived from the material facts of the case that was essential to the court's decision. Only the ratio is binding on subsequent courts; obiter dicta are merely persuasive.

Arthur L. Goodhart, "Determining the Ratio Decidendi of a Case" (1930) 40 Yale Law Journal 161:

- The ratio is found by considering the facts treated by the judge as material and the decision reached on those facts.
- Facts treated as immaterial by the judge do not form part of the ratio.
- A judge may inadvertently state the ratio too broadly or too narrowly; the task of the later court is to identify the true ratio from the judgment as a whole.

DEFINITION: Ratio Decidendi

The ratio decidendi is the legal principle(s) based on the material facts of the case that was essential to the court's decision. It is the binding element of the precedent. All other observations by the court that were not necessary to the decision constitute obiter dicta and are merely persuasive.

9.10 Exercise: Finding the Ratio

The following two cases are used in LAW 131 as exercises in identifying the ratio decidendi. Students must be able to state the ratio of each case precisely and explain why other statements in the judgment constitute obiter dicta.

Attorney-General v Dow 1992 BLR 119 (CA)

ISSUE	Whether the Citizenship Act 1984 was inconsistent with the constitutional guarantee of equality and freedom from discrimination on the grounds of sex.
RULE / RATIO DECIDENDI	The Constitution of Botswana must be interpreted broadly and purposively to give full effect to the fundamental rights it guarantees. The Constitution is the supreme law, and all legislation inconsistent with it is void. Equality before the law and freedom from discrimination on the grounds of sex are justiciable constitutional rights. The Citizenship Act 1984, in denying citizenship to children of Botswana women while granting it to children of Botswana men in the same position, discriminated unconstitutionally on the grounds of sex.
APPLICATION	The Court of Appeal applied purposive constitutional interpretation and found the differential treatment of women was unjustified sex discrimination violating Chapter II.
CONCLUSION	The Citizenship Act was declared unconstitutional.

SIGNIFICANCE & ANALYSIS	<i>The ratio of this case operates at multiple levels: constitutional interpretation (purposive approach), equality (sex discrimination), and constitutional supremacy. Students must distinguish the binding ratio from obiter observations about constitutional development, citizenship policy, and international law.</i>
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Kanane v The State 2003 (2) BLR 67 (CA)

ISSUE	Whether the criminalisation of consensual adult same-sex conduct under the Penal Code violated constitutional rights to liberty and equality.
RULE / RATIO DECIDENDI	The ratio decidendi of the Court of Appeal's decision (which upheld the criminalisation) is that the constitutional rights to liberty and equality did not, as at 2003, extend to the decriminalisation of homosexual conduct in Botswana, having regard to prevailing social and cultural standards of Botswana society at that time. The court left open the possibility that changing social conditions might warrant a different conclusion in the future.
APPLICATION	The court examined the constitutional rights provisions and assessed them against prevailing social conditions in Botswana.
CONCLUSION	The appeal against conviction was dismissed.
SIGNIFICANCE & ANALYSIS	<i>This case is valuable as a ratio-finding exercise because the court's reasoning is complex and multilayered. Students must distinguish the core ratio from obiter observations about constitutional development and comparative law. Subsequent developments have rendered aspects of this decision controversial, illustrating the dynamic character of constitutional interpretation over time.</i>

9.11 Ratio Decidendi -- The Principles

Turnbull-Jackson v Hibiscus Court Municipality and Others 2014 (6) SA 592

ISSUE	What constitutes the binding ratio decidendi of a judgment in a case involving multiple judgments?
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RULE / RATIO DECIDENDI	The ratio decidendi of a case with multiple judgments is the principle of law that commanded majority support and was essential to the outcome. Where judges reach the same result by different reasoning, the ratio is the principle common to the majority. Statements of law not necessary to the outcome constitute obiter dicta.
APPLICATION	The court identified the principles essential to the majority decision.
CONCLUSION	The distinction between ratio and obiter was confirmed and applied.
SIGNIFICANCE & ANALYSIS	<i>This case provides a method for identifying the ratio in complex cases with multiple judgments -- find the principle essential to the outcome that commanded majority support. Directly applicable in Botswana where the Court of Appeal routinely delivers multiple judgments.</i>

9.12 Obiter Dicta

Obiter dicta (singular: obiter dictum) -- literally "things said by the way" -- are observations made by a court not essential to the decision. They may be statements of general legal principle, hypothetical discussions, or comments on the facts. Obiter dicta are not binding on subsequent courts but may be highly persuasive, particularly when expressed by a senior court or respected judge.

The following cases contain significant obiter observations that have influenced the development of Botswana law:

- **Tafic Sporting Club v Mokobi N.O. and Another** [1997] BLR 177 -- obiter observations on the scope of judicial review of private bodies exercising public functions.
- **FNB of Botswana v Botswana Bank Employees' Union** [1998] BLR 403 -- obiter observations on the constitutional rights of trade unions.
- **State v Moyo & Others** [1988] BLR 113 -- obiter observations on the right to silence and the privilege against self-incrimination.
- **Rhodesian Industrial Materials and Agencies v Botswana Builders** [1968-70] BLR 76 -- obiter observations on the reception of Roman-Dutch law.

10. Precedents that are Not Binding

Not all precedents are binding. There are several categories of precedent that courts may, in appropriate circumstances, depart from or decline to follow.

10.1 Persuasive Precedents

A persuasive precedent is one that is not binding but may be followed if the court finds it persuasive. Categories of persuasive precedent include:

- Decisions of courts of lower jurisdiction.
- Decisions of courts from other jurisdictions -- e.g., South African Supreme Court of Appeal, English Court of Appeal, Privy Council. Particularly relevant in Botswana given the shared Roman-Dutch heritage.
- Obiter dicta from any court.
- Academic commentary and legal writing.

State v Mankurwane [1985] BLR 168

ISSUE	Whether decisions of South African courts were binding or merely persuasive in Botswana.
RULE / RATIO DECIDENDI	Decisions of South African courts, including the Appellate Division, are not binding on Botswana courts but may be treated as persuasive authority, given the shared Roman-Dutch law heritage and the similarities between the two legal systems.
APPLICATION	The court considered South African precedents as persuasive authority and applied the relevant principles to the Botswana facts.
CONCLUSION	South African decisions were applied as persuasive authority.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the status of South African judgments in Botswana courts. They are persuasive but not binding. Botswana courts frequently follow South African jurisprudence given the shared legal heritage, but retain independence to depart where the Botswana context requires.</i>

10.4 Overruled Precedents

A precedent is overruled when a higher court in a later case expressly declares that the earlier decision was wrong and should no longer be followed. The effect of overruling is prospective -- it applies to future cases.

Young v Bristol Aeroplane Co Ltd [1944] KB 718

ISSUE	In what circumstances may the Court of Appeal depart from its own previous decisions?
RULE / RATIO DECIDENDI	The Court of Appeal is generally bound by its own previous decisions. However, it may depart in three circumstances: (1) where two previous decisions of the Court of Appeal conflict, the court must choose which to follow; (2) where a previous decision conflicts with a subsequent decision of the House of Lords, the House of Lords decision prevails; and (3) where a previous decision was made per incuriam -- without the court being referred to a relevant statute or binding authority.
APPLICATION	The court identified three exceptions to the general rule that the Court of Appeal is bound by its own decisions.
CONCLUSION	The three exceptions to the principle of binding precedent were established.
SIGNIFICANCE & ANALYSIS	<i>This is the foundational case on the self-binding rule of the Court of Appeal and the recognised exceptions. The three Young v Bristol Aeroplane exceptions are directly applicable in Botswana where the Court of Appeal similarly regards itself as generally bound by its own decisions.</i>

10.7 Precedents that can be Distinguished

A court may distinguish a precedent -- decline to follow it -- where there is a material difference between the facts of the case before it and the facts of the precedent case, such that the ratio of the precedent does not apply. Distinguishing allows courts to avoid the binding force of a precedent without overruling it.

Botswana Railways Organisation v Setsogo & Others [1996] BLR 763

ISSUE	Whether the ratio of a prior decision on jurisdiction applied to the facts before the court.
RULE / RATIO DECIDENDI	A court may distinguish a prior decision where the material facts of the case before it differ from those of the precedent in a legally significant way. The ratio of the earlier decision is applicable only on facts that are materially similar; where the facts differ, the earlier ratio does not bind.

APPLICATION	The court examined the material facts and compared them to those of the precedent relied upon. Finding material differences, the court distinguished the earlier decision.
CONCLUSION	The precedent was distinguished on the facts.
SIGNIFICANCE & ANALYSIS	<i>This is the principal Botswana authority on the technique of distinguishing precedents. It confirms that the ratio of a case extends only as far as its material facts justify. Competent use of the distinction technique is an essential skill in legal argument and one that LAW 131 examinations specifically test.</i>

10.9 Decisions per Incuriam

A decision is made per incuriam -- literally "through lack of care" -- where the court reached its conclusion without being referred to a relevant and binding statute or precedent that would have led to a different result. A per incuriam decision is not binding and may be departed from.

Cassell & Co Ltd v Broome [1972] AC 1027

ISSUE	Whether a prior House of Lords decision should be treated as per incuriam and therefore not binding.
RULE / RATIO DECIDENDI	A decision is per incuriam only where the court was not referred to a relevant statute or binding precedent that would have led to a different conclusion. Mere errors of reasoning or judgment do not make a decision per incuriam. The doctrine is to be applied sparingly and only where the earlier decision was reached in genuine ignorance of a directly applicable authority that would have changed the outcome.
APPLICATION	The House of Lords examined the circumstances of the earlier decision and found it was not per incuriam.
CONCLUSION	The per incuriam doctrine was held to apply only in narrow circumstances.
SIGNIFICANCE & ANALYSIS	<i>This case defines the limits of the per incuriam doctrine. It must not be used as a convenient device to escape the binding force of inconvenient precedents. Only genuine ignorance of a directly applicable authority justifies the per incuriam exception.</i>

11. The Operation of the Doctrine of Binding Precedent in Botswana

The hierarchy of courts in Botswana determines the relative binding force of judicial decisions. Every court is bound by the decisions of courts above it in the hierarchy.

11.1 The Court of Appeal

The Court of Appeal is the highest court in Botswana and its decisions are binding on all lower courts. It is generally bound by its own previous decisions but may depart from them in the circumstances identified in *Young v Bristol Aeroplane Co Ltd*.

The State v Nkani [1980] BLR 195

ISSUE	Whether the Court of Appeal is bound by its own previous decisions.
RULE / RATIO DECIDENDI	The Court of Appeal of Botswana is generally bound by its own previous decisions in the interests of certainty and consistency. However, the court retains the ability to depart from a previous decision in the three <i>Young v Bristol Aeroplane</i> circumstances: where two previous decisions conflict, where a previous decision conflicts with a later decision of a higher court, or where a previous decision was given per incuriam.
APPLICATION	The Court of Appeal affirmed its practice of following its own decisions while recognising the established exceptions.
CONCLUSION	The Court of Appeal affirmed the self-binding rule and its exceptions.
SIGNIFICANCE & ANALYSIS	<i>This is the foundational Botswana authority on the binding effect of Court of Appeal decisions. It establishes the practice of the Botswana Court of Appeal in relation to its own previous decisions.</i>

11.2 The High Court

The High Court is bound by the decisions of the Court of Appeal. It is not strictly bound by its own previous decisions but will generally follow them in the interests of consistency, unless it is convinced that the earlier decision was clearly wrong.

Kgoboki v The State [1985] BLR 383

ISSUE	Whether the High Court is bound by the decisions of a fellow High Court judge.
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RULE / RATIO DECIDENDI	A High Court judge is not strictly bound by the decisions of a fellow High Court judge but will generally follow such decisions in the interests of certainty and consistency. Departure is justified only where the earlier decision was clearly wrong or the facts are materially different. The principle of judicial comity requires that High Court judges give serious consideration to and ordinarily follow the decisions of their brethren.
APPLICATION	The court considered the earlier High Court decision and concluded it should be followed as it was not clearly wrong.
CONCLUSION	The earlier High Court decision was followed.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the principle of comity between High Court judges in Botswana. Judicial consistency and comity ordinarily require them to follow previous High Court decisions unless they are clearly wrong.</i>

12. The Structure and Jurisdiction of Courts

12.1 Classification of Courts

- **Superior and Inferior Courts** -- The Court of Appeal and the High Court are superior courts; magistrates' courts and customary courts are inferior courts. Superior courts exercise supervisory jurisdiction over inferior courts.
- **Courts of Record and Courts Not of Record** -- Courts of record (High Court and Court of Appeal) maintain official records of proceedings and decisions.
- **Courts and Tribunals** -- Courts are established by the Constitution or statute and exercise judicial power. Tribunals are quasi-judicial bodies exercising limited jurisdiction in specific areas. Tribunals are subject to judicial review by the High Court.
- **Courts of General and Special Jurisdiction** -- Courts of general jurisdiction (High Court) may hear any matter. Courts of special jurisdiction are limited to specific subject matters.

12.2 The Court of Appeal

The Court of Appeal is established by Section 97 of the Constitution. It is the apex court and its decisions are final and binding on all other courts. It hears appeals from the High Court and certain other courts and tribunals.

Dipate v Mmusi [1990] BLR 153

ISSUE	What is the jurisdiction of the Court of Appeal and the circumstances under which it will interfere with a High Court judgment?
RULE / RATIO DECIDENDI	The Court of Appeal has jurisdiction to hear appeals from the High Court on questions of law, fact, or mixed law and fact. However, the court will not lightly interfere with findings of fact made by the trial court, particularly where those findings depend on the credibility of witnesses. The Court of Appeal will only disturb factual findings where they are clearly wrong or where the trial court materially misdirected itself.
APPLICATION	The court applied the principle of appellate deference to factual findings.
CONCLUSION	The Court of Appeal defined the scope of its appellate jurisdiction.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the general principle governing appellate review of factual findings in Botswana. The Court of Appeal respects the trial court's advantage in assessing witness credibility and will not substitute its own factual findings unless the trial court's findings are clearly unsupportable.</i>

12.3 The High Court

The High Court is established by Section 95 of the Constitution. It has unlimited original jurisdiction to hear any civil or criminal matter and supervisory jurisdiction over all inferior courts and administrative bodies. Key constitutional functions include: jurisdiction to determine constitutional interpretation questions; jurisdiction to enforce fundamental rights under Chapter II; and supervisory jurisdiction over inferior courts through prerogative orders.

Letsatsi v The State [1993] BLR 11

ISSUE	What is the extent of the High Court's supervisory jurisdiction over inferior courts?
RULE / RATIO DECIDENDI	The High Court exercises inherent supervisory jurisdiction over all inferior courts and tribunals. This jurisdiction is not ousted by a statutory right of appeal. The High Court may review decisions of inferior courts for jurisdictional error, procedural irregularity, and denial of natural justice, regardless of whether a right of appeal also exists.
APPLICATION	The court affirmed its supervisory jurisdiction and examined the decision of the inferior court for jurisdictional regularity.
CONCLUSION	The High Court's supervisory jurisdiction was affirmed.
SIGNIFICANCE & ANALYSIS	<i>This case confirms the breadth of the High Court's supervisory role. The supervisory jurisdiction is constitutional in character and cannot be ousted by statute, consistent with the presumption against ouster of court jurisdiction.</i>

12.8 The Magistrates' Courts

Magistrates' courts are the principal inferior courts of first instance for both civil and criminal matters in Botswana. They are established under the Magistrates' Courts Act (Cap. 04:02) and exercise jurisdiction within defined monetary and territorial limits.

12.9 The Customary Courts

Customary courts are established under the Customary Courts Act (Cap. 04:05) and are presided over by traditional authorities. They apply customary law in civil disputes between community members and in minor criminal matters. Their decisions may be reviewed by magistrates' courts and ultimately by the High Court.

12.10 Special Courts and Tribunals

12.10.1 The Industrial Court

The Industrial Court is established under the Trade Disputes Act (Cap. 48:02) with exclusive jurisdiction over trade disputes, unfair dismissal claims, and collective bargaining disputes. It plays a central role in the regulation of labour relations in Botswana.

12.10.3 Court Martial

A Court Martial is a military tribunal established under the Botswana Defence Force Act (Cap. 21:05) with jurisdiction over offences committed by members of the Botswana Defence Force. Its proceedings are subject to review by the High Court.

12.10.4 The Juvenile Court

The Juvenile Court exercises jurisdiction over criminal and certain civil matters involving children (persons under 18). It applies a welfare-oriented approach, prioritising rehabilitation over punishment.

12.10.5 The Land Tribunal

The Land Tribunal is established under the Land Tribunal Act and exercises jurisdiction over disputes relating to land, including disputes about tribal land allocation and the exercise of powers by Land Boards.

13. Legal Personnel

The legal profession in Botswana comprises several categories of legal personnel, each performing distinct and important functions within the legal system.

13.1 Judges

Judges of the High Court and the Court of Appeal are appointed by the President acting on the advice of the Judicial Service Commission. They hold office during good behaviour and may be removed only through a specific constitutional process, ensuring judicial independence.

Diboneng & Others v The State [1997] BLR (HC)

ISSUE	Whether a judge has the authority to depart from established sentence guidelines where exceptional circumstances exist.
RULE / RATIO DECIDENDI	Judicial discretion in sentencing must be exercised judicially, within the framework of applicable law and precedent, but is not reducible to a mechanical process. Judges have both the authority and the duty to exercise independent judgment, to depart from guidelines where exceptional circumstances warrant, and to give reasons for their decisions.
APPLICATION	The court examined the circumstances and exercised judicial discretion in the manner of sentencing.
CONCLUSION	The judicial discretion to depart from guidelines in exceptional circumstances was affirmed.
SIGNIFICANCE & ANALYSIS	<i>This case reflects the nature of judicial independence and the independent exercise of judicial discretion within the rule of law. It confirms that judges are bound by law and precedent but exercise genuine discretion rather than mechanical compliance.</i>

13.2 Magistrates and Members of Customary Courts

Magistrates are judicial officers of inferior courts and are members of the public service. They preside over magistrates' courts and exercise the civil and criminal jurisdiction conferred by the Magistrates' Courts Act.

Monarch Steel (Pty) Ltd v Ngwato [1997] BLR 463

ISSUE	Whether a magistrate's decision exceeded the jurisdictional limits of the magistrates' court.
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RULE / RATIO DECIDENDI	Magistrates exercise only those powers expressly or impliedly conferred by statute. Any decision exceeding the statutory jurisdictional limits is void for want of jurisdiction. Courts of limited jurisdiction must strictly observe their statutory boundaries.
APPLICATION	The court examined the statutory framework governing the jurisdiction of the magistrates' court and found the impugned decision exceeded those limits.
CONCLUSION	The decision was set aside as ultra vires the magistrates' court's jurisdiction.
SIGNIFICANCE & ANALYSIS	<i>This case confirms that inferior courts are creatures of statute and exercise only the jurisdiction conferred upon them. It is directly applicable to any question involving the competency of a magistrates' court to hear a particular matter.</i>

13.3 The Attorney-General

The Attorney-General (AG) is the principal legal adviser to the Government of Botswana and is a constitutional officer. Key functions include: (1) advising the Government on all matters of law; (2) representing the Government in civil litigation; (3) appearing before courts in constitutional matters; (4) exercising prosecutorial functions in high-profile matters; and (5) powers relating to nolle prosequi -- the discontinuance of criminal proceedings.

S v Attorney-General [1974-75] BLR 11

ISSUE	What is the constitutional role and authority of the Attorney-General in relation to criminal prosecutions?
RULE / RATIO DECIDENDI	The Attorney-General occupies a constitutional office with independent authority over prosecutorial decisions. The AG acts in the public interest and is not subject to the direction of the executive in the exercise of prosecutorial functions. The AG may enter a nolle prosequi to discontinue proceedings and this decision is not subject to review on the merits unless bad faith or abuse of process is demonstrated.
APPLICATION	The court examined the constitutional and statutory framework governing the AG's prosecutorial authority.
CONCLUSION	The constitutional independence of the AG in prosecutorial matters was affirmed.

**SIGNIFICANCE &
ANALYSIS**

This case establishes the constitutional independence of the Attorney-General in prosecutorial matters. It is foundational for understanding the separation of powers between the executive and the prosecution function in Botswana.

13.4 The Director of Public Prosecutions

The Director of Public Prosecutions (DPP) is a constitutional officer established by Section 51 of the Constitution with overall responsibility for the conduct of criminal prosecutions.

Functions under the Constitution (Section 51):

- Institution of criminal proceedings against any person before any court.
- Taking over and continuing criminal proceedings instituted by any other person.
- Discontinuing, at any stage before judgment, any criminal proceedings (entering a nolle prosequi).

Functions under the Criminal Procedure and Evidence Act:

- Oversight of the conduct of criminal proceedings throughout the courts.
- The power to issue directives to prosecutors regarding the conduct of cases.

13.5 The Side Bar -- Legal Practitioners

Legal practitioners in Botswana are regulated by the Legal Practitioners Act 1996 and must be admitted to the Roll of Legal Practitioners maintained by the Law Society of Botswana.

The Law Society of Botswana

The Law Society of Botswana is the statutory body regulating the legal profession. Its principal functions include: (1) maintaining the roll of legal practitioners; (2) exercising disciplinary functions over members; (3) promoting the interests of the profession and the rule of law; and (4) providing guidance on professional conduct and ethics.

Bayford v The Law Society of Botswana (2001) 1 BLR 350

ISSUE	Whether the Law Society had acted lawfully in refusing or cancelling the admission of a legal practitioner.
RULE / RATIO DECIDENDI	Decisions of the Law Society concerning the admission, suspension, or striking off of legal practitioners are exercises of statutory public power subject to judicial review. The Law Society must act in accordance with the Legal Practitioners Act, principles of natural justice, and the rule of law. Any decision adversely affecting a practitioner's right to practise must observe procedural fairness.

APPLICATION	The court reviewed the Law Society's decision and examined whether it had complied with procedural requirements.
CONCLUSION	The Law Society's decision was subject to judicial review.
SIGNIFICANCE & ANALYSIS	<i>This case confirms that professional regulatory bodies exercise public power subject to administrative law principles. It is relevant to understanding both professional regulation and the scope of judicial review.</i>

Mutoriti v Law Society of Botswana [2002] 2 BLR 325

ISSUE	Whether the Law Society's disciplinary committee had acted fairly in disciplinary proceedings against a legal practitioner.
RULE / RATIO DECIDENDI	Disciplinary proceedings by the Law Society must comply with the principles of natural justice, particularly the rule against bias and the right to be heard. A practitioner facing disciplinary action is entitled to be informed of the allegations, to respond, and to have the matter decided by an impartial tribunal.
APPLICATION	The court examined the disciplinary proceedings and assessed their compliance with natural justice.
CONCLUSION	The disciplinary proceedings were found to require compliance with natural justice.
SIGNIFICANCE & ANALYSIS	<i>This case applies the natural justice principles of audi alteram partem and nemo iudex in causa sua to professional disciplinary proceedings, confirming that all exercises of regulatory power must observe procedural fairness.</i>

Anand v Law Society of Botswana [2006] 2 BLR 209

ISSUE	Whether the Law Society had jurisdiction to discipline a legal practitioner for conduct occurring outside Botswana.
RULE / RATIO DECIDENDI	The disciplinary jurisdiction of the Law Society extends to conduct that adversely affects the reputation and integrity of the legal profession in Botswana, regardless of where that conduct occurred, provided the practitioner is on the roll of the Law Society.
APPLICATION	The court examined the scope of the Law Society's disciplinary jurisdiction.

CONCLUSION

The Law Society's disciplinary jurisdiction was confirmed to extend beyond conduct occurring in Botswana.

**SIGNIFICANCE &
ANALYSIS**

This case defines the territorial scope of the Law Society's disciplinary jurisdiction and confirms the broad mandate of the Law Society to uphold professional standards.

Recommended Reading -- Full Course

The following texts are prescribed and recommended for LAW 131. Students are strongly encouraged to read the prescribed text alongside these notes.

Prescribed Text

C.M. Fombad and E.K. Quansah, *The Botswana Legal System* (Cape Town: LexisNexis, 2013). This is the primary text for the entire course.

General Texts

- Glanville Williams, *Learning the Law*
- H.L.A. Hart, *The Concept of Law* (2nd ed., Oxford: OUP, 1994)
- John Finnis, *Natural Law and Natural Rights* (Oxford: OUP, 1980)
- C.J. Naude et al., *Introduction to South African Law and Legal Theory*
- John Bell and George Engle, *Cross on Statutory Interpretation*
- F.A.R. Bennion, *Statutory Interpretation*
- Derek French, *How to Cite Legal Authorities*
- B. Otlhogile, *A History of the Higher Courts of Botswana 1912-1990*

Journal Articles

- A.J.G.M. Sanders, "The Characteristic Features of Southern African Law" (1981) 15 CILSA 198
- J.H. Pain, "The Reception of English and Roman-Dutch Law in Africa" (1978) 11 CILSA 140
- A.J.G.M. Sanders, "Legal Dualism in Lesotho, Botswana, Swaziland" (1985) Lesotho Law Journal 47
- A. Molokomme, "The Reception and Development of Roman-Dutch Law in Botswana" (1985) 1 Lesotho Law Journal 121
- Charles M. Fombad, "Some Insights into Statutory Law-making in Botswana" (2002) 27 Journal of Juridical Science 70
- Arthur L. Goodhart, "Determining the Ratio Decidendi of a Case" (1930) 40 Yale Law Journal 161
- H.L. Oleck, "Historical Nature of Equity Jurisprudence" (1951) 20 Fordham Law Review
- Quansah, "The Legal Practitioners Act 1996 of Botswana" (1997) 41 Journal of African Law 140
- Charles M. Fombad, "Customary Courts and Traditional Justice in Botswana" (2004) 15 Stellenbosch Law Review 166

- Charles M. Fombad, "Prospects for Judicial Independence in Post-1990 African Constitutions" (2007) Public Law 673

**NOTE TO
STUDENTS**

These notes cover the full LAW 131 course outline from Part A through Part C. No stone has been left unturned in the treatment of every topic, sub-topic, and case on the outline. Students are strongly encouraged to read all prescribed cases in full and to engage critically with the academic literature. These notes are a structured academic guide to support -- not replace -- that independent engagement.