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LEGAL INDETERMINACY, MORALITY, AND THE LAW

Writing critically on a tendency of American courts to favor employers over employees, even in the face of legal reform, Karl Klare (1982) nevertheless highlights the moral underpinnings of labor dispute settlement. He proposes that notions of equity, of fairness and unfairness, permeate relations with employers and hence also litigation and negotiation in labor disputes. Increasingly, he argues, judges, especially in the U.S. Supreme Court, are cognizant that labor disputes cannot be settled merely on factual grounds, just as labor rules cannot be applied mechanically. The area of legal indeterminacy concerns standards of fairness, reasonableness, and ethical conduct that should govern labor relations as overarching principles.

The present paper applies Klare’s insight to a 1991 landmark labor dispute that took place in Botswana between a public sector manual workers’ union and the Botswana government. In their considered verdicts, judges in the Botswana High Court and Court of Appeal invoked notions of “fairness,” “reasonableness,” and “legitimate expectations,” and these ultimately determined the final outcome of the dispute. In light of this, this paper aims, first, to revisit an early disciplinary debate in legal anthropology regarding the use by judges of yardsticks of morality and justice in reaching their judgments. Secondly, following Anne Griffiths’ (1997) discussion of legal pluralism in Botswana, I endeavor to reveal the permeability of customary and statutory courts, especially with regard to the moral or ethical legal concepts they deploy. Beyond Griffiths, however, I argue that we must recognize the innovatory or

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reformist potential of leading customary court judges in Botswana. This calls our attention to the relative discreteness and autonomy of customary law, even when it is saturated by a wide range of other unwritten norms and practices. Third, I take a broader historical perspective to highlight the extent to which morally grounded legal notions associated with judicial review have in the postcolonial period continued to “travel” internationally, influencing judicial considerations well beyond their original provenance.1

As Watson (1993) and others have argued, legal comparison is always “perilous,” and particularly so when the comparison is between customary judicial processes in African tribal courts and modern-day African courts. Comparison is valuable nonetheless for illuminating commonalities across difference. The cases outlined here disclose that in order to justify ethically or morally “fair” judgments, both customary and modern judges must first mobilize the full intricacy of the law in rational argumentation. To be seen to be fair, in other words, a judgment must be seen as based on “objective” legal facts and edicts set out logically and coherently. Rationality and morality are thus two faces of a single coin.

Comparison can contribute to development of shared interdisciplinary theoretical insights across legal anthropology and socio-legal studies regarding the morality and rationality of the law and, more specifically, morally grounded judicial reasoning. Although an earlier generation of legal anthropologists carried on an interdisciplinary conversation on judicial moral reasoning, their fellow anthropologists dismissed them for being “ethnocentric,” and the discussion was summarily abandoned. As a result, with the few exceptions highlighted below, neither discipline—anthropology or socio-legal studies—has appreciated the other’s cognate work about the ethics and morality of the law. I will illustrate this with an overview of debates in legal anthropology, before turning to the deployment of moral reasoning in Botswana’s modern-day courts.

When anthropology writ large rejected the focus on morality that emerged within legal anthropology in the 1950s, the discipline effectively ruptured a fruitful conversation just started with socio-legal scholars. It is remarkable that, outside of legal anthropology, there has only recently been a renewed disciplinary interest in local notions of ethics and moral conduct, mostly within studies of ritual and religion (e.g., Lambek 2003; Mahmood 2005; Robbins 2013),2 and almost entirely focused on personal ethics. This is exemplified in Laidlaw’s (2002) contention that, despite anthropology’s indebtedness to

1 In his monumental historical, comparative study of trade unions and labor relations in Africa, Fredrick Cooper (1996) showed how ideas about labor rights traveled internationally during the colonial period. See also the special 2009 issue of African Identities edited by Schler, Bethlehem, and Sabar (Schler et al. 2009).

2 Against claims by these authors, questions of ethics were never really absent in discussions of religion. With regard to law, Clifford Geertz, writing from a sharply cultural relativist perspective,
Durkheim, it has, surprisingly, produced “no sustained field of enquiry and debate” on ethics and morality, no “connected history.” Other than a nod to Malinowski’s Crime and Custom in Savage Society (1926), Laidlaw omits legal anthropology from his overview, and focuses instead on agency and freedom as theorized, not by anthropologists, but by philosophers—Kant, Nietzsche, and Foucault. Issues of legal public ethics and morality remained relatively untouched in this renewed discussion until the recent rise of an anthropology of human rights engaged with wider interdisciplinary debates, but without attending to earlier disciplinary considerations of ethics in dispute settlement.\(^3\) One has to go back to the work of Max Gluckman on judicial decision-making among the Barotse of Northern Rhodesia (now Zambia) to find a clearly laid out, foundational anthropological analysis of the morality and ethics of law in non-Western societies.

Although Gluckman did not identify himself explicitly with any school of thought, his debates with a range of jurists make clear that he is a post-Legal Realist critic,\(^4\) and his writings constitute a precursor of discussions of morality and law in the works of Ronald Dworkin and others. Gluckman accepts the Realists’ view that the law allows, indeed requires, wide latitude for interpretation. For any case, facts must be assembled and judged as they occur in particular social situations, in accord with a variety of sometimes-conflicting rules. As he says, “Judicial decision supplements legislation. Through the ‘reasonable standards’ they [Barotse] maintain their traditional laws and traditional morals, and yet cope with the effects of the introduction of Christianity and schools, labour for whites and money and trade-goods, new skills, changes in every aspect of Barotse life” (1963: 192). In deploying notions of reasonable behavior or the “reasonable man,” he says, “Social principles and prejudices, customs and habits, group interests and individual experiences, are absorbed, to relate the fixed rules of law to the changing variety of life. But the law aims at justice, and the idea of a reasonable man implies an upright man” (ibid.).

Law is thus marked by an essential “indeterminacy,” allowing for “judicial discretion,” a starting point for Gluckman’s analysis, as it was for the Realists (see ibid.: 198). Indeterminacy implies, as the American Appeal Court Judge Cardozo argued, that law is a malleable instrument that allows judges to mould amorphous words like reasonable care, unreasonable restraint of trade,

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\(^3\) On the whole, anthropologists have approached human rights with caution, as in Wilson’s highly skeptical and critical analysis of the Truth and Reconciliation Commission in the post-apartheid era in South Africa (2001), or Englund’s (2006) trenchant critique of human rights NGOs’ poor record in defense of employee labor rights vis-à-vis employers in Malawi, despite a raft of recent progressive liberal legislation there.

\(^4\) The “post” refers to his additional stress on language, an issue taken up by later legal scholars.
and due process to justify any outcome they desire. To avoid the potential for legal arbitrariness, Realists such as Cardozo advocated that all judges must interpret the law to advance the welfare of society. Thus some Realists, it has been argued, turned Bentham’s philosophy on its head, arguing that the law should serve the interests of the most fragile members of society, enacting legislation to protect certain vulnerable classes of employees, particularly women and children, from harsh working conditions. This strand of Realism came to be known as “sociological jurisprudence,” according to which judges used their own sense of fairness and ethical sensibility in passing judgment.5

As Gluckman acknowledges, Barotse judges’ notions of reasonableness were inevitably influenced by their biases, stereotypes, and prejudices, and rooted in their day-to-day experiences. But the important point he makes is that, in passing judgment, judges drew on notions of equity, fairness, and reasonableness. They saw their task as a moral or ethical one—“so-and-so did this, and it was immoral” (1967 [1955]: 196). Necessarily, therefore, he says, “the kuta [Barotse court] ends up by trying to protect the ethical code, even if it is against the application of the letter of the law” (ibid.: 196–97, my emphasis). Referring to Cardozo, Gluckman proposes that Barotse judges, too, “employ his so-called ‘method of sociology’ by which they import equity, social welfare, and public policy into their applications of the law. They are able to do so because the main certainty of the law consists in certain general principles whose constituent concepts are ‘flexible’—as is law itself, right and duty, good evidence, negligence, reasonableness” (1967 [1955]: 24).6 In their judgments, Barotse courts are dominated by ideas of ethics, justice, and equity (ibid.: 256–67). These ideas “influence their total evaluation of evidence” (Gluckman 1963: 197). They call these principles “laws of God,” the equivalent of English natural justice (ibid.). Hence, Barotse courts of law are also courts of morality (ibid.: 194). Although they do not enforce very high ethical standards beyond the legal demand for reasonableness, they proclaim these higher standards publicly in their judgments (ibid.: 192).

Where Gluckman parts with Cardozo is regarding the sources of legal indeterminacy. Indeterminacy stems not merely from legal gaps or contradictions, he contends, but from the intrinsically flexible nature of certain overarching concepts such as fairness (1967: 337–38). Drawing on legal semantic

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theory, he suggests, “The most important legal concepts have to cover the widest range of rules and processes” (ibid.: 341), and therefore legal concepts and ethical principles should be conceived of as arranged hierarchically. This allows them to “absorb, and be permeated by, the ever varied and changing exigencies of life” (ibid.: 355). While Gluckman did not highlight this in *The Judicial Process among the Barotse*, a key building block of Legal Realism was the attention to social “situations” (Tamanaha 2009: 754), which itself became a central concept in Gluckman’s extensive oeuvre.7

Against charges by Bohannan (1957; 1969) and others (e.g., Conley and O’Barr 2004: 209–12) that *The Judicial Process* was ethnocentric, a major strength of the book is its attention to indigenous concepts of justice, fairness, and equity. Among these, the notion of “rights,” *liswanelo*, matches the cognate Tswana notion of *dishwanelo*, meaning both rights and obligations (Gluckman 1967: 166; Schapera 1955 [1938]: 35–36). Against those who seek to posit an epistemic break to the modern (or colonial) period, I concur with Ajantha Subramanian’s view about “the inadequacy of treating rights as simply a by-product of Western modernity or colonial governmentality.” Instead, Subramanian says about the Indian fishermen she studied, “Rights claims are embedded in dense histories of struggle and, in this sense, are not distinct from other cultural expressions of relationality and obligation” (2009: 20–21). In similar vein, I suggest that ideas about rights and equity were already embedded in the discourse of the Barotse *kuta*, as in the Tswana *kgotla*, even before the advent of British colonialism and the introduction in postcolonial Botswana of statutory, modern courts.8 The fundamental notion of *tshiamo*, of “fairness” and “justice,” as I will argue, is still used by Tswana judges in the modern, post-colonial era, and is an everyday concept pervasive in all areas of social life. In the case analyzed below, a sense of unfairness undoubtedly drove the Botswana Manual Workers Union members to seek justice in the courts, against their government, even though they acknowledged that technically their strike was unlawful.

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7 Gluckman discussed the place of legal case studies versus rules in the Realists’ and his own work (1973). In a masterly tribute to E. Adamson Hoebel, he argued that a combination of both is essential in the “triad of case-rule-praxis” (ibid.: 617). By then, Gluckman was clearly aware of Dworkin’s work (ibid.: 616).

8 In trying to argue that Barotse legal concepts were imposed by the British, who “needed native courts,” Conley and O’Barr (2004: 209–10) err in conflating the very different modes through which state and stateless societies, respectively, were incorporated into the colonial state. They fail to see that indigenous, hierarchical Barotse courts (*kuta*), like Tswana courts (*kgotla*), preceded colonial indirect rule and thus differed radically from the stateless Tiv “government” courts that were a British invention. Prins for example, while he mentions debates in the Barotse *kuta* only in passing, tells us that “white power never attained a high intensity in BuBarotse” (1980: 2). Schapera wrote that “apart from certain changes regarded as essential, there has been as little interference as possible with the traditional forms of government and jurisdiction” (1955: 39–40).
Gluckman’s analysis linked Barotse jurisprudence to a major jurisprudential intellectual legal movement that questioned the certainty of law, and introduced questions of ethics, everyday life, and historical change into legal anthropology. Yet, innovative and bold as his analysis was, it was never fully taken up by his fellow anthropologists, and it certainly did not lay the foundation for an anthropology of ethics and morality. Instead, it was dismissed as Anglocentric and vague, and much of the legal anthropology that followed stressed not morality but manipulation, individual strategizing, and the notion that, pragmatically, in most societies studied by anthropologists, power trumps law (see Moore 2001), although this begs the question of why people bother to go to law at all. Moore defends Gluckman on the grounds that, in the colonial context, with its racist assumptions about primitive irrationality, his intent was “political”: “Gluckman wanted to show that indigenous African legal systems and practices were as rational in the Weberian sense as Western ones” (ibid.: 98). But she fails to acknowledge that in addition to demonstrating that they were rational, Gluckman was just as concerned to show that “African legal systems and practices” were morally and ethically grounded much like their Western counterparts. Gluckman argued that for the Barotse morality and rationality were inextricably linked.

The reasonable man and the whole edifice of ethics and morality associated with that concept and others like it (fairness, equity, justice, uprightness) thus virtually vanished from anthropology, having been greeted with skepticism, never fully understood, and often taken as a substantive description of a type of person rather than as a principle of practical ethical judgment. As Epstein admitted, “It is plain that the notion of the reasonable man has not had the impact that Gluckman clearly hoped it would have” (1973: 644). To rescue the term, Epstein suggested that it needed to be located in the opposition between rules and standards. In legal theory, standards are much wider and more indeterminate than rules, and require judges to use their discretion in deciding whether an act is reasonable and thus acceptable (see Kaplow 1992; Korobkin 2000). As a result, cases concerning standards are often unpredictable. Epstein echoes Gluckman in arguing that the value of the reasonable man concept lies in explaining how judges adapt the law in changing circumstances (1973: 654–55). This is only a partial reading of Gluckman, however: beyond referring to “normative” standards, there is little in Epstein’s critical evaluation that shows that what is at issue is not merely judges’ practical evaluation of reasonable behavior or expectation, but also the wider issue of

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9 I use “power” here to refer to litigants’ alleged ability to influence the outcome of a dispute through superior support mobilization or connections to decision-makers, rather than necessarily through the threat of violence, or persuasive argumentation, alone.

10 This is evident, most recently, in an article by Maurer (2005), which sees the reasonable man as opposed to economic man, a clear misunderstanding of the highly abstract notion of reasonableness as embodied in particular situations, informing judicial reasoning.
interpersonal ethics and morality in highly politicized contexts. Conservative readings, and an inability or unwillingness to raise comparison to a more abstract level or to consider the complex intangibles of ethics in social context, have thus arguably led generations of legal anthropologists into a sterile cul-de-sac.11

This rupture has persisted in research on customary courts in postcolonial Botswana. For example, challenging the discrete autonomy of customary law or courts, legal anthropologists John Comaroff and Simon Roberts (1981) shifted the terms of the debate—a move paralleling in some ways the move in Critical Legal Studies—to stress that everyday rules, norms, and customs, beyond formal courts, were all mobilized in legal argumentation. They thus denied the separation between law, custom, and politics typical of what they termed the “rule-centered” paradigm adopted, in their view, by Gluckman and others (ibid.: 8). The “processual” paradigm they recommend instead consists of an unsystematic “loosely constructed repertoire” (ibid.: 18) of rules, habits, and norms, often contradictory or ambiguous, that enables litigants to formulate multiple interpretations (“paradigms”) in their defense, as they engage in negotiations, alliance-making, and individual political maneuverings. This whole range of customary rules, norms, and values, they say, is constantly being constructed and reconstituted (ibid.: 20). Accordingly, the two Tswana groups they studied, the Kgatla and Tshidi-Barolong, possessed no indigenous “laws” that could determine dispute outcomes in any predictable fashion (ibid.: 14–15, 18).

The major fallacy in this contrast lies in the authors’ implicit definition of the “rule-centered” paradigm in legal positivist, objectivist, pre-Realist (and hence pre-Gluckman) terms, essentially as positing an inert body of definitive law (see Hunt 1986: 4; Dagan 2005: 55–56). In rejecting this so-called rule-centered approach, they also deny a privileged place to judges and judicial reasoning (ibid.: 14), and fail to consider the possibility that customary court decisions are embedded in considerations of equity that also inform wider ideological, critical movements and processes of judicial innovation and legal reform. Their very own data show that, contrary to this denial, chiefly Tswana tribal “innovators” have historically had the capacity to introduce legal judgments in response to not only changing circumstances or norms (Schapera 1970) but also changing notions of equity and fairness. In particular, they themselves report that the chief presiding over the Kgatla court at the time of Roberts’ study, Linchwe II, decided, against widespread opposition, on an equitable distribution of inheritance on the grounds that, in his words, “In recent times eldest sons had shown a tendency to ‘eat up’ the heritable cattle

11 As Gluckman himself commented, “I cannot help feeling that it is lamentable that so-called ‘legal anthropologists’ should be so ignorant of those [American Realist] jurisprudential controversies” (1973: 616).
themselves (at the expense of their younger siblings). In these circumstances it seemed pointless, indeed unfair, to perpetuate such an inappropriate norm” (Comaroff and Roberts 1981: 80, my emphasis; also 179–83).

This is the only mention of the principle of “fairness” in the entire monograph, and it is notable that it appears to describe judicial reasoning. Remarkably for a study that situates political maneuvering at the heart of dispute settlement (see, for example, ibid.: 211), Comaroff and Roberts’ Rules and Processes fails to recognize the way the Kgatla chiefly customary court of appeal (the highest in the tribe) repeatedly awarded women in divorce cases generous property settlements, even when their marital status was relatively ambiguous (e.g., ibid.: 149, 155, 164, also 181). The question of why the interests of the weaker party (women) had increasingly come to be protected by the Kgatla court is mentioned (ibid.: 183), but left un-theorized.

The contrast with the neighboring Kwena tribe studied by Anne Griffiths (1997) is stark. Among Kwena, the customary tribal court of appeal repeatedly sought to reconcile marriage partners even when this clearly went against women’s welfare; where divorce seemed inevitable, judges awarded women little or no property settlement. We find a hint of the possible reason for the contrast with the Kgatla in the few occasions on which the Kgatla judge, Chief Linchwe II, who had presided over the court studied by Comaroff and Roberts, was called in to adjudicate Kwena disputes. Chief Linchwe tended to protect women’s interests. In one case, as Griffiths points out explicitly, the chief as judge “based his argument on notions of fairness,” arguing, “A woman should not go back to her parents with nothing at all…. We found that it was a reasonable share because she is also entitled to a better [decent] life” (ibid.: 199).

Chief Linchwe’s equitable division of the matrimonial property in one case “astounded” the local Kwena headmen (“It was the talk of Molepolole for weeks afterward”), who told Griffiths that his verdict “was not based on the ‘old traditional Tswana ways of doing things; it is done according to modern ideas’” (ibid.: 200). Griffiths remarks that Linchwe had “made his own mark on chiefship” (ibid.). In the verdict cited above, Linchwe referred explicitly to “the hard rule of common law and equity” (ibid.: 202). Griffiths highlights these cases to support her more general argument:

In Botswana, it is clear that any analysis of law must incorporate the legal system as a whole and that any attempts to focus on customary and common law as discrete entities that stand apart from one another cannot be sustained. Earlier ethnographies of law, including those written in the postcolonial period (Comaroff and Roberts 1981; Kuper 1970), failed to address the national legal context, thereby limiting their study of village life to certain forms of local ordering divorced from the broader national dimension and their relationship with the state (1997: 208).

The other side of this interpenetration of different legal domains is, Griffiths suggests, that “social understandings, expectations, and values permeate
law—regardless of whether law is located in the customary or Western setting” (ibid.). Following this line of reasoning, I will show here that widely held moral and ethical notions of fairness, equity, and reasonableness permeate legal decision-making in Botswana across customary, common, and administrative law, as reflected in judicial review.12

The relative autonomy of the law, whether customary or modern, is key to understanding historical trends in Botswana’s legislative and social reform.13 A limitation of studies such as Rules and Processes, which deny any separation between the law or legal institutions and everyday norms, is their inability to trace trajectories of legal reform or innovation over time, apart from changing normativities.14 In Botswana, feminists have campaigned for legal reform of women’s rights in marriage and divorce settlement, and their ideas about equitable property distribution have consequently also entered the customary courts, and led to a series of reforms of statutory law.

Significantly, the aforementioned Chief Linchwe II, a reformist judge, became president of the Botswana Customary Court of Appeal, the highest customary court in the land. In a series of conversations with another member of that court, Phineas Makepe, I found that although, in 2000, Makepe dismissed the idea that customary law could be reformed since it was “unwritten,” in 2005 he told me that when it comes to divorce, “In the customary court we follow the principle of division of property. This is a new practice influenced by wider practice. The customary court of appeal has accepted the principle of division of the property [in the case of divorce]. In 1997 it was there and was confirmed by the High Court.” He explained further, “When it comes to natural justice, the question is, according to whom? When it comes to me, Phineas, as a judge, it must be my understanding of natural justice. I am a Western-educated man, baptized in the Catholic Church, and these influence my idea of natural justice” (17 Aug. 2005). The Tswana chief of the customary Court of Appeal in Tswapong North told me that customary courts had “always” practiced an equitable division of property in cases of divorce. In fact, he claimed, statutory or common law had learnt from and borrowed its current reforms from customary law.

Despite the pervasive folk mythology, then, that customary law never changes, it seems evident, as Griffiths argues, that in postcolonial Botswana, different legal institutional domains are infused with ideas about equity, reasonableness, and fairness. Botswana’s post-independence legal complexity is

12 Changes to the law and its jurisdiction can be experienced by ordinary people as threatening and confusing, as in the case of land law reforms introduced in Botswana with the creation of land boards (Werbner 1980).
13 On the relative autonomy of courts more generally, see Tomlins (2007) and Ernst (1993). Tomlins argues that the autonomy of courts is always “relational” to some other entity (e.g., “society”). Arguing for the relative autonomy of customary courts in Tanzania, Sally Falk Moore speaks of their “semi-autonomy” (1978: 54–81).
14 An example is the changing acceptable standards of property settlements in case of divorce.
further complicated by the nature of the judiciary in Botswana, which includes
a number of expatriate commonwealth judges, which perhaps explains the
incorporation of legal doctrines such as judicial review from English adminis-
trative law. Public law in Botswana is modeled on English law, including
English administrative law, even though the country’s common law is based
on South Africa’s Roman-Dutch law. This legal plurality became apparent
during the course of the two labor trials I will discuss presently.

To sum up this section, my purpose in tracing a genealogy of legal anthro-
pological engagements with notions of morality has been to recuperate an earlier
conversation between legal anthropologists and legal scholars on the place of
morality in legal judgments. Although the cases discussed below were heard
entirely in Botswana’s modern courts, we shall see that trade unionists were ani-

tated by deeply felt vernacular notions of justice and fairness (in Setswana,
tshiamo) pitched against apparently strict and often technical legal rulings. As
elsewhere in the world, so too in modern Botswana. The cases outlined here
have become an originary palimpsest on which working people in Botswana
have “indelibly imprinted the law of labor relations with their aspirations,
values, and struggles, both in victory and anguishing defeat” (Klare 1982: 546).

FROM PROTEST AND STRIKE TO JUDICIAL REVIEW

There was little disagreement among the various actors, including union offi-
cials, that the 1991 Manual Workers Union strike was, from a strictly legalist
perspective, illegal. But was the strike justified on moral grounds, and was
the government’s response reasonable, moral, and fair? Moreover, to the
extent that the strike was not legal, could morality trump legality in court?

Strikes and litigation have been considered from a Critical Legal Studies
perspective. This is a post-Realist approach that interrogates the way the
“formal” edifice of labor laws both generates and legitimizes class and labor
inequalities while, from a critical, anti-formalist perspective, it is dialectically
being subverted by the very same economic and political forces, and by pro-
gressive judicial decisions, employer lobbying, and labor activism. In the
New Deal and postwar eras, in response to American popular worker struggles
to “humanize and democratize work” (Klare 1982: 563), the United States intro-
duced a raft of liberal, progressive labor laws protecting workers rights. But
worker freedoms, including the freedom to strike, have paradoxically been
restricted by the very collective bargaining agreements intended to protect
their rights. As Klare argues, this inherent contradiction often favors the
employer because in such liberal labor regimes employers retain the right to
make crucial managerial and strategic decisions, and thus ultimately to dominate
labor, while the courts often interpret the law in support of employers’ claims.15

15 On the importance of the former in Botswana, see Mogalakwe 1997: 106. Daniel Ernst, in his
masterly account of the development of early American labor law (1995), shows that the shift from
The 1991 Manual Workers Union strike and the litigation that followed it highlighted some of these complex intersections of politics, law, and morality in the Botswana context. The strike was a postcolonial moment when a hitherto presumed ethos of government paternalism and care was cast into doubt. In early post-independence Botswana, even marginal citizens on the periphery could still believe that as loyal citizens their appeal to the country’s rulers would rescue them from oppression; in the words of a local headman in the Tswapong village studied by Richard Werbner, the President would undoubtedly “realize that his people are being reduced in cooking like grilled caterpillars”—or, to put the matter more abstractly, that “consent rather than coercion was the basis of government” (1977: 38). In the Tswapong case, the claims of district chiefs and local government councilors to have the right to shift Tswapong villagers from their homes into a centralized village were ultimately exposed as illegal, when villagers appealed to the central government: it was then revealed that since independence, new laws meant that no-one could be moved against their will. Analyzing the complex intersections of politics, law, and moral claims in this case study, Werbner cites Schapera’s perception that among Tswana, “The more powerful a government becomes, the more numerous and elaborate are the devices by means of which subjects can protect themselves against misrule and oppression” (Schapera 1956: 220).

I cite this general faith among ordinary Botswanan citizens that government “misrule” could be countered because the same faith evidently moved the Manual Workers Union to seek justice in the courts against a government they judged to be uncaring, oppressive, and exploitative, even though the government appeared to hold all the cards. In the case discussed here, the union appealed through judicial review, first to the High Court and then to the Court of Appeal, to undo what they deemed to be an arbitrary administrative decision that constituted a betrayal of trust.

Seen through the lens of the court judgments, which are my main subject, the blood, sweat, and tears of the year-long struggle leading up to the strike were virtually irrelevant—the all-night vigils, exhausting long-distance driving to remote areas, seemingly endless meetings, and exhilarating rallies and protests, as well as the moments of deep disappointment, broken promises, and the sense of betrayal. This inattention to felt experience is a recognized feature of legal argumentation that considers only legally relevant facts, and

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common law-based universal individualism, with its anti-trust and closed shop floor ideology, to political “pluralism,” which recognized organized labor and in which the rights of workers to unionize were increasingly hedged by legislation and regulation, began early in the twentieth century, and was subject to fierce disagreement and political contestation between progressive and conservative jurists. On the later history of labor relations in America, see also Tomlins (1985; 1993).
strips away what are, for participants, emotionally compelling and highly significant details (see Tate 2007; Wilson 2001; Englund 2006).

The struggle was for a “living” wage that would allow workers, in the words of the union’s information officer, Sam Molaudi, to “provide their families with sufficient and wholesome food, to live in good homes, and to dress as other people do and not like beggars” (Molaudi 1992: Conclusions, 1). How such a wage was to be calculated became a central issue of contention between the union and the government’s Ministry of Finance.

Before addressing the judgments themselves, let me review the events that preceded the court cases. The impetus for the strike on 4 November 1991 came earlier, with a 1990 government decision to “decompress” top civil servant salaries (Botswana Government 1990), a policy much praised by the World Bank (Kiragu, Mukandala, and Morin 2004). Decompression allowed discretionary salary payments at the top of the civil service, outside the fixed salary scale, for specially qualified persons. Despite 5 percent devaluations of the Botswana pula in 1990 and 1991, in the latter year all workers had received pay increases of 11 and 12 percent, in April and November respectively (Molosiwa 2007: 72). In other circumstances this might have seemed satisfactory, but the move to raise top civil servants’ pay generated deep resentment among manual workers, whose minimum pay at the time was 236.72 pula a month, paid on a daily basis (less than $90 per calendar month in 1991). In Samuel Molaudi’s summary of the events leading to the strike, he commented bitterly, “The salary of a Permanent Secretary could pay twenty-eight cleaners having decompressed the car allowance and maintenance allowance” (1992: 4); the “Government cannot afford [it] when it comes to the lowly paid worker but when it is the highly paid, [it] … can even afford to buy a Mercedes Benz which are [sic] now used to take members of the ruling class from one eating room to the other” (Molaudi 1992: conclusions, 1).16

Following deregulation, the union commissioned a study of the minimum wage, based on a “basket of goods” for a family of six. Citing this study, its representatives argued that the minimum wage should be raised from 236 pula to over 600 pula, a 154 percent wage hike. This figure became the subject of union-government negotiations, which took place in what the union regarded as “the highest negotiating body,” the National Joint Industrial Coordinating Council (NJICC). Established in 1975, the NJICC was composed of both government and union representatives, and chaired by the Director of Public Service Management (the DPSM) (Mogalakwe 1997: 124).

The strike was a test of the NJICC’s authority to determine minimum wages. The Coordinating Council’s role was to negotiate on labor issues with the union. In the present case it turned out to have exceeded its brief,

16 By 2011, the wage gap had increased to 73:1.
and its decisions over minimum pay, reached harmoniously and amicably in negotiation with the union after lengthy and detailed deliberations, were summarily dismissed by the all-powerful super-Ministry of Finance and Development Planning. The Ministry refused point blank to authorize the NJICC’s jointly reached decision, citing a range of issues but essentially expressing its determination not to create an inflationary wage spiral (Mogalakwe 1997: 124–25). This was after the NJICC had appeared to seal the agreement to the satisfaction of all parties—it was communicated to the union’s Annual Delegates’ Conference by the DPSM himself with barely a hint that it still required higher-level authorization.

Following this debacle, the establishment of viable collective bargaining instruments became the ultimate goal for the Manual Workers Union, and indeed for the whole trade union movement in Botswana. Their effort was still ongoing in 2012, despite the domestication in 2005 of International Labor Organization Convention No. 98, which stipulated that such instruments be established.  

Once the negotiations with the government finally failed, the strike began at seven sites on 4 November, joined by twenty-two others the following day when it extended nationwide to include all the fourteen regions. According to Molaudi, sixty thousand workers went on strike (1992: 12). Molosiwa reports that the strike revealed a rift between the union and the Botswana Federation of Trade Unions (BFTU). The latter allegedly told a South African radio station that this was not a union strike but a “form of insurgency” engaged in by a “few disruptive elements” (ibid). On 11 November, at a meeting called by the DPSM, the BFTU was alleged by Molosiwa to have said that the strike was “illegal.”

Remarkably, the Botswana independent media supported the strike. By all accounts, it was an exhilarating moment. Monageng Mogolakwe, a lecturer at the University of Botswana, described the scene he witnessed at the African Mall in Gaborone: “The whole shopping area was like a carnival, with workers and students toyi-toying (a dance form popularized by ANC cadres in South Africa) and singing, despite acts of provocation by units of the paramilitary Special Support Group, which deliberately drove through the chanting crowds several times” (1997: 125).

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17 A public sector bargaining council was finally established in 2012, but it was still functioning unsatisfactorily from the unions’ perspective.
18 Mogalakwe claims there were forty thousand. Molaudi lists the names of all the places that went on strike (1992: 12).
19 According to Molaudi, however, the DPSM telephoned the union chairman once but then never called back until the strike was over (1992: 12). Molosiwa gets the date wrong; the meeting took place after the strike was over, on 11 November.
20 For a description of the strike in Kanye, see Werbner 2009.
The government responded to the strike with a mass dismissal of all striking workers. On 7 November 1990, the union chairman wrote a letter to the strikers appealing to them to resume work on 11 November, and informing them that the union was taking their case to court (Molaudi 1992: 16–17). In a letter that the Director of Public Service Management wrote to the union, referring to the 11 November meeting in which BFTU had participated, he reiterated the decision of the government that “…all who had been absent from work for two or more consecutive days had their employment terminated. On re-application for employment, they would be re-engaged afresh, and would be made to fill new contracts of employment, and serve a probation of two months…. The exception was that, those who had committed criminal offences and [been] found guilty by the [customary] courts would not be re-engaged” (ibid.: 17).

The union, Molaudi says, persuaded the workers “to abide by that dirty decision noting that this new employment will be challenged in a constituted High Court of law” (ibid.). Of the sixty-five workers arrested while mobilizing support for the strike, which the union claimed the Trade Unions and Employers Organisations Act permitted, none were re-employed. Molaudi reports, “Twelve workers from Ramotswa got forced corporal punishment. Ten workers got four lashes or strokes each on their naked backs. They were made to lie (on the ground being naked to the waist) on their stomachs” (ibid.: 18). The memory of this humiliating punishment has rankled with the union ever since.

Letters to the government expressing support for the dismissed strikers streamed in from Public Service International (PSI), the Congress of South African Trade Unions (COSATU), the South African National Council of Trade Unions (NACTU), the National Union of Miners (NUM), the National Union of Public Service Workers, and the South African Trade Union Coordinating Council (SATUC). The latter offered to send a five-man delegation to meet with the minister, but this was refused (for details, see ibid.: 13–16). The union also received support from the Botswana teachers’ unions, the Catholic Church, the Student Representative Council, and various other organizations (ibid.: 16).

From the government’s viewpoint, the chain of events leading to the strike seemed an unmitigated fiasco, yet the courts considered nearly all of the intense union activities over the year preceding the strike to be irrelevant. Most conspicuous, instead, was an absence: since the initial decision to strike on 19–20 January 1991, the union appeared to have made no attempt to make the strike lawful, even though it had warned the government repeatedly, in writing, of its intention to strike. Union officers probably believed that under the labor laws then operating in Botswana, legally sanctioned strikes were impossible, with earlier strikes in the country having all been declared unlawful and ultimately defined as “rebelliousness” against the state (Mogalakwe 1997:
Another factor was that union negotiations with the government seemed, for a while, to be going extremely well. When the strike did happen, almost a year later, it appeared rushed, unplanned, and last minute, as though some workers simply felt that further delay would be intolerable.

The ensuing cases in the High Court and the Court of Appeal revealed areas of legal indeterminacy with regard to the legitimate government response to illegal strikes, in which different judges interpreted the Trade Dispute Act 1982 in quite varied ways, often while referring to case law from beyond Botswana. The indeterminacy may have been due at least in part to the shallowness of industrial relations case law in a country that had up to that point witnessed only a handful of labor disputes. The final judgment was regarded as a moral as well as legal victory for the union, and bore historical significance for later disputes. For example, a 2012 High Court judgment following a public service strike and mass dismissal of workers in 2011 came down in favor of the Botswana Federation of Public Service Unions (BOFEPUSU).

THE MORALITY OF LAW: THE HIGH COURT AND COURT OF APPEAL JUDGMENTS

Six issues were brought to the High Court for judicial review on 26 November, 1991, the key one being: “Declaring the summary dismissal of all the striking workers null and void and of no force and effect and that the said workers are entitled to reinstatement forthwith on the same terms and conditions of service as existed before the purported dismissal.” Comparing the judgments passed by the two courts—the High Court and the Court of Appeal—it is evident that while the High Court’s Judge Barrington-Jones set out the moral issues clearly, he made no attempt to convert them into a legal case that would allow him to find for the union on any of the six counts. Instead, he merely appealed to the government in the judgment’s conclusion. By contrast, and

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21 In an interview of 19 August 2005, Ronald Baipidi, who was head of the Botswana Federation of Trade Unions (BFTU) during the 1991 strike, said the procedure for calling a strike legally was “too long. First you have to register a dispute with the Commissioner of Labor. Then you have to wait twenty-one days. Having attempted and failed to negotiate a settlement you would have to go to the industrial court.” There was, he said, “a loophole in the law—after twenty-one days, in the short space of time before the commissioner of labor gave the certification to go to the Industrial Court, you could declare a strike, but once he issued the certificate you could no longer strike—you had to go to court and then the ruling made there was binding, whatever was awarded was binding. The strike, if declared in time, could thus be at most between the twenty-first day and the day for the hearing set by the court.

22 The 2012 court case surrounding the 2011 strike is discussed in Werbner (2014). By 2011, the law had been amended considerably, but the indeterminacy regarding employers’ legitimate responses to illegal strikes persisted, as was evident by the conflicting judgments in the High Court and Court of Appeal, where the unions lost.

23 Civil Case No. 1604 of 1991; and Civil Appeal No. 26/93.

24 Judges in the Botswana High Court and the Court of Appeal were drawn for many years from different parts of the Commonwealth, until “localization” began in 1992. Justice J. Barrington-Jones was a UK barrister who became a judge in the High Court of Botswana in
in true Realist tradition, Judge Amissah of the Court of Appeal drew skillfully on a range of laws to reach a judgment that the government as employer had acted unfairly and unreasonably, at least in its response to the strike action. Both courts looked meticulously at the minutes of certain meetings, correspondence, and legal statutes.

**The High Court Judgment**

Judge Barrington-Jones summarized the negotiations with government in the National Joint Industrial Coordinating Council, highlighting that the chairman “not only complimented the sub-committee … ‘for a good job’ but accepted that a P600.00 minimum wage ‘had been justified,’ since the current P236 ‘was historical’” (Botswana High Court 1991: 6). All the same, the judge reasoned in detail that the government clearly had ultimate authority regarding the pay hike. In light of this, he said, “If I am right in my conclusions in this regard, then my sympathies are certainly with the plaintiff Union…. I therefore consider that the aforesaid clumsy attempt [by the government] to persuade the Council to revise its earlier adopted recommendation was both improper and contrary to the accepted principles of administrative law” (ibid.: 12–13). He added, “…unless matters placed before such bodies as the NJICC are dealt with in a regular and democratic manner, any such body will, with the effluxion of time, lose all credence with those whose claims or grievances fail to be adjudicated” (ibid.: 13). Clearly, then, “All that transpired in the Council had sorely taxed the patience of the plaintiff Union who had clearly expected (with some justification) that the Council’s adoption of a revised minimum wage would, as a matter of course, have been referred to NEMIC and/or the Salaries Review Commission; but sadly it was not” (ibid.: 13–14). Despite having sympathized with the union and lambasted the government’s procedural conduct, the judge concluded that he was unable to find “on balance of probability, that the State is in breach of its Memorandum of Agreement” (ibid.: 14).

On the “lock out” of striking workers and their re-appointment without benefits, the judge cited the plaintiff counsel’s argument that workers were dismissed without a prior hearing, which conflicted with the government’s own requirements for dismissals, and should, the counsel argued, have been judged according to the “…emerging doctrine of legitimate expectation [which] is but one aspect of the ‘duty to act fairly’ (American Journal of Comparative Law 1988 by Professor Robert Riggs)” (ibid.: p. 15; see Riggs 1988).

Although the judge found another set of conflicting regulations, he acknowledged that absentee workers should be given an opportunity to

1984, having previously been a judge in Hong Kong and Zambia. In 1986, he acted as chief justice for an interim period (Othhogile n.d.: 93, 118, n.119, 136).
present their defense, and should also have the right of appeal (ibid.: 15). But because he thought, on balance, the strike was “both unconstitutional and unlawful” since the union did not conduct a secret ballot as required by its own constitution, and had rejected striking at an earlier Union Council meeting, he accepted it was a “wildcat strike” (ibid.: 17), and hence, since negotiations had not been exhausted, the minister was right to declare the strike unlawful (ibid.: 18–19), and, “Government’s decision to ‘lock out’ the striking workers was not in breach of the aforesaid Memorandum of Agreement” (ibid.: 21).

Finally, almost as an afterthought, Judge Barrington-Jones said that while he was unable to reverse the decision to dismiss the workers, “I do, however, believe that there are persuasive grounds, not unconnected with the clearly held widespread belief on the part of the plaintiff’s members, that a minimum wage of P600 had been adopted by the NJICC; [and to them] inexplicably not implemented by Government…. to suggest that the State reconsider its decision to summarily dismiss all the striking workers” (ibid.: 22). In the light of the confusion and “muddled thinking,” he “believes” that the state “be minded to take a more liberal view.” Of course, the state was not minded to do so, and the union lost the High Court case on all six counts.

The Appeal Court Judgment

In the High Court of Appeal, the union’s counsel, Guy Hoffman, referred to Robert Riggs’s 1988 article, mentioned above in the High Court trial, in which Riggs argued,

Since the landmark decision…. 1963, English courts have been in the process of imposing upon administrative decision-makers a general duty to act fairly. One result of this process is a body of case law holding that private interests of a status less than legal rights may be accorded procedural protections against administrative abuse and unfairness. As these cases teach, a person whose claims fall short of legal right may nevertheless be entitled to some kind of hearing if the interest at stake rises to the level of a ‘legitimate expectation.’ The emerging doctrine of legitimate expectation is but one aspect of the ‘duty to act fairly,’ but its origin and development reflect many of the concerns and difficulties accompanying the broader judicial effort to promote administrative fairness (1988: 395, my emphasis).

Riggs proposes that “legitimate expectation” parallels the American “due process” but is wider in the sense that it includes both substantive and procedural expectations. In English law, the notion of legitimate expectations is grounded in the rules of natural justice and of “reasonable expectation,” all of which rely on notions of acting fairly. As cases citing legitimate expectations have increased, it has come to be defined more clearly as arising “either from an

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25 This is odd given that the chronology recorded above shows that the union repeatedly postponed a strike to allow more time for negotiations, without ever rejecting the action. Moreover, it was nearly impossible to conduct a legal strike (see above, and note 19).
express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue” (ibid.: 422, citing Lord Fraser). By 1988, it had become a doctrine widely used in English courts (ibid.: 435). In a wide-ranging analysis, Carolan (2009) shows that as judicial review developed, English courts arrogated to themselves increasing autonomy in deciding not simply on grounds of *ultra vires* (i.e., that the administrative body had exceeded its authority) or procedural grounds, but on the basis of natural justice, commonsense, reasonableness, and fairness. Rather than merely interpreting parliamentary statutes and laws, the courts began to interpret the intention of the lawmakers. They did so even before the Human Rights Act had been domesticated in Britain.

Advocate Hoffman argued that, given statements on different occasions by the chairman of the NJICC, a delegated spokesman, and the relevant minister, the union had a “legitimate expectation” that the decision reached by the NJICC was final, subject only to formal approval through recognized channels. This was rejected in the High Court, despite its acknowledgment that the government decisions were “muddled.” The High Court failed to recognize that this was but one facet of a broader question—whether or not the administration had acted fairly toward the union throughout the dispute.

The Court of Appeal consisted of a panel of five judges presided over by Judge Austin Amissah, who delivered the judgment in the union’s case (see Botswana Court of Appeal 1995). He did so in 1995, two years after the High Court judgment and more than three years after the strike. One reason the Court of Appeal’s administration gave for the delay was that the High Court judgment needed to be “typed up,” a feeble excuse, which sparked bitter union complaints.

Judge Amissah’s reasoning followed two steps: First, he weighed the argument in favor of the employer, even expanding on the judgment of the High Court in this regard. In a second step, he shifted the weight of argument in favor of the union. He outlined meticulously the meeting minutes, ministerial letters, and relevant clauses in the Memorandum of Agreement in the Labor Act, based on the documents submitted to the court and agreed upon by both sides. He included in his review such items as a secret Cabinet Information Note (ibid.: 5), an interview on Radio Botswana (ibid.: 10–11), and ministerial speeches not mentioned in the High Court case. On the basis of these

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26 Judge Amissah was well known in Botswana as an innovative liberal judge who presided over the Unity Dow Court of Appeal case in 1992, known also as the “Citizenship Case.” In it he decreed, against an Act of Parliament, that Botswana women had the same rights as men to pass their citizenship on to their children (see Dow 1995; Selolwane 1998). A distinguished jurist, Amissah was born in Accra in 1930, educated at Oxford, and held the highest legal positions in Ghana, including minister of justice. He served as judge of the Court of Appeal in Botswana from 1981 to 2001, and for a time as that court’s president. He has authored several books. See [http://en.wikipedia.org/wiki/Austin_Amissah](http://en.wikipedia.org/wiki/Austin_Amissah) (accessed 26 July 2013).
documents, he concluded that the government’s behavior had been neither inconsistent nor muddled. At every stage, he showed, the minister of Presidential Affairs and Public Administration and representatives of Finance or the Director of Public Service Management had made clear that the grounds for deciding a pay hike were productivity and affordability, and at the very least that decisions in the Coordinating Council would need to be approved by “relevant authorities.” He thus found against the appellant (the union) that it knew from the start and throughout that the agreement reached in the Coordinating Council was not “binding.” According to the judge, the union’s awareness that the decision was not binding was also indicated by its demand that it be represented alongside the council chairman (the Director of Public Service Management, who was a member of the government) in representing the Coordinating Council’s joint decision to the government (ibid.: 19, 25, 29–30).

Against evidence presented by union witnesses, then, Judge Amissah argued that the minutes recorded at the time had a “ring of truth” (ibid.: 19) and were well documented (ibid.: 21). Referring to the law of contract, he concluded that the decision in the Coordinating Council constituted a “conditional agreement.” The government had not delegated, or ever intended to delegate, to the council its power to reach a final agreement on industrial workers’ wages (ibid.: 24). This was the first time the National Joint Industrial Coordinating Council had dealt with wages and, “right from the very beginning,” Amissah argued, “the Union side was made aware of the position of Government” (ibid.: 25). The Coordinating Council was a “technical body” intended to “assist” the government (ibid.: 27). The DPSM may have been, according to the Regulations for Industrial Employees, the official authorized to “approve changes in the rates of pay and allowances,” but in this case he was “acting in his capacity as Chairman of the NJICC,” whose “mandate” did not extend to setting the wages of industrial workers (ibid.: 31). Amissah went on to say, “It is not for this Court to say whether a wage of P236 or P600 was adequate to sustain a family for an industrial worker in this country” (ibid.: 32). In other words, he asserted that the Appeal Court could not judge on substantive issues, only procedural ones.

27 For example, according to its own minutes, during its investigations the sub-committee, which included union members, had met with a delegation from the Ministry of Finance who had stated some of the objections made by the government later: that a family of five rather than six should have been used as the norm; that the wage was “historical,” adopted from the colonial system and adjusted according to inflation, and therefore was unrelated to the Poverty Datum Line; and that “wage determination had nothing to do with a household but depended on the ability to pay and productivity” (Botswana Court of Appeal 1995: 15, my emphasis). The sub-committee stuck to its terms, and simply continued its deliberations on the justification for the various items to be tabulated for an estimated “living wage” for a family of six.
So far, more than halfway through the judgment, the judge seemed merely to be vindicating the government, with little sympathy for the union’s case. But Amissah did make a concession in concluding this part of the judgment:

The strike appears to have taken place as a result of the workers’ belief that Government had resiled from its undertaking…. There must have been some misunderstanding about the powers of the NJICC…. [T]hough wrong, it does not mean that the view determined by the erroneous interpretation was not strongly held. And it did require some delicate handling to bring both parties back to the right course. Labor relations are always likely to raise strong emotions. The mere fact that news had spread about some agreement or consensus with the NJICC that a wage of P600 was justified could have led workers to believe that this was to be the legally binding minimum wage (ibid.: 33).

The judge stressed the “sensitivity” of the situation, and the obvious need for “delicate” handling because of workers’ “strong emotions.” Four months had passed, he pointed out, from the Coordinating Council’s decision in July until the strike in November, during which time, with no positive news, “disappointment and frustration must have increased with each passing day.” This final statement hints at where Judge Amissah’s sympathies lay.

In further denying the legality of the mass dismissal of workers, the judge appealed to the law and to natural justice: on 5 November 1991, the minister, the DPSM, and various ministries had,

…summarily dismissed all striking workers and ordered the forfeiture of all their benefits; these summary dismissals were in breach of the Regulations for Industrial Employees at well as the Memorandum of Agreement; all striking workers have an inherent natural right to a hearing in respect of the substantive allegations leading to their dismissal, but no hearing was given them; the Minister of Labor and Home Affairs made an order declaring the strike illegal in terms of section 34 of the Trade Disputes Act (Cap. 48:02), but as the order was made without giving a hearing to the striking workers, it was null and void (ibid.: 34, my emphasis).

He thus disagreed with the High Court judge’s verdict, that because the minister had acted correctly in declaring the strike unlawful the strikers were not entitled to a hearing. The chronology of events that he then went on to reconstruct meticulously showed that from the start the government was abusing its “considerable power” to deny the workers the legitimate expectation to be heard. He thus invoked the audi alteram partum principle, of hear the other side too, a basic principle of natural justice and equity, as pertinent to the dismissal of striking workers, even in a strike deemed illegal.

The sequence of events he reconstructed so precisely revealed the government’s bad faith: on Sunday, the day before the strike was due to begin, a savigram from the DPSM was issued to all government permanent secretaries, heads of department, and district commissioners declaring the strike illegal and advising them “to dismiss summarily Industrial Class Workers who did not report to work at 13:45 on 4th November 1991” (ibid.: 35–36). A specimen letter of dismissal was also circulated which gave workers four days from the date of the letter to answer the charge of absenteeism either orally or in writing.
(ibid.: 36). But, as the judge pointed out, at this time there had been no declaration by the minister responsible that the strike was illegal, no press release advising industrial class workers to be at work at 13:45, and certainly four days had not elapsed from the date on the warning letter for them to answer charges. This would have allowed workers until 9 November, but by then the letters of dismissal had been written and in most cases delivered.

The government’s letters of dismissal referred to paragraph 8.29 of the Regulations for Industrial Employees, which stipulates that the employee “shall be given the opportunity to present his defence and to be represented in an atmosphere free from emotion.” Justice Amissah observed, “It seems to me unlikely that in the highly charged atmosphere of an ongoing strike, and with the speed with which an answer to the charge was required, a hearing ‘in an atmosphere free from emotion’ was possible” (ibid.: 38).

In the same letter, the judge remarked, reference was made to R.I.E. 8.19, which stipulates, “An employee may be considered to have left his employment if he takes two consecutive days’ absence without leave and without a satisfactory explanation” (ibid.: 38). The timing throughout was suspect: a letter dated the 4th may not have reached the president of the union on time (ibid.: 39). The press release issued on the evening of 5 November could not possibly have reached workers in time. A specimen letter of dismissal dated 5 November dismissed workers on grounds they did not turn up to work between “4th to 8th November” (ibid.: 41–42). Even more tellingly, while it was true that the union had not reported a trade dispute to the commissioner of labor as required (ibid.: 40), the government, too, was required to “make such a report,” which it had signally failed to do (ibid.: 41). The judge commented, “I am, therefore, constrained to ask what effort the Government side made to report the dispute to the Commissioner. Government, it seems to me, was engaged in a flurry of activity directed at dismissing the workers at the earliest possible time…. It is difficult, therefore, to avoid the conclusion that Government did not wish to invite the mediating or conciliatory intervention of the Commissioner of Labor which the Act called for” (ibid.: 41).

Slips in dating were “consistent with the interpretation that the decision had been taken to dismiss the workers even before the strike began.” The letter also indicated, the judge said, “a shift from reliance on breach of the Trade Disputes Act, as a reason for dismissal” (ibid.: 42). The minister of Labor and Home Affairs had only made a declaration in an Extraordinary Gazette that the strike was unlawful on 6 November, two days after the strike began, to be in effect from midnight (realistically speaking) from the 7th (ibid.: 43). By this time, the letters of dismissal had been issued. A “Notice of Appeal” to return to work was issued by the union to all striking workers on that day, alongside a letter to the secretary of the NJICC calling for an urgent meeting. When the workers turned up to work the following Monday, they were dismissed. Those who reapplied were not reinstated but employed anew, lost their gratuities
and any other accumulated privileges, and were required to sign new contracts and go on probation for two months (ibid.: 44).

If this was correct procedure, the judge commented, no worker would “dare” to join industrial action involving absence of more than two days (ibid.: 45). But is that what the Trade Disputes Act says about the settlement of trade disputes? The minister was entitled to declare the strike unlawful on the grounds that “all practical means of reaching a settlement of the trade dispute” had not been exhausted. But none of the machinery for trade disputes had been utilized (ibid.: 46–47).

Judge Amissah thus first tracks with detective-like tenacity the timing of the dismissal letters in order to expose that they were produced in bad faith. Only then does he introduce a landmark ruling regarding the legitimate response to an illegal strike. In a novel interpretation of the law, one that neither the High Court nor the appellant had recognized, he judges that even if the order declaring the strike illegal was valid, it did not automatically follow that the dismissals would also be upheld (ibid.: 47). The point of principle is, “The Act is specially designed to ensure that trade disputes are, as far as possible, settled peacefully and amicably… It is not, in my view, made to enable one side with the power to settle a dispute to its advantage. In any case, the Act does not contemplate wholesale dismissal of workers who take part in an illegal strike. The sanction it imposes … is in the form of criminal penalties” (ibid.: 48). The judge notes that later in the dispute no mention was made by government of the Trades Disputes Act, and he concludes, “Government must have appreciated the weakness of their case on the Act” (ibid.: 48).

**THE RULES OF NATURAL JUSTICE, FAIRNESS, AND LEGITIMATE EXPECTATIONS**

“Those placed in authority should in the exercise of their discretionary powers act fairly. This requirement of the law is one of the manifestations of the rules of natural justice” (ibid.: 48). The Court of Appeal showed that the government had clearly acted in bad faith throughout the dispute, and part of this was the fact, Judge Ammissah pointed out, that the real issue—why workers were on strike—“was not a matter the employer was prepared to consider.” “Acting fairly is not, however, limited to going through formal motions to justify a decision which has already been taken,” he said (ibid.: 49). And he asked further, “Who has legitimate expectation?” He said he preferred to use “legitimate expectation,” rather than “reasonable expectation … in order thereby to indicate that it has consequences to which effect will be given in public law” (ibid.: 50).

In this case, workers had a legitimate expectation that strikes should be settled in accordance with the Trade Disputes Act. Otherwise, “The worker is entitled to some rational explanation for abandoning the course charted by the Act” (ibid.: 50). In an English case, Lord Taylor had argued that “the doctrine
of legitimate expectation in essence imposes a duty to act fairly” (ibid.: 51). Hence, Justice Amissah concludes, “The essence of the rule of natural justice, therefore, may not always be a matter of giving a hearing but of acting fairly in the exercise of discretionary power… A strike situation seems to me to be a good example, where an ordinary hearing or showing cause on an individual basis, may not lead to a just result. That, I believe, is the reason why special provisions are made by the Trade Disputes Act and through collective bargain agreements for the resolution of industrial disputes” (ibid., my emphasis).

The government was aware that this was not an ordinary case of workers absenting themselves from their jobs for no discernable reason. They should have called the union for discussion to explore the possibility of an amicable settlement or, alternatively, gone through the processes set up by the Trade Dispute Act. They did neither. That the union held no ballot on whether or not to strike, as mentioned by the High Court, was irrelevant, since it was apparent that the union continued to recognize its responsibility toward workers throughout the dispute. The government had acted with “undue haste” to exercise its “power to dismiss workers” (ibid.: 53). If that was permissible, “The Trade Disputes Act would be unnecessary and of little value.” The judge thus made a declaratory order in favor of the union: “The dismissal of the striking workers was unlawful. The consequence is that they are entitled to reinstatement, not re-employment by Government. This is especially so as the majority of the workers was in any case taken back, and no prejudice would in the main be suffered by third parties by such reinstatement” (ibid.: 53–54).

The verdict was a triumph for the union, a landmark victory to be remembered in its annals of struggle with the government, its employer. But the victory was only partial; it highlighted the limitations of wage negotiations when employers withhold relevant managerial information, as Klare argued (1982). Even after the court verdict, questions remained: Why did the government allow expectations to be raised, to the extent of agreeing that no person could live on P236 a month? Why did the government embark upon and encourage the consultation process when, as it turned out, it had no intention of raising wages, and all the investigations were a complete waste of people’s valuable time? Clearly, the terms set for the Coordinating Council’s subcommittee were wrong and basically irrelevant. The judgments in both the High Court and Appeal Court recognized this, but the judges were unable to impose any penalties on the government for instigating a false procedure. Nor did they feel able to define the expectations generated by the process of investigating what “living wage” was “legitimate” or “fair.” The establishment of a false and wasteful consultation could well have been construed as “arbitrary” and a “breach of … legitimate expectation” (Carolan 2009: 208). It can be said, though, that issues of administrative fairness in the way the
government had used or abused its discretionary power on labor matters were nonetheless set out by the Court of Appeal.28

Even though the Court of Appeal’s verdict may have been a compromise, it highlighted the limits of the government’s power vis-à-vis workers. In the years that followed the strike, the government first attempted to “convert” industrial class workers into “Permanent and Pensionables” (P&P) and thus into members of the civil service—which at the time meant they could not unionize—before being advised to reverse the decision (Molosiwa 2007: 91). But for five years following the judgment the government continued to refuse to recognize a minimum wage hike to 600 pula, despite calls from the Botswana National Front Opposition party in Parliament for a 154 percent rise (ibid.: 94), and even though, in May 1999, the DPSM recommended to the government that since the minimum wage now stood at 537 pula it was time to accept 600 pula as the minimum wage, and that “government should effectively and seriously engage in decisive dialogue with the Union in the interests of peace and stability” (ibid.: 95). Despite warnings that refusal might effect the outcome of the coming elections, the government waited until after the elections, when, on 25 January 2000, the DPSM “informed the Union of the Government’s decision to award Industrial Class employees ‘the long-standing’ P600 minimum wage effective 1 April, 2000” (ibid.).

The same year, a 6 percent increase across the board was denied to Industrial class workers. The government argued that the P600 was inclusive of that award. When the labor commissioner examined the case, however, he judged that there was “no indication” that the P600 agreement had anything to do with the cost-of-living adjustment. Despite this, the government refused to implement the labor commissioner’s recommendation and its refusal was upheld in the Industrial Court (ibid.: 97), and then, in late January 2005, in the Court of Appeal (Chwaane 2005). Despite voices in support of the union from within the government, it remained intransigent, and in the process undermined the authority and legitimacy of its own labor mediating institutions. As Molaudi had concluded much earlier, in his 1992 report, “…we have to realise that Collective Bargaining with the employer, no matter how broad and sophisticated and whilst it is an essential protection, is not enough. In the end, the future of workers is in their own hands” (Molaudi 1992: conclusion, 2).

28 It should be noted that two years after this court case, in 1997, South Africa passed the Basic Conditions of Employment Act 75 (the BCEA), in recognition that “lawfulness does not necessarily equal fairness” (Garbers 2004: 400). This followed the adoption of the Constitution of the Republic of South Africa and the Bill of Rights in 1996, in which the requirement of fairness in employment had become a “constitutional imperative” (ibid.), in recognition that high unemployment leaves employees vulnerable to exploitation. Among the mechanisms imposed was “legislation that promotes collective bargaining to ensure a greater measure of equality,” protections against unfair dismissal, labor practices and discriminations, and the creation of specialist tribunals (ibid.: 400–1). The Court of Appeal verdict could thus be seen as reflecting an emergent regional trend in labor relations.
Legal skeptics could thus argue that the victory in court was in many ways a pyrrhic one. The employer used its might to deny workers a living wage. But it may also be argued that despite the limitations of the Court of Appeal victory, it bore considerable significance: in a developmental country that actively fostered ideas of national consensus and solidarity, the Manual Workers Union broke ranks to highlight the plight of low-paid workers, and to challenge the established wisdom that Botswana could not afford to pay them a living wage. In this sense, the victory in the Court of Appeal, like other signal victories in judicial review in Botswana, is remembered historically as a turning point that established the independence of the Botswana judiciary and the democratic right to question unfair pay inequities and abusive employer practices.

CONCLUSION

It is, I think, significant that in addressing their judgments to litigants and a lay audience, judges must appeal to moral values. As Simmonds argues, in the application of rules a “judgment must implicitly or explicitly appeal to moral or political values that can be regarded as binding or normative for the litigants” (2007: 136). The same tendency to articulate moral standards in passing judgment was visible, we have seen, in the judgments of Barotse judges. They, too, invoked moral principles in explaining their reasoning. In both customary and modern courts, however, judicial morality must additionally be anchored in rational and complex judicial reasoning. Both customary and modern judges must first mobilize the full intricacy of the law in rational argumentation, whatever their ethical judgments.

Despite legal skepticism among some anthropologists about the increased use of the law in postcolonial nations, which they argue serves as a mere smokescreen for the pervasive rise in violence and corruption (e.g., Comaroff and Comaroff 2007), it is evident that the widening remit of judicial review in both the West and developing countries, intended to curb the arbitrary power of the state by appealing to notions of fairness and legitimate expectations, has enabled activists, including public service unionists, to use the law in their democratic struggles for justice and equity. Increasingly, populist movements are exposing dictatorial regimes that attempt to hide behind a façade of the law. Undoubtedly, Critical Legal theorists are right that politics, economics, morality, and the law intersect in complex ways in different social situations, as the case outlined here illustrates. But this is not to deny the force of judicial morality or the power of judicial review to overturn unjust laws and

29 Notable are the 1992 Unity Dow citizenship case (see above), and the San CKGR cases in 2006 and 2011, respectively, both of which the government lost. On the former, see Saugestad 2011, and also Solway 2009.

30 Comaroff and Comaroff do admit the law can be a “weapon of the weak” (2007: 144, 145).
administrative decisions. Just as an earlier generation of legal anthropologists dismissed Max Gluckman’s analysis of the moral dimensions of Barotse legal judgments, preferring to discern maximizing man or complex maneuverings behind the legal façade in the societies they studied, so too it seems that a cohort in the current generation of anthropologists is denying the impact of increasing legal understanding and sophistication among public workers and postcolonial democratic activists, utilized as a tool to control the arbitrary power of the postcolonial state.

Despite their lack of formal education, members of the Manual Workers Union, in addition to being successful negotiators in worker-employer arbitration tribunals, had a life-long acquaintance with judicial reasoning in customary courts. This led them to believe, as the cases outlined here indicate, that if they persisted in their struggle for “fairness” and equity, ultimately justice would prevail even in the less familiar arena of Botswana’s modern state courts. This faith in the possibility of a fair judicial process can thus be said to permeate the whole legally plural landscape, moving workers to appeal what they regarded as a blatantly unjust decision by their employers, the Government of Botswana.

REFERENCES


Abstract: This paper analyses the significance of the Botswana High Court and Court of Appeal judgments of a case in which the Manual Worker Union, a blue-collar public sector union, challenged the Botswana Government to reinstate dismissed workers with all their past benefits. I examine the role of public ethics and morality in Botswana as reflected in key notions used by High Court judges, such as “the duty to act fairly” and “legitimate expectations,” and argue that legal anthropologists have neglected such ideas, despite their having become a bedrock of contemporary judicial reasoning. While anthropology has shown a renewed interest in ethics, issues of public ethics and morality remain relatively unexplored in contemporary legal anthropological debates. One has to go back to the work of Max Gluckman on reasonableness in judicial decision-making among the Barotse to find foundational anthropological insights into the morality and ethics of law in non-Western societies. In the legally plural context of Botswana, notions of equity and fairness, this paper argues, “permeate” the legal landscape.