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COURSE NOTES

LAW 135

Law and Social Research Methods

Legal Research, Writing and Social Science Methods

KNOW THE LAW. OWN THE ROOM.

NOTE TO STUDENTS

These notes are a study aid produced by The Legal Vault. They supplement but do **not** replace your lecture notes, prescribed texts, relevant statutes and legislation, and reading the cases in full. Always verify citations and section numbers against the primary sources before relying on them in assessment.

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PART 1

LEGAL RESEARCH AND WRITING*Research, Writing, Law Reporting, CALR and Legislative Drafting*

I. An Outline of Legal Research

1. History of Legal Writing

Legal writing has ancient roots. In Roman law, the jurists of the classical period (1st to 3rd centuries AD) produced highly sophisticated legal texts -- the Digest of Justinian is essentially an anthology of classical legal writing. In the common law tradition, the Year Books of the 13th to 16th centuries were the first systematic attempts to record judicial decisions in writing. The development of modern law reporting in England from the 17th century onward, and the emergence of legal periodicals and monographs in the 19th century, established the foundations of modern legal writing.

In Botswana, the tradition of legal writing is relatively recent but is developing rapidly. The establishment of the University of Botswana Faculty of Law, the publication of the Botswana Law Reports, and the growing body of academic writing on Botswana law by scholars such as Fombad, Quansah, and others have contributed to the development of a distinctive legal writing tradition in Botswana.

The relationship between legal research and legal writing is intimate and indissoluble. Good legal writing is always the product of thorough legal research -- the quality of a legal argument, opinion, or academic paper depends fundamentally on the quality and depth of the research that underlies it. As the course outline emphasises, a good lawyer is one who knows how to find the law, not merely one who knows what the law is.

2. Sources of Law in Legal Research

2.1 Primary Sources

DEFINITION: Primary Sources of Law

The original, authoritative legal materials that constitute the law itself. Primary sources are binding (or potentially binding) on courts and legal actors. They include legislation (constitutions, statutes, subsidiary legislation), judicial decisions (case law), and treaties and other international legal instruments.

The principal primary sources of law relevant to legal research in Botswana are:

- **The Constitution of Botswana 1966** -- the supreme law of Botswana. Any research involving constitutional questions must begin with the Constitution itself.
- **Acts of Parliament** -- Acts of the National Assembly of Botswana, promulgated in the Botswana Government Gazette. For Botswana law, the primary legislative database is Botswana e-laws (www.botswanalaws.com) and the official Government Gazette.
- **Subsidiary Legislation** -- regulations, statutory instruments, notices, and by-laws made under the authority of an enabling Act of Parliament.
- **Judicial Decisions (Case Law)** -- decisions of the Court of Appeal, the High Court, magistrates' courts, and other courts and tribunals. In Botswana, decisions are reported in the Botswana Law Reports (BLR) and are available on SAFLII (Southern African Legal Information Institute) at www.saflii.org.
- **International Legal Instruments** -- treaties, conventions, and international customary law that Botswana has adopted or ratified. These are relevant where domestic law is silent or where they serve as interpretive aids.

2.2 Secondary Sources

DEFINITION: Secondary Sources of Law

Materials that describe, explain, analyse, or comment upon the primary sources of law. Secondary sources are not themselves law but are valuable research tools that help the researcher locate, understand, and apply the primary sources. They include textbooks, journal articles, legal encyclopaedias, case digests, and commentaries.

The principal secondary sources used in legal research in Botswana include:

- **Legal Textbooks** -- comprehensive treatments of areas of law. For Botswana law, the primary secondary source is Fombad and Quansah, *The Botswana Legal System* (2nd ed., LexisNexis, 2013).
- **Legal Periodicals and Journal Articles** -- academic articles published in peer-reviewed law journals. Relevant journals for Botswana legal research include the University of Botswana Law Journal, the Botswana Notes and Records, the Comparative and International Law Journal of Southern Africa (CILSA), the Journal of African Law, and the South African Law Journal.
- **Legal Encyclopaedias** -- comprehensive, regularly updated digests of the law, organised alphabetically by topic. Halsbury's Laws of England is the principal English legal encyclopaedia.
- **Case Digests** -- summaries of judicial decisions organised by subject matter, enabling the researcher to locate relevant cases quickly.

- **Dissertations and Theses** -- academic research undertaken for postgraduate degrees. Significant Botswana legal scholarship has been produced in this form, including Radijeng's D.Phil thesis on customary law and gender equality.

2.3 Additional Authorities

In addition to primary and secondary sources, legal research may draw on the following additional authorities:

- **Law Reform Commission Reports** -- reports of the Botswana Law Reform Commission and similar bodies in other jurisdictions recommending changes to the law.
- **Legislative History (Hansard)** -- the official record of parliamentary debates, which may be used as an aid to statutory interpretation under the mischief rule.
- **Practice Directions and Court Rules** -- directions issued by the courts governing practice and procedure.
- **Legal Opinions and Memoranda** -- formal legal opinions issued by government legal departments, including opinions of the Attorney-General.
- **Foreign Law** -- the law of other jurisdictions, particularly South Africa, England, Zimbabwe, and other common law countries in Southern Africa, used as persuasive authority.

II. The Legal Research Process

1. Preliminary Considerations

Before beginning any legal research project, the researcher must address several preliminary questions:

- **What is the precise legal question?** -- Legal research must be focused on a clearly defined legal question or problem. A vague or overly broad question will produce unfocused and unmanageable research. The researcher must identify the precise legal issue to be investigated.
- **What jurisdiction and legal system are involved?** -- The applicable legal system determines which primary sources are binding and which are merely persuasive.
- **What is the time frame?** -- Has the law changed recently? Is the researcher looking for the current law or the law as it was at a particular date?
- **What resources are available?** -- Which databases, libraries, and other research resources are accessible?

2. The Research Process

Legal research follows a systematic process that may be described in the following steps:

- (1) **Identify and define the legal problem** -- state the legal question with precision. Distinguish legal from factual issues.
- (2) **Conduct background research** -- begin with secondary sources (textbooks, encyclopaedias) to gain an overview of the area of law and identify the relevant primary sources.
- (3) **Locate the primary sources** -- identify the specific statutes, regulations, and cases that are directly relevant to the legal question.
- (4) **Read and analyse the primary sources** -- read each statute and case carefully, identifying the ratio decidendi of each case and the precise scope of each statutory provision.
- (5) **Update the research** -- check that the statutes are still in force and have not been amended, and that the cases have not been overruled, distinguished, or reversed.
- (6) **Synthesise the research** -- bring together the results of the research into a coherent analysis that answers the legal question.
- (7) **Write up** -- produce the written output (advice, opinion, essay, or research paper) that communicates the results of the research clearly and effectively.

3. Selection of Topic and Researching the Topic

For the purposes of the LAW 135 term paper, the selection of a research topic is a critical first step. The following criteria should guide the selection of a topic:

- **Significance** -- the topic should raise a significant legal question that has practical or theoretical importance.
- **Manageability** -- the topic should be narrow enough to be researched and written about within the word limit and time frame of the assignment.
- **Originality** -- the topic should permit some original analysis or contribution, not merely a description of existing law.
- **Availability of sources** -- there should be sufficient primary and secondary sources available to support a well-researched paper.

Once a topic has been selected, the research process should proceed systematically through the steps identified above. The researcher should keep detailed notes of all sources consulted, including full citation details, to facilitate accurate referencing.

4. Detailed Outline and Plan of Work

Before beginning to write, the researcher should prepare a detailed outline of the paper. A good outline serves as a roadmap for the research and writing process and ensures that the paper has a logical, coherent structure. A typical outline for a legal research paper includes:

- **Introduction** -- states the research question, explains its significance, outlines the structure of the paper, and states the thesis or argument.
- **Background/Context** -- provides the legal and factual context necessary to understand the research question.
- **Analysis** -- the main body of the paper, in which the legal question is analysed systematically by reference to the primary and secondary sources.
- **Conclusion** -- summarises the findings of the research and states the answer to the research question.
- **Bibliography/References** -- lists all sources cited in the paper in the required citation format.

5. General Matters of Form and Departmental Guidelines

The University of Botswana Department of Law has specific guidelines for the format and presentation of research papers. Students must comply with these guidelines in all assessed work. General matters of form include:

- **Citation style** -- legal research papers use a specific citation style for cases, statutes, and secondary sources. Cases are cited by party names, year, volume, law report abbreviation,

page number, and court. Statutes are cited by their short title and year.

- **Word limit** -- all assessed work has a specified word limit that must be respected.
- **Font and formatting** -- typically Times New Roman 12pt or Arial 11pt, double-spaced, with footnotes in a smaller font.
- **Plagiarism** -- all work must be the student's own. Plagiarism -- the presentation of another's work as one's own -- is a serious academic offence. All sources must be properly cited.

EXAM TIP

LAW 135 has no examination. The grades are based entirely on continuous assessment: two assignments (40%) and one term paper (60%). Students must therefore pay close attention to the requirements of each assessment task and to the departmental guidelines on form and citation.

III. Computer-Based Legal Research (CALR)

1. Introduction

Computer-Assisted Legal Research (CALR) refers to the use of computer technology and digital databases to conduct legal research. The advent of CALR has transformed legal research, making it faster, more comprehensive, and more accessible than traditional print-based research. In Botswana and other Southern African jurisdictions, CALR has become an indispensable tool for legal practitioners and researchers.

2. CALR -- Advantages and Disadvantages

Advantages of CALR	Disadvantages of CALR
Speed -- electronic databases can be searched in seconds, whereas manual searching of print volumes is time-consuming.	Technical dependency -- CALR requires internet connectivity and computer access, which may not always be available.
Comprehensiveness -- electronic databases contain vastly more material than any individual library, including materials from multiple jurisdictions.	Information overload -- the sheer volume of materials available electronically can make it difficult to identify the most relevant sources.
Currency -- online databases are updated more frequently than print publications and may include very recent decisions not yet available in print.	Copyright restrictions -- access to some commercial databases requires a subscription, which may be expensive.
Full-text searching -- electronic databases allow full-text keyword searching, enabling the researcher to locate materials by subject matter without knowing the specific citation.	Reliability concerns -- not all online sources are reliable or authoritative; the researcher must assess the credibility of online sources carefully.
Accessibility -- online databases can be accessed from any location with internet connectivity.	Digital divide -- unequal access to technology and internet connectivity may limit the benefits of CALR for researchers in some jurisdictions.

3. Electronic Information Formats

Legal materials are available in electronic format in several ways:

- **Online databases (subscription)** -- commercial databases such as LexisNexis, Westlaw, and JUTASTAT provide comprehensive collections of legal materials, including case law, legislation, and secondary sources, for a subscription fee. LexisNexis is the primary commercial database used in Botswana.
- **Open access resources** -- freely available online collections of legal materials, including SAFLII (Southern African Legal Information Institute) and the Botswana e-laws project.
- **PDF and electronic documents** -- many primary and secondary sources are available in PDF format, either through official government websites or through academic repositories such as SSRN (Social Science Research Network).
- **Legal blogs and online commentary** -- while not authoritative sources, legal blogs and online commentary can be useful for identifying recent developments and emerging issues.

4. Copyright Issues in Legal Research

Copyright is an important consideration in legal research, particularly when reproducing or reproducing materials from electronic sources. Key copyright principles relevant to legal researchers include:

- Legislation (statutes and subsidiary legislation) is generally not subject to copyright protection in Botswana, as government publications are typically in the public domain.
- Judicial decisions are generally not subject to copyright protection, though the editorial additions made by law reporters (headnotes, catchwords, etc.) may be protected.
- Secondary sources -- textbooks, journal articles, and other academic works -- are protected by copyright. Reproduction of substantial portions of such works without permission or appropriate citation constitutes copyright infringement.
- The fair dealing exception allows limited reproduction of copyright materials for the purposes of research, study, criticism, and review without constituting infringement.
- **Section 8 of the Interpretation Act** -- students must be aware of the provisions of the Interpretation Act relevant to the construction of legislation, including the rules governing the interpretation of gender-neutral language and defined terms.

5. Legal Research Databases Relevant to Botswana

Database	Coverage	Access
SAFLII (Southern African Legal Information Institute)	Botswana and Southern African case law, legislation, and other legal materials. Free and comprehensive.	Free at www.saflii.org
Botswana e-laws	Official consolidated legislation of Botswana.	Free at www.botswanaanalaws.com
LexisNexis	Comprehensive South African and international legal materials; Botswana Law Reports.	Subscription (UB library)
SSRN (Social Science Research Network)	Academic papers and working papers in law and social sciences from around the world.	Free at www.ssrn.com
HeinOnline	Historical legal journals, international legal materials, and US federal documents.	Subscription (UB library)
Google Scholar	Academic articles, case law (in some jurisdictions), and books.	Free at scholar.google.com

IV. Legal Writing

1. Introduction to Legal Writing and Skills

Legal writing is a specialised form of writing that communicates legal analysis, argument, and advice clearly, precisely, and persuasively. It is a core professional skill for lawyers. The ability to write well is not optional for a lawyer -- it is essential. Poor legal writing can result in loss of cases, ineffective advice, and unenforceable contracts. Conversely, excellent legal writing is a mark of professional distinction and can have decisive practical consequences.

The principal forms of legal writing that a lawyer in Botswana will be expected to produce include:

- **Legal opinions and memoranda** -- written advice on a point of law, addressed to a client or to a senior colleague.
- **Pleadings** -- formal documents initiating or defending legal proceedings (summonses, declarations, pleas, etc.).
- **Contracts and other transactional documents** -- legal instruments creating legally binding rights and obligations.
- **Correspondence** -- formal legal letters to clients, opposing counsel, courts, and government bodies.
- **Academic legal writing** -- essays, research papers, dissertations, and journal articles.
- **Draft legislation** -- bills and subsidiary legislation prepared for Parliament or for regulatory bodies.

2. Essentials of Legal Writing

Good legal writing has several essential characteristics:

- **Clarity** -- the writing must be clear and easy to understand. Legal writing should not be obscure or unnecessarily complex. The goal is communication, not mystification.
- **Precision** -- legal writing must be precise. Vague or ambiguous language can have serious practical consequences, as illustrated by the punctuation cases discussed below.
- **Conciseness** -- good legal writing says what it needs to say in as few words as possible. Unnecessary verbiage weakens legal writing.
- **Organisation** -- legal writing must be logically organised, so that the reader can follow the argument from beginning to end without confusion.
- **Authority** -- legal writing must be supported by appropriate legal authority. Every significant legal proposition must be supported by a reference to a primary or secondary source.

2a. Using the IRAC Method

DEFINITION: IRAC

The IRAC method is the foundational framework for legal analysis and writing. It stands for: Issue, Rule, Application, Conclusion. Every legal analysis -- whether in an exam answer, an opinion, a legal memorandum, or an academic essay -- should follow this structure.

The IRAC method breaks down as follows:

- **Issue** -- state the precise legal question or issue to be resolved. The issue should be framed as a specific, answerable legal question, not as a broad topic.
- **Rule** -- state the legal rule, principle, or test that governs the issue. This includes the relevant statute, the ratio decidendi of the applicable cases, or both. The rule must be stated precisely, with full citation to the relevant authority.
- **Application** -- apply the legal rule to the specific facts of the case or problem. This is the most important and often the most difficult part of the IRAC analysis. The application must be thorough, systematic, and fact-specific. It must explain not merely what the rule is but how and why it applies (or does not apply) to the particular facts.
- **Conclusion** -- state the answer to the legal question posed in the Issue section. The conclusion should be clear and definitive, following logically from the Rule and Application sections.

PRACTICAL TIP

The most common weakness in student legal writing is inadequate application. Students often state the rule correctly but then apply it superficially, without engaging with the specific facts. A thorough application requires you to identify every relevant fact and explain precisely how the rule applies to each of them. Never assume the application is obvious -- explain it.

2b. Using the FANBOYS Rule

FANBOYS is a mnemonic for the seven coordinating conjunctions in English: **F**or, **A**nd, **N**or, **B**ut, **O**r, **Y**et, **S**o. In legal writing, the FANBOYS rule is relevant to sentence construction, particularly in relation to the use of commas and the joining of independent clauses.

The key principle is: when two independent clauses are joined by a coordinating conjunction (FANBOYS), a comma should be placed before the conjunction.

Example:

Correct: "The defendant drove negligently, and the plaintiff was injured as a result."

Incorrect: "The defendant drove negligently and the plaintiff was injured as a result."

In the context of legal drafting, the precise use of conjunctions and punctuation is critically important, as the cases on the Oxford comma (discussed below) illustrate.

2c. Punctuation Matters in Legal Writing

Punctuation is not merely a stylistic concern in legal writing -- it can determine the meaning of a legal text and have significant practical and financial consequences. The following cases illustrate the critical importance of punctuation in legal writing and drafting.

The Oxford Comma

The Oxford comma (also called the serial comma) is a comma placed before the final coordinating conjunction in a list of three or more items. Its presence or absence can fundamentally change the meaning of a legal text, as illustrated by the following cases:

O'Connor and Others v Oakhurst Dairy No 16-1901 (1st Circuit 2017)

This American case turned entirely on the presence or absence of an Oxford comma. A Maine statute provided that overtime pay exemptions applied to activities including "the canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of" various goods. The question was whether "packing for shipment or distribution" described one activity (packing) or two (packing for shipment, and distribution). Because there was no Oxford comma after "shipment", the court found the text ambiguous and ruled in favour of the dairy workers seeking overtime pay -- a ruling worth millions of dollars. The case is a compelling illustration of the practical consequences of punctuation in legal drafting.

Roger Cables Communication v Aliant Telecom CRTC 2006-45

This Canadian regulatory decision also turned on the interpretation of a comma in a contract. A comma in the disputed clause changed the meaning of the contract in a way that cost one party approximately one million Canadian dollars. The Canadian Radio-Television and Telecommunications Commission held that the placement of the comma meant that a rate clause applied throughout the duration of the contract rather than only in the final year, as one party had intended. The case was ultimately resolved in favour of the party that had benefited from the comma, illustrating that drafting errors cannot always be corrected after the fact.

Categories of commas in legal writing (as identified in the course):

- **Basic commas** -- commas that an educated reader would expect in any well-written text, placed according to standard grammatical rules.
- **Esoteric commas** -- commas that are required in sophisticated sentences to prevent ambiguity or misreading, particularly in complex statutory or contractual provisions.

- **Deadly commas** -- commas whose presence or absence changes the meaning of a legal text in a way that can have serious legal consequences (as in the Oakhurst Dairy and Aliant Telecom cases).

Sandford v Raikes (1816) 1 Mer 646

One of the earliest English cases to address the significance of punctuation in a legal document. The case established the principle that punctuation, while not determinative of meaning, may be taken into account as a contextual aid to statutory or contractual interpretation. The court recognised that punctuation could affect the meaning of a legal text and that courts must be attentive to its use.

Houston v Burns [1918] AC 337

The House of Lords addressed the interpretation of a statutory provision in which the meaning turned on the proper reading of punctuation, particularly commas. The court affirmed that while punctuation is not a reliable guide to parliamentary intention on its own, it may be used as one contextual factor in the interpretation of an ambiguous statutory provision.

The King v Casement [1917] 1 KB 98

A significant case in the history of legal interpretation in which a comma played a role in determining the meaning of the Treason Act 1351. The case involved the question of whether the Act applied to acts of treason committed outside the realm of England. The court's interpretation of the statutory language, including its punctuation, had life-or-death consequences for the accused (Sir Roger Casement, who was convicted of treason and executed). The case illustrates the deadly seriousness of precise legal interpretation.

V. Law Reporting

1. Introduction

DEFINITION: Law Reporting

The systematic publication of judicial decisions in a form accessible to lawyers, courts, and the public. Law reports record the decisions of courts and, crucially, the legal reasoning underlying those decisions. Law reporting is the foundation of the doctrine of judicial precedent in common law systems.

Law reporting is not merely an administrative convenience -- it is a constitutional and legal necessity in common law systems. Without accurate and accessible law reports, the doctrine of binding precedent cannot operate effectively, and legal certainty and consistency -- the hallmarks of the rule of law -- cannot be maintained.

2. The Importance of Law Reporting

2.1 The Common Law System and the Doctrine of Judicial Precedent

In common law systems (including Botswana), the doctrine of binding precedent (*stare decisis*) requires courts to follow the decisions of superior courts in cases involving the same legal question. This doctrine presupposes that judicial decisions are accessible -- a court cannot follow a precedent it does not know about. Law reports are therefore the practical foundation of the doctrine of precedent.

Without law reports, the common law would become uncertain and inconsistent. The development of the common law through judicial decision-making depends on judges having access to previous decisions. Law reports make this access possible.

2.2 The Heritage from Roman Law

While the doctrine of binding precedent is a distinctly common law institution, the practice of recording and publishing legal decisions has roots in the Roman law tradition. The *Corpus Juris Civilis* of Justinian is in essence a collection of legal texts -- including imperial constitutions and the writings of classical jurists -- that served a function analogous to modern law reports: making authoritative legal materials accessible for reference and application.

In the Civil law tradition, there is no doctrine of binding precedent, but courts do in practice follow earlier decisions (*jurisprudence*). The publication of court decisions in official collections makes this practice possible.

2.3 The German Influence

German legal scholarship has made significant contributions to the development of law reporting and legal documentation. The systematic organisation of legal materials, the development of comprehensive indices and digests, and the emphasis on accessible and well-organised legal publications in the German tradition have influenced law reporting practice in other jurisdictions.

3. Law Reporting in Botswana

The history of law reporting in Botswana reflects the development of the Botswana legal system itself. Key developments include:

- **The High Court of Bechuanaland Law Reports (HCTLR) 1926-1953** -- the earliest collection of reported cases from the Bechuanaland Protectorate, covering the period from 1926 to 1953.
- **The Botswana Law Reports (BLR)** -- the official series of law reports for Botswana, published since independence in 1966. The BLR is the primary source of reported case law for Botswana and is cited in the standard form: [year] BLR [page] ([court]).
- **SAFLII (Southern African Legal Information Institute)** -- an open-access online repository of judicial decisions from Southern Africa, including Botswana. SAFLII provides free online access to a large and growing collection of Botswana court decisions, including many decisions not published in the BLR.
- **Botswana e-laws** -- the official online database of Botswana legislation, maintained by the Government of Botswana. It provides free access to all current consolidated legislation.
- **LexisNexis** -- the primary commercial legal database used in Botswana, available through the University of Botswana library.

4. Criteria for Reportability of Judgments and Unreported Cases

Not all judicial decisions are published in official law reports. Decisions are selected for publication on the basis of their legal significance. The criteria for reportability typically include:

- The decision establishes a new legal principle or applies an existing principle to a new set of facts in a significant way.
- The decision resolves a conflict between existing authorities.
- The decision provides a significant restatement or clarification of an existing rule.
- The decision is of general public importance.
- The decision contains a significant analysis of an important point of statute or constitutional law.

Criteria for Reportability of Judgments 2002 (1) SA 905

This South African authority examines the criteria applied in determining whether a judgment is suitable for publication in an official law report. The criteria include novelty, significance, and practical utility. A judgment that merely applies well-established principles to straightforward facts does not warrant publication. The case is directly relevant to understanding the selection process for the Botswana Law Reports and to the question of when unreported decisions should be cited in legal argument.

Roberts Petroleum Ltd v Bernard Ltd [1983] 2 AC 192

The House of Lords addressed the practice of citing unreported decisions in legal argument. The court cautioned against the indiscriminate citation of unreported decisions, which had become a significant practical problem. The court held that unreported decisions should only be cited where they provide genuinely new guidance on a point of law not covered by reported decisions, and should not be cited merely to add bulk to a legal argument. This principle is directly applicable in Botswana practice.

5. Online Law Reports -- Open Access

- **SAFLII (Southern African Legal Information Institute)** at www.saflii.org -- provides free, open access to case law and legislation from Botswana, South Africa, Zimbabwe, Namibia, Lesotho, Swaziland, and other Southern African jurisdictions. For Botswana researchers, SAFLII is the primary open access source of case law.
- **Botswana e-laws project** at www.botswanalaws.com -- provides free access to all current consolidated legislation of Botswana, including the Constitution, Acts of Parliament, and subsidiary legislation.
- **African Legal Information Institute (AfricanLII)** -- a regional network of legal information institutes providing free access to African legal materials.
- **CommonLII** -- a global network of legal information institutes providing free access to common law materials from around the world.

6. The Structure and Types of Law Reports

6.1 Identifying Different Law Reports

Law reports are identified by their standard abbreviations. The principal law reports relevant to Botswana legal research include:

Abbreviation	Full Name	Jurisdiction
BLR	Botswana Law Reports	Botswana

HCTLR	High Court of Bechuanaland/Botswana Law Reports (1926-1953)	Botswana/Bechuanaland
SA	South African Law Reports	South Africa
SALJ	South African Law Journal	South Africa (journal)
All ER	All England Law Reports	England and Wales
AC	Appeal Cases (Law Reports)	England and Wales
QB/KB	Queen's/King's Bench Division Reports	England and Wales
WLR	Weekly Law Reports	England and Wales
CILSA	Comparative and International Law Journal of Southern Africa	Regional

6.2 The Structure of a Report Case (Case Brief)

A reported case typically contains the following elements:

- **Citation** -- the full citation of the case: party names, year, volume, law report series, page, and court abbreviation. Example: *Attorney-General v Dow* [1992] BLR 119 (CA).
- **Catchwords** -- keywords identifying the subject matter of the decision, used for indexing and retrieval.
- **Headnote** -- a summary of the facts, issues, and decision of the case, prepared by the law reporter. The headnote is not part of the judgment and is not authoritative -- it is a secondary source. Students must read the judgment itself, not merely the headnote.
- **Counsel** -- the names of the counsel who argued the case.
- **Judgment** -- the full text of the court's decision, including the facts, the legal issues, the analysis and reasoning, and the order made. The judgment is the authoritative part of the report.
- **Identifying the Ratio Decidendi** -- the binding element of the judgment is the ratio decidendi: the legal principle based on the material facts of the case that was essential to the decision. Students must be able to distinguish the ratio from obiter dicta and from the headnote's summary.
- **Obiter Dictum** -- observations by the court not essential to the decision. Obiter dicta are not binding but may be persuasive, particularly when expressed by a senior court or a respected judge.

Warren v Keen [1954] 1 QB 15

This case is included in the reading list for Section V of the course. It provides a practical illustration of the structure of a reported English case and the relationship between the ratio decidendi and the obiter dictum. Students should use this case to practise the skill of case briefing -- extracting the key elements of a reported decision and presenting them in a structured format.

VI. Drafting of Legislation

1. The Law Making Process

The law-making process in Botswana involves the following principal stages (as examined in detail in LAW 131 and LAW 135):

- **Policy development** -- the identification of a policy need or problem that requires a legislative response. Policy development typically involves consultation with stakeholders, research into comparative practice, and the preparation of a policy paper or white paper.
- **Legislative instruction** -- the government department responsible for the proposed legislation provides detailed instructions to the Parliamentary Counsel (the government's legislative drafter) specifying the objectives and content of the proposed legislation.
- **Drafting** -- the Parliamentary Counsel prepares a draft bill in accordance with the legislative instructions.
- **Parliamentary process** -- the bill is introduced in the National Assembly and proceeds through the three readings and committee stage (as described in LAW 131).
- **Presidential assent and commencement** -- the bill becomes law upon Presidential assent and comes into force on the commencement date.

2. Introduction to Legislative Drafting

Legislative drafting is the technical process of translating policy intentions into legally effective statutory language. It is one of the most demanding forms of legal writing, requiring the drafter to achieve precision, clarity, and comprehensiveness simultaneously. A well-drafted statute is one that:

- Clearly and unambiguously states the policy intention.
- Is internally consistent and free from contradiction.
- Is consistent with the existing body of law.
- Is accessible and understandable to the persons it governs.
- Is capable of effective enforcement.

3. The Drafting Process

The legislative drafting process involves the following steps:

- (1) **Understanding the policy intent** -- the drafter must fully understand the policy objectives of the proposed legislation and the problems it is intended to solve.
- (2) **Legal research** -- the drafter researches the existing law in the relevant area, including any legislation that will need to be amended or repealed, and comparative legislative models from other jurisdictions.

(3) Structural planning -- the drafter plans the overall structure of the bill, dividing it into parts, chapters, and sections as appropriate.

(4) Drafting -- the drafter produces a first draft, using plain English (or plain Setswana, as the case may be) while maintaining legal precision.

(5) Review and revision -- the draft is reviewed by the instructing government department, legal advisers, and other stakeholders. Revisions are made in response to their comments.

(6) Final approval -- the final draft is approved by the government and introduced in Parliament.

4. Legislative Structure

A well-structured Act of Parliament typically contains the following elements:

- **Short title** -- the official name by which the Act is known. Example: "This Act may be cited as the Marriage Act 2000."
- **Long title** -- a descriptive statement of the purposes of the Act. Example: "An Act to provide for the registration of marriages and for related purposes."
- **Preamble** (where used) -- a statement of the background and purposes of the Act.
- **Interpretation section** -- defines key terms used in the Act.
- **Operative provisions** -- the main body of the Act, divided into Parts, Divisions, sections, subsections, paragraphs, and sub-paragraphs as necessary.
- **Transitional provisions** -- provisions governing the transition from the old law to the new law.
- **Savings** -- provisions preserving existing rights and obligations.
- **Repeals and amendments** -- provisions repealing or amending earlier legislation.
- **Schedules** -- supplementary material appended to the Act, forming an integral part of it.
- **Commencement provision** -- specifies when the Act comes into force.

5. Amending Legislation

Amending legislation modifies an existing Act without repealing it entirely. Amendments may be:

- **Express amendments** -- specific provisions of the principal Act are identified and modified. Express amendments take one of three forms: (1) substitution (replacing existing text with new text); (2) insertion (adding new text); and (3) deletion (removing existing text).
- **Implied amendments** -- the new legislation is inconsistent with the principal Act, with the result that the earlier provision is impliedly amended or repealed (*lex posterior derogat priori*).

6. Subsidiary Legislation

Subsidiary legislation (also called delegated legislation or secondary legislation) is legislation made under a power delegated by an Act of Parliament (the enabling Act). In Botswana, subsidiary legislation is governed by the Statutory Instruments Act (Cap 01:05). Subsidiary legislation may take various forms, including:

- **Regulations** -- the most common form of subsidiary legislation, made by a minister or other authority under a specific enabling provision.
- **Rules** -- procedural rules governing the conduct of legal proceedings or the operation of regulatory bodies.
- **Notices** -- formal notifications required by statute.
- **By-laws** -- local legislation made by local authorities within the powers conferred by the Local Government Act.

DRAFTING PRINCIPLE

The golden rule of legislative drafting is: say what you mean and mean what you say. Every word in a statute should be there for a reason, and every word should say precisely what the drafter intends. Ambiguity in statutory language -- however innocent in origin -- can have unintended and costly consequences, as the punctuation cases discussed in Section IV illustrate.

PART 2

SOCIAL SCIENCE RESEARCH METHODS*Research Design, Data Collection and Analysis*

1. Introduction to Social Science Research Methods in Law

Social science research methods are tools and techniques for systematically investigating social phenomena -- including legal phenomena -- through empirical inquiry. They provide a means of going beyond the "black letter" of the law and investigating how law actually operates in social context: how it is understood, applied, resisted, and transformed by social actors.

The relationship between law and the social sciences is complex and contested. Some legal scholars insist that law is a purely normative discipline, concerned with the internal logic of legal rules rather than with empirical facts about society. Others argue that law is inevitably embedded in social context and cannot be properly understood without the tools of social science research.

For the purposes of LAW 135, social science research methods are introduced as complementary to -- not replacements for -- traditional doctrinal legal research. The goal is to equip students with a broader range of research tools that can enhance legal research and legal analysis.

2. Research Design

DEFINITION: Research Design

A plan or framework for conducting a research project. It specifies the research question, the methodology to be used, the population to be studied, the data collection instruments, the data analysis methods, and the expected outputs. A well-designed research project produces results that are valid (measuring what they claim to measure), reliable (producing consistent results), and generalisable (applicable beyond the specific cases studied).

The key elements of a research design for a legal research project are:

- **Research question** -- the specific question that the research is designed to answer. For legal social research, the research question may be doctrinal (what is the law?) or empirical (how is the law applied in practice?).
- **Research objectives** -- the specific goals that the research is designed to achieve.

- **Research methodology** -- the overall approach to the research: qualitative, quantitative, or mixed methods.
- **Research methods** -- the specific techniques used to collect and analyse data.
- **Ethical considerations** -- all research involving human subjects must comply with ethical requirements, including informed consent, confidentiality, and the avoidance of harm.

3. Quantitative and Qualitative Research

Dimension	Quantitative Research	Qualitative Research
Purpose	Measure, count, and statistically analyse social phenomena	Explore, describe, and interpret social phenomena in depth
Data type	Numerical data (statistics, surveys with closed questions)	Non-numerical data (interviews, observations, documents)
Sample size	Typically large, statistically representative samples	Typically small, purposively selected samples
Analysis	Statistical methods (frequencies, correlations, regressions)	Interpretive methods (thematic analysis, content analysis)
Validity	Internal validity (causal claims); external validity (generalisability)	Trustworthiness; transferability; credibility
Examples in law	Crime statistics; case outcome data; court delay statistics	Interviews with magistrates; observation of court proceedings; analysis of legal texts
Strengths	Objective; reproducible; generalisable to large populations	Contextually rich; sensitive to complexity; flexible
Weaknesses	May miss context; reductive; measures only what can be quantified	Time-consuming; not generalisable in same way; subject to researcher bias

4. Population of the Study

The population of a study is the complete set of entities (persons, cases, documents, events) from which the researcher wishes to draw conclusions. In legal social research, the population may include:

- Individuals (lawyers, judges, litigants, community members).
- Institutions (courts, law firms, government departments, NGOs).

- Documents (court decisions, statutes, contracts, legal correspondence).
- Events (court hearings, community meetings, legislative debates).

Because it is rarely possible to study the entire population, researchers typically work with a **sample** -- a selected subset of the population. The method of sampling determines whether and to what extent the findings of the research can be generalised to the broader population.

Principal sampling methods:

- **Random sampling** -- every member of the population has an equal chance of being selected. Produces a statistically representative sample.
- **Purposive sampling** -- the researcher selects cases or participants based on their relevance to the research question. Used in qualitative research where depth rather than representativeness is the goal.
- **Snowball sampling** -- used where the population is difficult to identify; initial participants refer the researcher to other relevant participants.
- **Convenience sampling** -- selecting participants based on their accessibility. Least rigorous but sometimes necessary in practice.

5. Data Collection Instruments

5.1 Interviews

Interviews are one of the most widely used qualitative data collection methods in legal social research. They involve the researcher asking questions of individual participants in order to elicit information, opinions, perceptions, and experiences relevant to the research question.

Types of interviews:

- **Structured interviews** -- the researcher uses a predetermined set of questions, asked in a fixed order. All participants are asked exactly the same questions. Structured interviews produce data that is easy to compare and analyse systematically.
- **Semi-structured interviews** -- the researcher has a set of core questions but allows the interview to develop in response to the participant's answers. Semi-structured interviews allow for greater depth and flexibility than structured interviews.
- **Unstructured interviews** -- the researcher has a general topic in mind but allows the participant to guide the conversation. Unstructured interviews are the most flexible and can produce rich qualitative data but are difficult to analyse systematically.

Key principles for conducting legal research interviews:

- Obtain informed consent from all participants before conducting the interview.
- Explain the purpose of the research, how the data will be used, and the participant's right to withdraw.
- Maintain confidentiality where required or appropriate.

- Prepare the interview guide thoroughly and pilot it before conducting the main interviews.
- Record or take detailed notes during the interview (with the participant's consent).
- Transcribe and analyse the interview data systematically.

5.2 Observations

Observation involves the systematic recording of social behaviour and events in their natural setting. In legal social research, observation may be used to study how law operates in practice -- for example, by observing court proceedings, customary court hearings, or legal aid consultations.

Types of observation:

- **Participant observation** -- the researcher participates in the activities being observed, gaining an insider perspective. Used extensively in anthropological legal research.
- **Non-participant observation** -- the researcher observes without participating. More appropriate for formal settings such as court proceedings.
- **Structured observation** -- the researcher uses a predetermined checklist or coding scheme to record specific behaviours or events.

Observation produces rich contextual data but raises ethical issues, particularly regarding informed consent and the impact of the observer on the behaviour being observed (the "observer effect").

5.3 Document Analysis

Document analysis involves the systematic examination and interpretation of written, visual, or digital documents. In legal social research, document analysis is used to examine legal texts (statutes, cases, contracts), official records (court files, parliamentary debates), and non-official documents (legal correspondence, media reports).

Document analysis may be:

- **Content analysis** -- a quantitative method involving the systematic coding and counting of specific elements (words, themes, arguments) in a body of documents.
- **Discourse analysis** -- a qualitative method examining how language constructs social reality, including legal reality. Useful for examining how legal texts construct concepts such as "crime," "property," or "rights."
- **Textual analysis** -- a close reading of legal texts for their meaning, structure, and rhetorical strategies.
- **Archival research** -- the examination of historical documents and records, useful for legal historical research. The University of Botswana Botswana Collection and the Botswana National Archives are important sources for archival legal research in Botswana.

6. Data Collection -- Primary and Secondary Data

6.1 Primary Data

DEFINITION: Primary Data

Data collected by the researcher directly from original sources, specifically for the purposes of the current research project. In legal social research, primary data may include interview transcripts, observation notes, survey responses, and original documents obtained from courts, government departments, or community members.

Primary data has the advantage of being specifically tailored to the research question and of being current. Its disadvantages include the time and cost required to collect it and the ethical obligations it entails.

6.2 Secondary Data

DEFINITION: Secondary Data

Data that has already been collected by others for purposes other than the current research project. In legal social research, secondary data includes published case law, legislation, academic articles, government reports, and statistical databases. Secondary data is more readily available than primary data but may not perfectly match the needs of the current research project.

For the purposes of LAW 135, the term paper will require students to use both primary and secondary sources. The primary sources will be the legal materials (cases and statutes) directly relevant to the research question; the secondary sources will be the academic commentary and empirical research relevant to the topic.

7. Term Paper Guide

The term paper is worth 60% of the total grade for LAW 135. It is the most significant assessment in the course and must demonstrate the student's ability to conduct independent legal research, to apply social science research methodology to a legal question, and to communicate the results of the research in a well-structured and clearly written academic paper.

7.1 Structure of the Term Paper

A well-structured term paper for LAW 135 should contain the following elements:

- **Title page** -- the title of the paper, the student's name and student number, the course name and code, the name of the instructor, and the date of submission.
- **Abstract** -- a concise summary (150-200 words) of the research question, methodology, key findings, and conclusions.
- **Table of contents** -- a numbered list of the sections and sub-sections of the paper with page numbers.
- **Introduction** -- introduces the research topic and research question, explains the significance of the topic, provides an overview of the structure of the paper, and states the thesis or main argument.
- **Literature review** -- surveys the existing academic and legal literature on the topic, identifying what is known, what gaps exist in the existing literature, and how the current paper contributes to filling those gaps.
- **Methodology** -- explains the research methods used in the paper, including the type of research (doctrinal, empirical, or both), the sources consulted, and (for empirical research) the data collection instruments and analysis methods.
- **Analysis** -- the main body of the paper, presenting the research findings and analysis in a logical, well-structured way. Legal analysis should follow the IRAC framework.
- **Conclusion** -- summarises the key findings of the research, restates the thesis, and identifies areas for further research.
- **Bibliography** -- lists all sources cited in the paper in the correct citation format.

7.2 Citation Format

All sources cited in the term paper must be cited in the correct format. The standard citation formats for legal research in Botswana (following the South African/common law citation convention) are:

- **Cases:** *Party Name v Party Name* [year] Volume Law Report Abbreviation Page Number (Court). Example: *Attorney-General v Dow* [1992] BLR 119 (CA).
- **Statutes:** Short Title Year (Cap Number if applicable). Example: Marriage Act 2000 (Cap 29:01).

- **Journal Articles:** Author Surname, "Article Title" (Year) Volume Journal Abbreviation First Page. Example: AJGM Sanders, "The Characteristic Features of Southern African Law" (1981) 14 CILSA 196.
- **Books:** Author Surname, *Book Title* (Publisher, Year) Page. Example: CM Fombad and EK Quansah, *The Botswana Legal System* (LexisNexis, 2013) 45.
- **Internet sources:** Author (if known), "Title" (Year) URL (date accessed).

**ASSESSMENT
CRITERIA**

The term paper will be assessed on the following criteria: (1) clarity and precision of the research question; (2) quality and depth of the legal research; (3) appropriate use of social science research methodology; (4) quality of analysis and argument; (5) clarity, precision, and organisation of the writing; (6) accuracy and completeness of citation and referencing. Students should study these criteria carefully and ensure that their term paper addresses each of them.

Full Reading List

Part 1 -- Legal Research and Writing

- Charles M Fombad and EK Quansah, The Botswana Legal System (LexisNexis, 2013) Chapter 15 (legal writing) and Chapter 12 (legislative drafting).
- ATH Smith (2002), Glanville Williams, Learning the Law.
- Ralph Berry, The Research Project (5th ed).
- Paul Rylance, Legal Writing & Drafting (1994).
- Laurel Currie Oates et al, The Legal Writing Handbook (2002).
- John P Dawson, The Oracles of the Law, Chapters I, II, VI.
- C Stebbings, Law Reporting in Britain (Hambledon Press, 1995).
- CM Fombad & EK Quansah, The Botswana Legal System, Chapter 4 (law reporting).
- EK Tetteh, "Law Reporting in Anglophone Africa" (1971) 20 International and Comparative Law Quarterly 87.
- F Viljoen, "Canonising Cases: The Politics of Law Reporting" (1997) 114 South African Law Journal 318.
- C Stefanou & H Xanthai, Drafting Legislation: A Modern Approach (Ashgate Publishing, 2008).
- VCRAC Crabbe, Legislative Drafting (Cavendish, 1993).
- GC Thornton, Legislative Drafting (Butterworth, 1996).
- CM Fombad & EK Quansah, The Botswana Legal System, Chapter 12 (legislative drafting).
- Chris Stokel-Walker, "The Commas that Cost Companies Millions" BBC Capital, 23 July 2018.

Part 2 -- Social Science Research Methods

- N Channels, Social Science Methods in the Legal Process (1985).
- W Lawrence Neuman, Social Research Methods: Qualitative and Quantitative Approaches (2006).
- GR Adams & JD Schvaneveldt, Understanding Research Methods (1985).
- Charles C Ragin, Constructing Social Research: The Unity and Diversity of Method (1994).

Cases Referenced in the Course

- Sandford v Raikes (1816) 1 Mer 646 -- punctuation in legal documents.
- Houston v Burns [1918] AC 337 -- punctuation in statutory interpretation.
- The King v Casement [1917] 1 KB 98 -- interpretation of statutory language.

- O'Connor and Others v Oakhurst Dairy No 16-1901 (1st Circuit 2017) -- Oxford comma; millions-dollar punctuation dispute.
- Roger Cables Communication v Aliant Telecom CRTC 2006-45 -- comma in contract; million-dollar consequence.
- Criteria for Reportability of Judgments 2002 (1) SA 905 -- criteria for publication in official law reports.
- Roberts Petroleum Ltd v Bernard Ltd [1983] 2 AC 192 -- citation of unreported decisions.
- Warren v Keen [1954] 1 QB 15 -- structure of a reported case; practice of case briefing.

**NOTE TO
STUDENTS**

LAW 135 is assessed entirely by continuous assessment -- there is no examination. The two assignments (40%) and the term paper (60%) together constitute your entire grade. This means that research skills, writing skills, and the ability to apply social science methodology are being tested in every piece of work you submit. Students should approach every assignment with the same rigour and care that they would bring to an examination answer. These notes provide a comprehensive guide to the course content -- use them alongside the prescribed textbooks and the materials in the UB Law Library.