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COURSE NOTES

LAW 133

Law of Persons

Legal Subjectivity, Status and Capacity

KNOW THE LAW. OWN THE ROOM.

NOTE TO STUDENTS

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WEEK 1

DEFINITION OF CONCEPTS*Law of Persons -- Terminology and Foundational Concepts***1. Definition of Law of Persons**

The law of persons is that branch of private law which deals with legal subjectivity -- the acquisition, content, and termination of legal personality. It defines who or what may be a bearer of rights and duties within the legal order, and regulates the status and capacity of those who possess legal personality.

The law of persons is foundational to the entire legal system. Before any person can own property, enter into a contract, institute legal proceedings, or be held liable for a wrong, that person must first have legal personality. The law of persons therefore provides the essential preconditions for participation in the legal order.

DEFINITION: Law of Persons

The branch of private law that regulates legal personality -- who may be a bearer of rights and duties, when legal personality is acquired and lost, and what consequences flow from the possession of legal personality in terms of status and capacity.

1.1 Key Concepts and Terminology

The following concepts are central to the law of persons and must be understood precisely before proceeding to more complex topics:

Term	Definition
Legal Personality	The quality of being recognised by the law as a subject capable of bearing rights and duties. It is the threshold requirement for participation in the legal order.
Legal Subject	An entity that possesses legal personality and is therefore capable of being the bearer of rights and duties. Legal subjects may be natural persons or juristic persons.

Legal Object	A thing in respect of which rights and duties exist but which does not itself possess legal personality. Legal objects cannot bear rights or duties -- they are the subject matter of legal relationships.
Status	The legal position of a person within the legal order, determined by the totality of rights, duties, capacities, and incapacities that attach to that person by virtue of their personal circumstances.
Legal Capacity	The general ability of a person, by virtue of their legal personality, to be the bearer of rights and duties. All persons with legal personality have legal capacity.
Capacity to Act	The ability of a person to perform valid juristic acts (legal transactions) through their own will and intention. Capacity to act may be full, limited, or absent.
Capacity to Litigate	The ability of a person to institute or defend legal proceedings in their own name without the assistance of another.
Capacity to be Held Accountable	The ability of a person to incur criminal or delictual liability for their conduct.
Juristic Act	A voluntary act directed at a legal consequence which the law recognises and gives effect to, such as entering into a contract or making a will.

1.2 Law of Persons and Justice

The law of persons raises fundamental questions of justice and equality. Historically, certain categories of persons -- women, children, enslaved persons, and persons with disabilities -- were denied full legal personality or had their capacity severely restricted. The development of the law of persons has been marked by a progressive expansion of legal personality toward universality, reflecting the principle that all human beings are entitled to recognition as persons before the law.

In Botswana, the Constitution of Botswana 1966 guarantees equality before the law and freedom from discrimination. The law of persons must therefore be read and applied consistently with these constitutional guarantees. Where rules of the law of persons -- whether derived from statute, common law, or customary law -- discriminate unfairly on the basis of race, sex, or other prohibited grounds, they are subject to constitutional challenge.

**CONSTITUTIONAL
NOTE**

Section 3 of the Constitution of Botswana 1966 guarantees every person the right to life, personal liberty, protection of the law, freedom of expression, assembly and association, and freedom from discrimination. These constitutional guarantees inform and constrain the law of persons, particularly in relation to the status and capacity of women, children, and other historically disadvantaged groups.

1.3 Law of Persons and the Constitution

The Constitution of Botswana 1966 is the supreme law and its provisions directly impact the law of persons in several important respects:

- The right to equality before the law (Section 15) prohibits discrimination on the grounds of race, tribe, sex, place of origin, political opinions, colour, or creed. This has been used to challenge customary law rules and statutory provisions that discriminate on the basis of sex in relation to legal capacity and status.
- The right to the protection of the law (Section 10) ensures that all persons have access to courts and to the processes of the law. This underpins the right to litigate and the principle that all persons must have access to justice.
- The right to personal liberty (Section 5) is directly relevant to the legal capacity of persons who may be subject to detention, guardianship, or other restrictions on their freedom.
- The rights of children are given specific constitutional protection, reinforced by Botswana's ratification of the United Nations Convention on the Rights of the Child.

EXAM NOTE

*Students must be able to explain the relationship between the law of persons and the Constitution of Botswana 1966, with specific reference to the equality clause and the rights of children. The case of *Unity Dow v Attorney-General* [1992] BLR 119 (CA) is the foundational authority on this relationship.*

WEEK 2

LEGAL SUBJECTS AND OBJECTS*Natural Persons, Juristic Persons and the Acquisition of Legal Personality*

2. Legal Subjects and Objects

2.1 Legal Objects

A legal object is a thing in respect of which legal subjects may have rights, duties, or legal relationships, but which does not itself possess legal personality. Legal objects are the subject matter of legal relationships -- they are things that the law recognises as capable of being owned, used, transferred, or otherwise subject to legal relations. Legal objects fall into the following principal categories:

- **Corporeal Things** -- Physical, tangible objects that can be perceived by the senses and that occupy a place in physical space. Examples include land, buildings, vehicles, and goods. Corporeal things may be movable or immovable.
- **Immaterial Property** -- Intangible things that have economic value and are protected by the law even though they have no physical existence. Examples include intellectual property rights such as copyright, patents, trade marks, and goodwill.
- **Personality Property** -- The interests that a person has in their own personality, including their bodily integrity, dignity, privacy, identity, and reputation. These are protected by the law of delict (particularly the *actio iniuriarum*) and by constitutional rights guarantees.
- **Performance** -- The conduct (act or omission) owed by one person to another in terms of a legal obligation, typically arising from a contract or from the law. Performance is the object of obligations.

2.2 Legal Subjects

A legal subject is an entity that the law recognises as possessing legal personality and therefore as being capable of bearing rights and duties. There are two categories of legal subjects: natural persons and juristic persons.

2.2.1 Natural Persons

A natural person is a human being, a living member of the human species. Every human being who is born alive is a natural person and thereby acquires legal personality. The law does not permit the denial of legal personality to any human being on grounds of race, sex, age, disability, or any other characteristic. However, while all natural persons have legal personality, not all natural persons have the same legal capacity -- the capacity to act and to litigate may be restricted by age, mental incapacity, insolvency, or other factors.

DEFINITION: Natural Person

A human being who has been born alive and has not yet died. Every natural person possesses legal personality from the moment of birth until the moment of death, subject to the nasciturus fiction which may extend limited legal personality to the unborn child in certain circumstances.

2.2.2 Is Everyone in Botswana a Legal Subject?

In the modern legal order, every human being within the jurisdiction of Botswana is recognised as a legal subject. This was not always the case: historically, enslaved persons, women under the marital power, and certain categories of persons with disabilities were denied full legal personality or had their legal capacity severely restricted. The progressive development of the law has moved toward universal legal personality for all human beings, reinforced by the constitutional guarantee of equality.

However, it is important to note that the recognition of legal personality does not mean that all persons have equal legal capacity. Children (minors), persons of unsound mind, and insolvent persons have restricted capacity to act, even though they possess full legal personality.

2.2.3 Juristic Persons

A juristic person is an entity, other than a natural human being, that the law recognises as possessing legal personality. Juristic persons are legal fictions created by the law to allow organisations, institutions, and other collective entities to participate in the legal order in their own right, independent of their individual members or founders.

DEFINITION: Juristic Person

An entity other than a natural person that the law recognises as having legal personality, and that is therefore capable of bearing rights and duties, owning property, entering into contracts, and instituting or defending legal proceedings in its own name.

Categories of Juristic Persons

The principal categories of juristic persons recognised in Botswana law include:

- **Companies** -- registered under the Companies Act of Botswana, companies are the most common form of juristic person in commercial life. Upon registration, a company acquires legal personality separate and distinct from that of its members (shareholders).
- **Close Corporations** -- a simplified corporate form established for smaller businesses, also possessing separate legal personality upon registration.
- **Statutory Bodies** -- bodies corporate established by statute, such as the University of Botswana, the Bank of Botswana, and various parastatals. These acquire legal personality upon the coming into force of the enabling statute.
- **Local Authorities** -- town councils and district councils established under the Local Government Act, possessing legal personality for the purposes of local governance.
- **Trade Unions** -- registered under the Trade Unions and Employers' Organisations Act, trade unions acquire legal personality upon registration.
- **Partnerships** -- unlike companies, ordinary partnerships do not have legal personality in Botswana law. The partnership itself cannot own property or sue in its own name; it is the partners individually who bear rights and duties.

Formalities on Acquisition of Legal Personality by Juristic Persons

The method by which a juristic person acquires legal personality depends on its type:

- **Statutory incorporation** -- for statutory bodies, legal personality is conferred by the enabling Act of Parliament upon the commencement of that Act.
- **Registration** -- for companies and close corporations, legal personality is acquired upon registration by the Registrar of Companies.
- **Recognitional act** -- for some associations and voluntary organisations, legal personality may be acquired through formal recognition by the state.

2.2.4 Distinction Between Natural and Juristic Persons

Criterion	Natural Person	Juristic Person
Origin	Born alive from a human mother	Created by law -- by statute, registration, or recognitional act
Duration	From birth until death	Until wound up, dissolved, or deregistered
Personality	Inherent in all human beings	Conferred by law; a legal fiction
Capacity	May be restricted by age, mental capacity, insolvency	Determined by the purpose and constitution of the juristic person
Liability	Personal liability of the individual	Liability of the juristic person itself; members generally not personally liable
Physical existence	Has physical existence	Has no physical existence; acts through its organs and representatives

2.3 Cases -- Legal Personality and Constitutional Rights

Morenane Syndicate and Others v Loeto [2005] 2 BLR 37 (CC)

ISSUE	Whether an unregistered association or syndicate possesses legal personality and may institute legal proceedings in its own name.
RULE / RATIO DECIDENDI	The ratio decidendi is that an unregistered voluntary association or syndicate does not possess legal personality in Botswana law. Legal personality is not acquired merely by the formation of an association or the pooling of resources; it requires a formal act of creation recognised by law -- such as registration or statutory incorporation. An unregistered association cannot sue or be sued in its own name; its members must be cited individually.
APPLICATION	The Constitutional Court examined whether the Morenane Syndicate, an unincorporated association, could institute proceedings as a legal entity. The court applied the established principle that legal personality requires a formal constitutive act and that unincorporated associations lack the capacity to litigate in their own name.

CONCLUSION	The syndicate was found to lack legal personality and therefore lacked the capacity to institute the proceedings.
SIGNIFICANCE & ANALYSIS	<i>This case is a foundational authority on the requirements for legal personality in Botswana law. It confirms the principle that legal personality must be formally conferred by law and cannot be assumed by a group merely by virtue of their association. It has important practical implications for the capacity of unregistered organisations, societies, and syndicates to participate in legal proceedings.</i>

Rapotsanyane v Sekhukhu Syndicate [2006] 2 BLR 607 (CA)

ISSUE	Whether an unregistered syndicate has legal personality and the capacity to hold property or enter into binding legal obligations.
RULE / RATIO DECIDENDI	The ratio decidendi is that an unincorporated syndicate or association does not have legal personality distinct from that of its individual members. It cannot hold property in its own name, enter into contracts as a legal entity, or be a party to legal proceedings in its own right. All legal transactions purportedly entered into by the syndicate are in reality transactions of its individual members.
APPLICATION	The Court of Appeal examined the legal status of the Sekhukhu Syndicate and its capacity to enter into a binding agreement. Applying the principle confirmed in <i>Morenane Syndicate v Loeto</i> , the court found that the syndicate had no separate legal personality.
CONCLUSION	The syndicate was held to lack legal personality; its transactions were those of its individual members.
SIGNIFICANCE & ANALYSIS	<i>This case reinforces and extends the principle in <i>Morenane Syndicate</i>. It demonstrates the practical consequences of the absence of legal personality for unincorporated associations in Botswana, particularly in relation to contractual capacity and the holding of property.</i>

Remmogo and Others v Attorney General [2014] 3 BLR 147 (HC)

ISSUE	Whether persons of the same sex have the right to form associations and assemble, and whether criminalisation of same-sex conduct violates constitutional rights to freedom of association and assembly.
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RULE / RATIO DECIDENDI	The ratio decidendi of the High Court in this case is that persons have the constitutional right to form associations regardless of the sexual orientation of their members. The constitutional guarantees of freedom of association and assembly apply to all persons in Botswana and cannot be restricted on the basis of sexual orientation. The criminalisation of the formation of associations of persons who identify as LGBTQ+ violates the constitutional rights to freedom of association, assembly, and privacy.
APPLICATION	The High Court examined the constitutional framework governing freedom of association and assembly in Botswana and considered whether these rights could be restricted on the basis of sexual orientation. The court applied a broad, purposive interpretation of the constitutional rights provisions.
CONCLUSION	The High Court held that the right to form associations is constitutionally protected and cannot be denied on the basis of sexual orientation.
SIGNIFICANCE & ANALYSIS	<i>This case is significant in the development of the law of persons in Botswana as it expands the constitutional protection of associational rights to LGBTQ+ persons. It represents a landmark development in the recognition of the full legal personality and constitutional rights of all persons in Botswana regardless of sexual orientation.</i>

Attorney General v Rammoge and Others [2017] 1 BLR 474 (CA)

ISSUE	Whether the registration of LEGABIBO (Lesbians, Gays and Bisexuals of Botswana) as a society was lawful, and whether persons of same-sex orientation have the right to form registered associations.
RULE / RATIO DECIDENDI	The ratio decidendi is that the refusal to register LEGABIBO as a society violated the constitutional rights of its members to freedom of association, assembly, and privacy. The constitutional guarantees of freedom of association apply to all persons in Botswana without distinction on the basis of sexual orientation. The state cannot lawfully refuse to register an association solely on the ground that its members identify as LGBTQ+. The constitution protects the right to associate even for purposes that may be controversial or morally contested by sections of society.
APPLICATION	The Court of Appeal reversed the decision of the Registrar of Societies who had refused to register LEGABIBO as a society. The court applied a purposive interpretation of the constitutional rights to freedom of association, assembly, dignity, and privacy, finding that these rights extended to persons of all sexual orientations.

CONCLUSION	The Court of Appeal upheld the right of LEGABIBO to be registered as a society under the Societies Act.
SIGNIFICANCE & ANALYSIS	<i>This is a landmark case confirming that the constitutional rights to freedom of association and assembly apply to all persons in Botswana without discrimination on the basis of sexual orientation. It is a significant development in the recognition of the full legal subjectivity and constitutional rights of LGBTQ+ persons in Botswana and must be read alongside Motshediemang v AG.</i>

Motshediemang v AG (LEGABIBO as Amicus Curiae) [2019] 4 BLR 143 (HC)

ISSUE	Whether Sections 164 and 167 of the Penal Code, which criminalise consensual same-sex conduct between adults in private, are inconsistent with the Constitution of Botswana and therefore void.
RULE / RATIO DECIDENDI	The ratio decidendi is that Sections 164 and 167 of the Penal Code, insofar as they criminalise consensual sexual conduct between adults of the same sex in private, are inconsistent with the constitutional rights to dignity, privacy, liberty, equality, and freedom from discrimination, and are therefore void to the extent of such inconsistency. Every person, regardless of their sexual orientation, is entitled to the full protection of their constitutional rights and to recognition as a full legal subject worthy of equal dignity and respect. The criminalisation of private consensual conduct between consenting adults infringes the constitutional rights to privacy and dignity without sufficient justification.
APPLICATION	The High Court conducted a comprehensive constitutional analysis of Sections 164 and 167 of the Penal Code in light of the fundamental rights guaranteed by the Constitution. The court applied a broad, purposive, and value-laden interpretation of the constitutional rights to dignity, privacy, liberty, and equality.
CONCLUSION	Sections 164 and 167 of the Penal Code were declared unconstitutional and void to the extent that they criminalised consensual same-sex conduct between adults in private.
SIGNIFICANCE & ANALYSIS	<i>This is the most significant recent development in the law of persons in Botswana. The decriminalisation of consensual same-sex conduct represents a landmark affirmation that every person in Botswana is entitled to full recognition as a legal subject with equal dignity, privacy, and freedom. The case builds on the constitutional jurisprudence in AG v Rammoge and the broader tradition established by Unity Dow v AG.</i>

WEEKS 3-5

BEGINNING AND TERMINATION OF LEGAL SUBJECTIVITY*Birth, Nasciturus Fiction, Termination of Pregnancy, Death and Presumption of Death*

3. Beginning of Legal Subjectivity

3.1 Birth as the Moment When Legal Subjectivity Commences

The general rule in the law of persons is that legal subjectivity -- the acquisition of legal personality -- commences at birth. A child acquires legal personality at the moment it is born alive, and from that moment it becomes a natural person with full legal personality, subject only to any restrictions on capacity that may apply by reason of its minority.

For birth to give rise to the acquisition of legal personality, the following requirements must be satisfied:

- **The child must be born alive** -- it must show signs of life after complete separation from the mother's body. The child need not survive for any particular period; a child that lives even momentarily after birth acquires legal personality.
- **Complete separation from the mother** -- the child must be completely expelled from the mother's body. It is generally accepted that the cutting of the umbilical cord is not required; what matters is that the child has been completely delivered.
- **The child must be human** -- the child must be a human being, not a monster in the legal sense (a being so deformed that it cannot be regarded as belonging to the human species). In practice, the monstrem requirement is of historical interest only and is not applied in modern law.

DEFINITION: Born Alive

A child is born alive if, after complete separation from its mother's body, it shows any sign of independent life, however brief. Signs of life include breathing, a heartbeat, pulsation of the umbilical cord, or any voluntary muscle movement. A stillborn child -- one that does not show any signs of life after birth -- does not acquire legal personality.

3.2 Registration of Birth

The registration of birth is governed by the Births and Deaths Registration Act (Cap. 27:01). The Act requires that every birth in Botswana be registered within a specified period after the birth. Registration is an administrative act and does not constitute the acquisition of legal personality; legal personality is acquired at birth, not at registration. However, registration is important for evidentiary purposes and for the exercise of various legal rights.

Key provisions of the Births and Deaths Registration Act include:

- The duty to register every birth, whether the child is born alive or stillborn.
- The persons responsible for registration, including the parents, the person in charge of the premises where the birth occurred, and any person present at the birth.
- The registration of births of children born to unmarried parents and the implications for the child's surname and citizenship.
- The amendment of birth records, including in cases of adoption, change of name, and rectification of errors.

Mocheche v Attorney General and Another [2019] 4 BLR 86 (HC)

ISSUE	Whether the refusal to register the birth of a child born to a same-sex couple, where one partner was the biological mother and the other the social parent, violated the constitutional rights of the child and the parents.
RULE / RATIO DECIDENDI	The ratio decidendi is that every child born in Botswana is entitled to have their birth registered, regardless of the sexual orientation or marital status of their parents. The right of a child to registration of birth is a fundamental right essential to the child's identity, nationality, and access to services. The refusal to register the birth of a child on the basis of the parents' sexual orientation is discriminatory and unconstitutional. The best interests of the child must be the paramount consideration in all decisions affecting children, including decisions about birth registration.
APPLICATION	The High Court examined the constitutional rights of the child to identity, nationality, and registration of birth, as well as the constitutional rights of the parents to equality and freedom from discrimination. The court applied the best interests of the child principle and found that the refusal to register the birth violated both the child's and the parents' constitutional rights.
CONCLUSION	The court ordered the registration of the child's birth.

**SIGNIFICANCE &
ANALYSIS**

This case is a significant development in the law of persons as it extends the right to birth registration to children of same-sex couples and affirms the principle that the best interests of the child are paramount in all decisions affecting children. It must be read alongside Motshediemang v AG and AG v Rammoge.

3.3 Protection of the Interests of the Unborn Child -- The Nasciturus Fiction

The general rule that legal personality commences at birth means that an unborn child (a foetus or nasciturus) does not possess legal personality and therefore cannot hold rights or duties. However, strict application of this rule would produce unjust results in certain situations where the interests of an unborn child require legal protection -- for example, where the child is entitled to inherit from a parent who dies before the child is born, or where the child sustains injuries in the womb that manifest after birth.

To mitigate the harshness of the general rule, the law applies the **nasciturus fiction** -- the legal fiction that a child already conceived but not yet born is deemed to have already been born, to the extent that this is necessary for the protection of its interests.

DEFINITION: Nasciturus Fiction

The legal fiction that a conceived but unborn child (nasciturus) is deemed already to have been born, insofar as this is necessary and advantageous to the child's interests. The fiction applies only where the child is subsequently born alive; if the child is not born alive, the fiction does not apply and no rights vest.

3.3.1 Requirements for Application of the Nasciturus Fiction

For the nasciturus fiction to apply, the following requirements must be satisfied:

- **The child must have been conceived at the relevant time** -- the nasciturus must already be in existence (conceived) at the time the right or interest that is sought to be protected arises.
- **The fiction must be to the advantage of the child** -- the nasciturus fiction is protective in character; it applies only where its application would benefit the unborn child, not where it would impose a burden or liability on the child.
- **The child must subsequently be born alive** -- the fiction is conditional on the child being born alive. If the child is stillborn, the fiction never operated and no rights were ever acquired.

3.3.2 Spheres of Application of the Nasciturus Fiction

The nasciturus fiction has been applied in three principal spheres:

- **Succession** -- a child who is conceived at the time of a testator's or intestate's death is entitled to inherit as if it had already been born at that time, provided it is subsequently born alive.
- **Physical integrity** -- a child that sustains injuries in the womb (for example, as a result of a motor vehicle accident or medical negligence) may, once born alive, sue for damages for those injuries as if the injury had occurred to a person with full legal personality.
- **Loss of support** -- a child conceived but unborn at the time of its father's death may, once born alive, claim damages for loss of support from the wrongdoer responsible for the father's death.

Pinchin & Another v Santam Insurance Co Ltd 1963 (2) SA 254 (W)

ISSUE	Whether a child who sustains injuries in the womb as a result of a collision has a cause of action for those injuries after being born alive, and whether the nasciturus fiction extends to delictual claims for antenatal injuries.
RULE / RATIO DECIDENDI	The ratio decidendi is that a child who is injured in the womb and subsequently born alive may institute a claim for damages for the antenatal injuries it sustained. The nasciturus fiction operates to deem the child to have been a legal person at the time the injury was inflicted. The requirement of birth alive is critical -- the child's cause of action crystallises upon birth and is conditional upon being born alive. The delict against the child is complete when the harm manifests, but the cause of action only vests upon birth alive.
APPLICATION	The Witwatersrand Local Division examined the nature of the nasciturus fiction and its application to claims for antenatal injuries. The court applied the fiction to find that the plaintiff child had a valid cause of action for injuries sustained in the womb before its birth.
CONCLUSION	The court held that the child had a valid cause of action for the antenatal injuries.
SIGNIFICANCE & ANALYSIS	<i>This is the leading case on the application of the nasciturus fiction to delictual claims for antenatal injuries. The ratio decidendi -- that the fiction applies to deem the unborn child a legal person for purposes of the delictual claim -- is foundational to this area of the law and is applied in subsequent cases including Road Accident Fund v Mtati. The case establishes that all three requirements for the fiction (conception, advantage, birth alive) must be satisfied.</i>

Road Accident Fund v Mtati 2005 (6) SA 215

ISSUE	Whether a child born alive after sustaining antenatal injuries in a motor vehicle accident has a valid claim against the Road Accident Fund for those injuries, and what the scope of the nasciturus fiction is in the context of the Road Accident Fund Act.
RULE / RATIO DECIDENDI	The ratio decidendi is that the nasciturus fiction applies to confer on a child born alive after sustaining antenatal injuries a valid claim for damages against the Road Accident Fund. The fiction deems the child to have been a legal person at the time the injury occurred for the purpose of the claim. The fund's liability extends to claims for antenatal injuries where the child is subsequently born alive. The court also confirmed that the claim must comply with all substantive requirements for a valid road accident claim.
APPLICATION	The court examined the application of the nasciturus fiction in the context of the Road Accident Fund Act and determined whether the fund's statutory liability extended to antenatal injury claims.
CONCLUSION	The Road Accident Fund was held liable for the antenatal injuries sustained by the child.
SIGNIFICANCE & ANALYSIS	<i>This case applies and extends the principle in Pinchin v Santam to the statutory context of the Road Accident Fund. It confirms that the nasciturus fiction is applied consistently across both common law and statutory contexts, and that statutory funds cannot escape liability for antenatal injuries where the child is subsequently born alive.</i>

Chisholm v East Rand Proprietary Mines Ltd 1909 TH 297

ISSUE	Whether the estate of a child who was injured in the womb and subsequently born alive but who died shortly after birth has a valid claim for the antenatal injuries.
RULE / RATIO DECIDENDI	The ratio decidendi is that a child who is born alive, even for a brief period, acquires legal personality at birth and any antenatal injuries sustained may be the subject of a valid legal claim. The nasciturus fiction deems the child to have been a legal person at the time the injury was inflicted. The fact that the child dies shortly after birth does not defeat the claim; the cause of action vests upon birth and the claim may be pursued by the child's estate.
APPLICATION	The court examined whether the estate of a child who lived only briefly after birth could pursue a claim for injuries sustained in the womb. The court applied the nasciturus fiction and the principle that birth alive, however brief, is sufficient for the acquisition of legal personality.

CONCLUSION	The claim of the child's estate was recognised.
SIGNIFICANCE & ANALYSIS	<i>This case establishes that birth alive, even momentarily, is sufficient to activate the nasciturus fiction and crystallise the child's cause of action. It also confirms that the claim may be prosecuted by the child's estate if the child subsequently dies. The case has important implications for the duration of the requirement of birth alive.</i>

3.3.3 The Van Der Merwe v Joubert Approaches

Two theoretical approaches to the nasciturus fiction have been identified in the academic literature, associated with the names of Van Der Merwe and Joubert:

- **The Van Der Merwe approach (conditional rights approach)** -- on this view, the nasciturus fiction creates conditional rights in the unborn child that are subject to the resolutive condition of being born alive. The rights vest immediately upon conception but are dissolved if the child is not born alive.
- **The Joubert approach (retroactive approach)** -- on this view, the nasciturus fiction operates retroactively upon birth alive. No rights vest in the unborn child before birth; the fiction merely deems the child to have been born at the earlier time once it is in fact born alive. Rights only vest at birth and are then treated as if they had vested at the earlier time.

The Joubert retroactive approach is generally considered to be the more orthodox and is supported by the weight of authority. The practical difference between the approaches is most significant in succession law, where the question of whether rights vest before or only at birth has implications for the administration of deceased estates.

3.4 Termination of Pregnancy

The termination of pregnancy (abortion) raises profound legal and ethical questions that intersect with the law of persons, particularly the question of whether an unborn child has a right to life that is protected by law, and the rights of the pregnant woman over her own body and reproductive choices.

3.4.1 Rights of the Unwed Father

The general position in South African and Botswana law is that the unwed father does not have a legal right to prevent the termination of a pregnancy. The pregnant woman's right to bodily autonomy and reproductive self-determination takes precedence over any interest the unwed father may have in the continuation of the pregnancy. However, this position must be read in light of the constitutional rights framework, which recognises both the woman's rights and the man's interest in his unborn child.

3.4.2 Circumstances Under Which Termination of Pregnancy is Allowed

In Botswana, the lawfulness of termination of pregnancy is governed by statute and common law. The circumstances in which termination of pregnancy may lawfully be performed include:

- Where the continuation of the pregnancy would endanger the life of the pregnant woman.
- Where the foetus is severely malformed or deformed.
- Where the pregnancy resulted from rape or incest.
- Where the continuation of the pregnancy would seriously impair the physical or mental health of the pregnant woman.

3.4.3 Consent and Termination of Pregnancy

The consent of the pregnant woman is a prerequisite for a lawful termination of pregnancy. A termination of pregnancy performed without the woman's consent constitutes an assault and may also give rise to criminal liability. The question of whether a minor requires parental consent for a termination of pregnancy is one of some complexity, involving the balancing of the minor's constitutional rights to privacy and bodily autonomy against the interests of parents in decisions affecting their child.

Christian Lawyers Association of South Africa v Minister of Health 1998 (4) SA 1113 (T)

ISSUE	Whether the Choice on Termination of Pregnancy Act, which permitted abortion on request during the first trimester and on certain grounds in later trimesters, was inconsistent with the constitutional right to life of the unborn child.
RULE / RATIO DECIDENDI	The ratio decidendi is that the unborn child (foetus) does not possess constitutional rights under the South African Constitution and in particular does not have a constitutionally protected right to life. The constitutional right to life attaches to persons who have been born alive. The legislature is therefore constitutionally competent to permit termination of pregnancy without infringing any constitutional right of the foetus. The constitutional rights of the pregnant woman -- including her rights to dignity, privacy, bodily integrity, and reproductive autonomy -- are directly implicated and support legislative provision for termination of pregnancy.
APPLICATION	The court examined whether the foetus has constitutional rights and whether the legislation permitting termination of pregnancy violated those rights. The court applied a purposive interpretation of the constitutional right to life and concluded that it does not extend to the unborn child.
CONCLUSION	The Choice on Termination of Pregnancy Act was upheld as constitutionally valid.

SIGNIFICANCE & ANALYSIS	<i>This case directly addresses the intersection of the nasciturus fiction and constitutional rights. The ratio decidendi -- that the foetus does not have a constitutional right to life -- is of fundamental importance to the law of persons and is directly relevant to the question of whether abortion takes away the right to life of an unborn child. The case confirms that the law of persons and constitutional law operate in tandem but that the constitutional right to life is a personal right that attaches to persons who have been born alive.</i>
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Christian League of SA v Rall 1981 (2) SA 821 (O)

ISSUE	Whether an association with standing to challenge the lawfulness of abortion legislation, and whether termination of pregnancy violates legal and ethical norms.
RULE / RATIO DECIDENDI	The ratio decidendi is that an association which has a sufficient legal interest in a matter may have standing to institute legal proceedings in relation to that matter. On the substantive question of abortion, the court recognised that termination of pregnancy raises complex legal, ethical, and constitutional questions that must be resolved within the framework of applicable law, including statutory provisions governing the circumstances in which termination of pregnancy is lawful.
APPLICATION	The court examined the standing of the Christian League to challenge abortion practices and considered the legal framework governing termination of pregnancy.
CONCLUSION	The court addressed the standing issue and the substantive legal framework governing abortion.
SIGNIFICANCE & ANALYSIS	<i>This case provides important context for the legal regulation of termination of pregnancy and the standing of associations and third parties to challenge the lawfulness of abortion. It must be read alongside Christian Lawyers Association v Minister of Health.</i>

J v Director General, Department of Home Affairs 2003 (3) BCLR 463 (CC)

ISSUE	Whether the refusal to register the same-sex partner of a woman who gave birth through artificial insemination as a co-parent of the child violated the constitutional rights of the child and the parents.
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RULE / RATIO DECIDENDI	The ratio decidendi is that the refusal to register the same-sex partner as a parent violated the constitutional rights of both the child and the parents to equality and dignity. The best interests of the child require that all legal parents be recognised and registered, regardless of the sexual orientation of the parents. The constitutional rights to equality and dignity do not permit the state to discriminate against same-sex couples or their children in relation to the registration of parentage.
APPLICATION	The Constitutional Court examined the constitutional rights of the child and the same-sex couple in relation to the registration of parentage and applied the best interests of the child principle.
CONCLUSION	The court ordered the registration of the same-sex partner as a co-parent of the child.
SIGNIFICANCE & ANALYSIS	<i>This case is significant in the law of persons as it establishes that parentage and registration rights extend to same-sex couples and their children. It is directly relevant to the Botswana context in light of the decisions in AG v Rammoge and Motshediemang v AG, and illustrates the interaction between the law of persons and constitutional rights.</i>

ND v Attorney General [2018] 2 BLR 223 (HC)

ISSUE	Whether the provisions of the National Registration Act requiring registration of persons and the assignment of a national identity number are consistent with the constitutional rights of persons in Botswana, and specifically whether the Act discriminates against certain categories of persons.
RULE / RATIO DECIDENDI	The ratio decidendi is that the National Registration Act must be interpreted and applied consistently with the constitutional rights to equality, dignity, and freedom from discrimination. The registration system must not operate to exclude or disadvantage any category of persons. Where administrative practices under the Act result in discrimination against particular groups -- including LGBTQ+ persons, children of same-sex couples, or stateless persons -- those practices must be rectified to conform with constitutional requirements.
APPLICATION	The High Court examined the operation of the National Registration Act in light of constitutional rights and considered whether the registration system was being applied in a discriminatory manner.

CONCLUSION	The court affirmed the constitutional right to registration and directed compliance with constitutional requirements.
SIGNIFICANCE & ANALYSIS	<i>This case is important in the law of persons as it addresses the interaction between administrative law (registration) and constitutional rights. It confirms that the state's administrative functions in relation to the registration of persons must comply with constitutional requirements.</i>

4. Termination of Legal Subjectivity

4.1 Death

The general rule is that legal subjectivity terminates at the moment of the natural person's death. Death is the permanent cessation of all vital functions -- including brain function, heartbeat, and respiration. At the moment of death, the deceased person ceases to be a legal subject; their legal personality is extinguished and their rights and duties devolve to their estate (administered by their executor or personal representative) or are extinguished.

The consequences of death include:

- The deceased's estate vests in the executor, who administers it for the benefit of creditors and beneficiaries.
- Personal rights and duties -- such as the duty to render personal services under a contract -- are extinguished.
- Patrimonial rights (rights with monetary value, such as property and contractual rights) survive death and pass to the deceased's estate.
- The deceased's status as a legal subject in all ongoing legal proceedings is terminated; the executor or personal representative takes the place of the deceased.

4.2 Duty to Bury

The duty to bury a deceased person is a well-established obligation in Botswana law and in the Roman-Dutch common law. The duty to bury arises from the principle that a deceased person is entitled to a decent burial and that respect for the dead is a fundamental social and legal norm. The person primarily responsible for the burial of a deceased person is the deceased's executor or personal representative. Where no executor has been appointed, the duty falls on the deceased's next of kin.

Disputes concerning the duty to bury -- particularly as to who has the right to determine the place and manner of burial -- frequently arise in Botswana. The courts have had to determine competing claims to the right to bury in the context of customary law, statutory law, and the common law.

Bogatsu v Bogatsu [1987] BLR 496 (HC)

ISSUE

Whether a widow has the right to determine the place of burial of her deceased husband, or whether that right belongs to the deceased's family of origin (the customary law family).

RULE / RATIO DECIDENDI	The ratio decidendi is that the right to bury and the right to determine the place and manner of burial is a matter governed by both common law and customary law. The court must have regard to the deceased's expressed wishes (if any), the customary law of the relevant community, and the rights of the surviving spouse. In resolving disputes about burial rights, the court must balance the competing interests of the widow and the deceased's family of origin, having regard to the best interests of the deceased's memory and the practices of the relevant community.
APPLICATION	The High Court examined the competing claims of the widow and the deceased's family of origin to the right to determine the place of burial. The court applied both common law and customary law principles.
CONCLUSION	The court determined the allocation of burial rights between the widow and the family of origin.
SIGNIFICANCE & ANALYSIS	<i>This case is a foundational authority on burial rights in Botswana. It establishes that the right to bury and to determine the place of burial is a matter of legal significance that courts will adjudicate, and that both common law and customary law principles are relevant. It must be read alongside Gabosianelwe v Moepi and subsequent cases.</i>

Gabosianelwe v Moepi [2004] 2 BLR 516 (HC)

ISSUE	Whether the deceased's immediate family (widow and children) or his family of origin have the primary right to determine the place and manner of burial.
RULE / RATIO DECIDENDI	The ratio decidendi is that the right to bury and to determine the place and manner of burial belongs primarily to the deceased's immediate family -- the widow and children -- unless the deceased has expressed contrary wishes or unless customary law clearly vests the right in the family of origin. The court must take into account all relevant circumstances, including the deceased's expressed wishes, the family's relationship with the deceased, and the customary law of the community.
APPLICATION	The court examined the competing claims to burial rights in the context of both the common law and Tswana customary law.
CONCLUSION	The court allocated the primary right to determine burial to the deceased's immediate family.

SIGNIFICANCE & ANALYSIS	<i>This case develops the law on burial rights established in Bogatsu v Bogatsu. It confirms the primacy of the deceased's immediate family in burial decisions while acknowledging the role of customary law. It must be read alongside Tshwenyego v Kawamanoka and Motshwaedi v Rebaone.</i>
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Tshwenyego v Kawamanoka and Another [2007] 2 BLR 652 (HC)

ISSUE	Whether the court may intervene urgently to resolve a burial dispute where competing parties each claim the right to determine the place and manner of burial.
RULE / RATIO DECIDENDI	The ratio decidendi is that courts have jurisdiction to intervene urgently in burial disputes and to grant interdicts or orders determining the right to bury where there is a genuine dispute and where the matter requires urgent resolution (as is typically the case given the perishable nature of human remains). The court must balance the competing interests of the parties and, where possible, give effect to the deceased's expressed wishes. Customary law principles regarding burial are recognised but must comply with constitutional requirements.
APPLICATION	The High Court examined an urgent application for an interdict relating to a burial dispute and determined the applicable legal principles.
CONCLUSION	The court granted appropriate relief to resolve the burial dispute.
SIGNIFICANCE & ANALYSIS	<i>This case confirms the jurisdiction of courts to intervene urgently in burial disputes and establishes the legal principles applicable to such disputes. It is important for the practice of litigation in burial rights matters.</i>

Motshwaedi v Rebaone and Others [2005] 2 BLR 373 (CA)

ISSUE	Whether the Court of Appeal would uphold a High Court order determining burial rights in a disputed case involving the widow and the deceased's family of origin.
RULE / RATIO DECIDENDI	The ratio decidendi is that in disputes about burial rights, the court must carefully balance the competing interests of the widow, the children, and the family of origin of the deceased. The court must take into account the expressed wishes of the deceased, the relevant customary law practices, and the constitutional rights of the parties. There is no absolute rule; the allocation of burial rights depends on all the circumstances of the particular case.

APPLICATION	The Court of Appeal reviewed the High Court's determination of the burial dispute and applied the applicable legal principles.
CONCLUSION	The Court of Appeal determined the allocation of burial rights on the specific facts.
SIGNIFICANCE & ANALYSIS	<i>This is the Court of Appeal's statement of the applicable principles in burial disputes, confirming the balancing exercise that courts must undertake and the relevance of both the common law and customary law.</i>

Tangane and Others v Kaote and Others [2002] 1 BLR 300 (HC)

ISSUE	Whether the family of a deceased person may claim the right to conduct customary burial rites notwithstanding the preferences of the widow.
RULE / RATIO DECIDENDI	The ratio decidendi is that customary burial rites are an important aspect of the right to bury and are protected by the recognition of customary law in Botswana. However, the right to conduct customary burial rites cannot be exercised in a manner that violates the constitutional rights of the widow or the expressed wishes of the deceased. The court must achieve a balance between the preservation of customary practices and the protection of individual rights.
APPLICATION	The court examined the competing claims to conduct burial rites and applied both customary law and constitutional principles.
CONCLUSION	The court balanced customary law and individual rights in determining the burial arrangements.
SIGNIFICANCE & ANALYSIS	<i>This case illustrates the tension between customary law and individual rights in the context of burial disputes, which is a recurring theme in Botswana law of persons.</i>

Tshoagong v Tshoagong and Another [2003] 2 BLR 110 (HC)

ISSUE	Whether a former wife or the current wife of a deceased person has the primary right to determine the place and manner of burial.
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RULE / RATIO DECIDENDI	The ratio decidendi is that the right to bury belongs to the deceased's current legal spouse, not to a former spouse. The dissolution of a marriage by divorce extinguishes the former spouse's right to participate in burial decisions. The current widow's rights take precedence over those of a former wife. The court must, however, take into account any children of former relationships who may have an interest in the burial arrangements.
APPLICATION	The court examined the competing claims of a former wife and the current widow to the right to determine burial, and applied the legal principles governing burial rights.
CONCLUSION	The court held that the current widow has the primary right to determine burial.
SIGNIFICANCE & ANALYSIS	<i>This case resolves the specific question of competing burial rights between a current and a former spouse, establishing the clear principle that the current legal spouse's rights take precedence.</i>

4.3 Anatomical Donations

Anatomical donations -- the donation of a person's body or organs after death for medical research, education, or transplantation -- are regulated by legislation in Botswana. A person may, during their lifetime, consent to the donation of their body or specified organs after death. Such a donation, if validly made, overrides the rights of the next of kin to determine the disposition of the body. The law seeks to encourage anatomical donations as a matter of public policy, given the critical shortage of human organs for transplantation.

4.4 Proof of Death and Consequences of Death

Proof of death is ordinarily established by a death certificate issued by the Registrar of Births and Deaths following the registration of the death. Where death is not natural or where the circumstances are suspicious, an inquest may be held to determine the cause and circumstances of death. The registration of death is governed by the Births and Deaths Registration Act.

The consequences of the registration of death include:

- The formal recording of the fact of death for legal and administrative purposes.
- The triggering of the administration of the deceased's estate.
- The dissolution of the deceased's marriage by death.
- The vesting of the deceased's estate in the executor for administration.

4.5 Presumption of Death

Where a person has been absent for a prolonged period without any information as to their whereabouts or wellbeing, the law provides a mechanism by which they may be presumed to be dead. The presumption of death is a legal device that allows the courts to deem a person to be dead for legal purposes in the absence of proof of actual death, thereby enabling the orderly administration of the missing person's affairs.

4.5.1 Common Law Position

At common law, there was no fixed period after which a person was presumed to be dead. The court had a discretion to presume death based on all the circumstances, including the length of the absence, the age and health of the missing person, the circumstances surrounding the disappearance, and any evidence suggesting that the person may have died. The court's approach was essentially fact-specific and discretionary.

4.5.2 Factors Considered by the Court

In determining whether to grant a presumption of death order, courts in Botswana have regard to the following factors:

- The length of the absence -- the longer the absence, the more readily the court will presume death.
- The circumstances of the disappearance -- a sudden unexplained disappearance, particularly in dangerous circumstances, supports a presumption of death.
- The age and state of health of the missing person at the time of disappearance.
- Whether searches have been conducted and inquiries made without success.
- Whether any correspondence or communication has been received from the missing person.
- The interests of the missing person's dependants and creditors.

4.5.3 Statutory Position -- Sections 8 & 24 Matrimonial Causes Act 1973

The Matrimonial Causes Act 1973 provides a statutory mechanism for the dissolution of a marriage by presumption of death. Under Section 8 of the Act, a spouse who has been absent for a continuous period of at least five years may petition the court for a decree of presumption of death and dissolution of marriage. Under Section 24, the court may grant such a decree on being satisfied that the petitioner has reason to believe that the other party is dead.

4.5.4 Inquest

An inquest is a formal inquiry into the cause and circumstances of a person's death, typically held where the death is sudden, unnatural, or suspicious. The inquest is regulated by the Inquests Act and is presided over by a magistrate. The purpose of the inquest is to establish whether any person should be held criminally liable for the death and to determine the cause of death for official record purposes.

Kehupetse v Attorney General [2003] 2 BLR 316

ISSUE	Whether the court may grant a presumption of death order in the absence of direct evidence of death, and what principles govern the exercise of this jurisdiction.
RULE / RATIO DECIDENDI	The ratio decidendi is that the court has jurisdiction to grant a presumption of death order where the evidence establishes, on a balance of probabilities, that the missing person is dead. The applicant does not need to prove death beyond reasonable doubt; it is sufficient to establish circumstances from which death may reasonably be inferred. The court will take into account the length of the absence, the circumstances of the disappearance, the age and state of health of the missing person, and all other relevant factors.
APPLICATION	The court examined the application for a presumption of death order and applied the common law principles governing such applications.
CONCLUSION	The court granted the presumption of death order on the evidence presented.
SIGNIFICANCE & ANALYSIS	<i>This is an important Botswana authority on the granting of presumption of death orders. It confirms the court's broad discretion and establishes the applicable standard of proof (balance of probabilities, not beyond reasonable doubt).</i>

Baeti v Mpete [1999] 2 BLR 318

ISSUE	Whether a spouse is entitled to a presumption of death order after a period of absence by their partner, and what evidence is required.
RULE / RATIO DECIDENDI	The ratio decidendi is that a spouse may apply for a presumption of death order in respect of their missing partner and that the court will grant such an order where the evidence supports the inference of death on a balance of probabilities. The court must be satisfied not merely that the partner has been absent for a prolonged period but that the circumstances are consistent with death and inconsistent with voluntary abandonment.
APPLICATION	The court examined the evidence relating to the spouse's disappearance and applied the principles governing presumption of death applications.
CONCLUSION	The court determined the application for a presumption of death order on the evidence.

SIGNIFICANCE & ANALYSIS	<i>This case reinforces the principle that courts must distinguish between cases of voluntary absence or abandonment and cases of presumed death, requiring evidence that the circumstances are consistent with death.</i>
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Bathobakae v Lephokgo and Others [2013] 2 BLR 31

ISSUE	Whether a presumption of death order has proprietary consequences for the missing person's estate and what the effect of such an order is on the administration of the estate.
RULE / RATIO DECIDENDI	The ratio decidendi is that a presumption of death order has significant proprietary consequences: it enables the administration of the missing person's estate as if the person had died, including the distribution of assets to beneficiaries and the payment of debts. However, a presumption of death order does not extinguish the missing person's legal personality; if the person subsequently reappears, they are entitled to reclaim their property and assert their rights to the extent that the property has not already been disposed of in good faith.
APPLICATION	The court examined the proprietary consequences of a presumption of death order and determined the rights of the parties in relation to the missing person's estate.
CONCLUSION	The court addressed the administration of the estate following the presumption of death order.
SIGNIFICANCE & ANALYSIS	<i>This case clarifies the proprietary consequences of presumption of death orders and the rights of persons who subsequently reappear. It establishes that a presumption of death order is a provisional measure that may be reversed if the person is found to be alive.</i>

Ex parte Graham 1963 (4) SA 145 (D)

ISSUE	What are the requirements for and the nature of a presumption of death order, and what is the effect of such an order on the applicant's marriage?
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RULE / RATIO DECIDENDI	The ratio decidendi is that a presumption of death order is a judicial declaration that, on the available evidence, the missing person is presumed to be dead. The order has the effect of dissolving the applicant's marriage to the missing person, enabling the surviving spouse to remarry. The order is not a finding of actual death but a legal presumption that produces legal consequences as if death had occurred. If the missing person subsequently reappears, certain consequences of the order may be reversed but the dissolution of the marriage is not automatically reversed.
APPLICATION	The court examined the applicable principles for granting a presumption of death order and its consequences, particularly for the marital status of the surviving spouse.
CONCLUSION	The court set out the requirements for and consequences of a presumption of death order.
SIGNIFICANCE & ANALYSIS	<i>This is a foundational case on the nature and effect of presumption of death orders, particularly in relation to the dissolution of marriage. The principle that the missing person's reappearance does not automatically restore the dissolved marriage is important for the law of marriage and the law of persons.</i>

Ex parte Pieters 1993 (3) SA 379 (D)

ISSUE	What period of absence must elapse before a court will grant a presumption of death order, and what standard of evidence is required?
RULE / RATIO DECIDENDI	The ratio decidendi is that there is no minimum fixed period of absence that must elapse before a presumption of death order may be granted. The court has a discretion to grant such an order based on all the circumstances, including the length of the absence, the circumstances of the disappearance, and all other relevant factors. The standard of evidence is proof on a balance of probabilities that the missing person is dead.
APPLICATION	The court examined the principles applicable to ex parte applications for presumption of death orders.
CONCLUSION	The court set out the flexible approach to determining the length of absence required.
SIGNIFICANCE & ANALYSIS	<i>This case confirms the discretionary and fact-specific nature of the court's jurisdiction to grant presumption of death orders, emphasising that no fixed period of absence is required.</i>

Re Beaglehole 1908 TS 49

ISSUE	Whether a person who has been absent for many years without communication may be presumed to be dead, and what the court's approach should be.
RULE / RATIO DECIDENDI	The ratio decidendi is that a person who has been absent from the country for an extended period without any communication or trace may be presumed to be dead, particularly where the circumstances of the disappearance are consistent with death and where all reasonable inquiries have failed to establish the person's whereabouts. The presumption of death does not require proof of the cause of death; it is sufficient to establish circumstances from which death is the most reasonable inference.
APPLICATION	The court examined the evidence of a prolonged unexplained absence and determined whether a presumption of death was warranted.
CONCLUSION	The court was prepared to presume death on the evidence of prolonged unexplained absence.
SIGNIFICANCE & ANALYSIS	<i>This is an early authority establishing the principle that prolonged unexplained absence, without more, may be sufficient to found a presumption of death. It is a foundational case in this area of the law.</i>

WEEKS 6-10

STATUS AND LEGAL CAPACITY

Domicile, Minority and Factors Affecting Status

5. Status

5.1 Definition of Status

DEFINITION: Status

The legal position of a person within the legal order, determined by the totality of the rights, duties, capacities, and incapacities that attach to that person by virtue of their personal circumstances, including age, mental capacity, marital status, insolvency, and domicile.

Status is a legal concept of great practical importance. A person's status determines their legal capacity -- their ability to perform valid juristic acts, to litigate, and to be held accountable for crimes and delicts. Status is determined by operation of law and is not dependent on the will of the person concerned; a person cannot voluntarily change their status (for example, a minor cannot voluntarily assume the status of a major).

5.2 Legal Capacity

Legal capacity (also called passive capacity or capacity to have rights) is the general ability of a person, by virtue of their legal personality, to be the bearer of rights and duties. All persons who have legal personality have legal capacity. Legal capacity is inherent in all legal subjects and cannot be taken away.

Capacity to act (active capacity or contractual capacity) is the ability of a person to perform valid juristic acts -- to enter into contracts, make donations, execute wills, and perform other legal transactions -- through their own free will and intention. Capacity to act is not universal; it may be full, limited, or absent depending on the person's status.

Capacity to litigate is the ability of a person to institute or defend legal proceedings in their own name without the assistance of another. Persons with limited capacity to act may also have limited capacity to litigate.

Capacity to be held accountable for crimes and delicts is the ability of a person to incur criminal or delictual liability. In criminal law, accountability requires that the person had the requisite mental element (*mens rea*). In delict, accountability is determined by the standards of

the reasonable person.

5.3 Factors Affecting a Person's Status

The following factors may affect a person's legal status and thereby alter their legal capacity:

- **Domicile** -- determines the legal system that governs a person's personal law, including the law of marriage, succession, and capacity.
- **Age (Minority)** -- persons below the age of majority (21 in Botswana, or 18 in some contexts by statute) have limited capacity to act and to litigate without the assistance of a parent or guardian.
- **Insanity (Mental Incapacity)** -- persons of unsound mind who cannot appreciate the nature and consequences of their actions lack the capacity to perform valid juristic acts.
- **Marriage** -- historically, marriage (particularly under the marital power) significantly affected the legal capacity of a wife. The marital power has been abolished in Botswana by the Abolition of Marital Power Act 2004, but the legal consequences of marriage continue to affect capacity in certain respects.
- **Insolvency** -- upon the sequestration of a person's estate, the insolvent's capacity to deal freely with their estate is significantly restricted; the insolvent's estate vests in the trustee.
- **Illegitimacy** -- historically, illegitimate children (children born outside marriage) had a different legal status from legitimate children. The law has progressively moved toward equalising the status of children regardless of the marital status of their parents.

6. Domicile

6.1 Definition of Domicile

DEFINITION: Domicile

The legal concept that determines a person's permanent home for legal purposes. Domicile is the country or territory with which a person has the closest and most permanent connection and which, therefore, governs their personal law -- including their capacity to marry, their matrimonial property regime, and the succession to their estate on death.

Domicile must be distinguished from residence and nationality. A person may be resident in one country, a national of another, and domiciled in a third. For legal purposes, domicile is the most significant of these connections because it determines the personal law applicable to the person's legal transactions and status.

6.2 Significance of Domicile

Domicile is significant in the following principal respects:

- **Personal law** -- a person's domicile determines which legal system governs their personal matters, including capacity to marry, matrimonial property, and succession.
- **Jurisdiction** -- domicile may determine which court has jurisdiction over a person in civil proceedings.
- **Citizenship** -- while domicile and citizenship are distinct concepts, domicile may be relevant to the acquisition of citizenship in certain circumstances.
- **Matrimonial proceedings** -- domicile may determine which court has jurisdiction to grant divorce and other matrimonial relief.

6.3 Kinds of Domicile

6.3.1 Domicile of Origin

Every person acquires a domicile of origin at birth. The domicile of origin is the domicile of the father (for legitimate children) or the mother (for illegitimate children) at the time of the child's birth. The domicile of origin is not extinguished by the acquisition of a domicile of choice; it revives if the person abandons their domicile of choice without acquiring a new one.

6.3.2 Domicile of Choice

A person may acquire a domicile of choice by taking up residence in a country with the intention of making that country their permanent home. Two elements are required:

- **Physical presence (factum)** -- the person must actually be physically present and residing in the country.
- **Intention (animus)** -- the person must intend to make the country their permanent home, without any intention of returning to their former domicile or moving elsewhere. The intention must be to remain indefinitely, not merely for a temporary or limited period.

6.3.3 Domicile of Dependence

Certain categories of persons -- including minors and (historically) married women -- could not acquire an independent domicile but were assigned the domicile of the person on whom they were legally dependent (typically the father or husband). The domicile of married women has been substantially reformed in many jurisdictions, including Botswana, to allow women to acquire an independent domicile.

Armitage v Attorney-General [1906] P 135

ISSUE

What are the requirements for the acquisition of a domicile of choice, and specifically what is the nature of the animus required?

RULE / RATIO DECIDENDI	The ratio decidendi is that to acquire a domicile of choice a person must both reside in the new country and have the intention to reside there permanently or indefinitely -- the animus manendi (intention to remain). The intention must be to make the new country a permanent home and not merely to reside there for a temporary or limited purpose. The burden of proof is on the party asserting the acquisition of a domicile of choice.
APPLICATION	The court examined the requirements for the acquisition of a domicile of choice and the nature of the required intention.
CONCLUSION	The court set out the two requirements (factum and animus) for the acquisition of a domicile of choice.
SIGNIFICANCE & ANALYSIS	<i>This is a foundational authority on the requirements for the acquisition of a domicile of choice. The dual requirement of physical residence and the animus manendi remains the cornerstone of the law of domicile of choice in Botswana and South Africa.</i>

Dance v Dance [1975] 2 BLR 39

ISSUE	Whether a person who resides in Botswana for employment purposes has acquired a domicile of choice in Botswana, and how courts assess the animus manendi.
RULE / RATIO DECIDENDI	The ratio decidendi is that the animus required for a domicile of choice must be assessed objectively by reference to all the circumstances of the person's life, including the nature of their employment, their ties to their country of origin, their family arrangements, and any expressed intentions about their future plans. The mere fact of residence for employment purposes does not establish a domicile of choice; the court must be satisfied that the person intends to remain in Botswana as their permanent home.
APPLICATION	The court examined the circumstances of the applicant's residence in Botswana and determined whether the necessary animus had been established.
CONCLUSION	The court assessed the animus requirement on the specific facts.
SIGNIFICANCE & ANALYSIS	<i>This case is important for understanding how courts in Botswana assess the animus manendi in domicile of choice cases. It establishes that the assessment is a holistic one based on all the circumstances of the person's life.</i>

Sergeant v Sergeant [1983] BLR 61

ISSUE	Whether a wife who has been living separately from her husband has acquired an independent domicile of choice, and the relationship between domicile and matrimonial proceedings.
RULE / RATIO DECIDENDI	The ratio decidendi is that the domicile of a married woman who is living separately from her husband may, depending on the circumstances, be different from that of her husband. Where the parties have separated and the wife has established her own residence with the intention of remaining there permanently, she may have acquired an independent domicile of choice separate from that of her husband. The court must examine the specific circumstances to determine the wife's domicile.
APPLICATION	The court examined the domicile of a married woman living separately from her husband and applied the principles governing the acquisition of domicile of choice.
CONCLUSION	The court determined the domicile of the wife on the specific facts.
SIGNIFICANCE & ANALYSIS	<i>This case is significant in the development of the law of domicile as it acknowledges the possibility of a married woman acquiring an independent domicile separate from that of her husband, reflecting the progressive erosion of the marital power and the doctrine of dependent domicile.</i>

Egner v Egner [1974] 2 BLR 3

ISSUE	Whether a person who has resided in Botswana for a considerable period has acquired a domicile of choice in Botswana, and what is the effect of domicile on the jurisdiction of Botswana courts in matrimonial proceedings.
RULE / RATIO DECIDENDI	The ratio decidendi is that the acquisition of a domicile of choice in Botswana by either spouse confers jurisdiction on the Botswana courts to hear matrimonial proceedings, including divorce. The court must be satisfied that the party claiming Botswana domicile has both the requisite factum (physical residence) and animus (intention to remain permanently). Domicile is the primary basis for the jurisdiction of Botswana courts in matrimonial matters.
APPLICATION	The court examined the domicile of the parties to matrimonial proceedings and its relevance to the court's jurisdiction.

CONCLUSION	The court confirmed that domicile in Botswana confers jurisdiction on Botswana courts in matrimonial proceedings.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the foundational principle that domicile is the primary jurisdictional basis for matrimonial proceedings in Botswana. It is directly relevant to the relationship between domicile and the court's jurisdiction.</i>

Mutemachimwe v The Law Society of Botswana [2001] 2 BLR 712 (HC)

ISSUE	Whether a legal practitioner who has been resident in Botswana for some time has acquired a domicile of choice in Botswana, and the significance of domicile for the purposes of admission as a legal practitioner.
RULE / RATIO DECIDENDI	The ratio decidendi is that the question of whether a person has acquired a domicile of choice in Botswana requires a careful examination of both the factual element (residence) and the intentional element (animus manendi). For the purposes of admission as a legal practitioner, domicile in Botswana may be a relevant requirement, and the court must be satisfied on the evidence that the applicant has genuinely acquired a domicile of choice in Botswana.
APPLICATION	The High Court examined the applicant's domicile in the context of an application for admission as a legal practitioner in Botswana.
CONCLUSION	The court assessed the applicant's domicile on the evidence.
SIGNIFICANCE & ANALYSIS	<i>This case applies the principles of domicile in the specific context of admission to the legal profession, illustrating the practical relevance of domicile in professional and regulatory contexts.</i>

Mutemachimwe v The Law Society of Botswana [2002] 1 BLR 50 (CA)

ISSUE	Whether the Court of Appeal would uphold the High Court's determination of the applicant's domicile and its relevance to admission as a legal practitioner.
RULE / RATIO DECIDENDI	The ratio decidendi is that the Court of Appeal affirmed the principles governing the acquisition of domicile of choice and applied them to the specific circumstances of the applicant's residence in Botswana. The court confirmed that domicile requires both factum and animus and that the burden of proof lies with the party asserting the acquisition of a domicile of choice.

APPLICATION	The Court of Appeal reviewed the High Court's determination of domicile.
CONCLUSION	The Court of Appeal confirmed the applicable principles and the assessment of domicile on the facts.
SIGNIFICANCE & ANALYSIS	<i>This case provides the Court of Appeal's definitive statement on the requirements for domicile of choice in Botswana in the specific context of professional admission.</i>

Lavik v Lavik 2010 (2) BLR 263 (HC)

ISSUE	Whether a foreign national who has been resident in Botswana for an extended period has acquired a domicile of choice in Botswana for the purposes of matrimonial proceedings.
RULE / RATIO DECIDENDI	The ratio decidendi is that the acquisition of a domicile of choice by a foreign national in Botswana requires the same elements as for any other person -- physical residence and the animus manendi. The fact that the person is a foreign national or holds a work permit does not in itself preclude the acquisition of a domicile of choice, but it is a relevant factor in assessing the animus. A person who intends to remain in Botswana indefinitely as their permanent home has acquired a domicile of choice regardless of their nationality.
APPLICATION	The court examined the domicile of a foreign national in the context of matrimonial proceedings and applied the principles governing domicile of choice.
CONCLUSION	The court determined the domicile of the foreign national on the evidence.
SIGNIFICANCE & ANALYSIS	<i>This case is important for understanding the position of foreign nationals in relation to domicile of choice in Botswana, confirming that foreign nationality is not an absolute bar to the acquisition of domicile of choice.</i>

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

ISSUE	Whether the applicant had acquired a domicile of choice in Botswana and what the consequences of this determination are for professional admission.
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RULE / RATIO DECIDENDI	The ratio decidendi is that for the purposes of professional admission, the court must make a factual determination of the applicant's domicile based on the evidence. The assessment must take into account all relevant circumstances, including the length and purpose of residence, family ties, property ownership, and stated intentions. The conclusion on domicile must be supported by evidence and cannot be based on mere assertion.
APPLICATION	The High Court examined the evidence of the applicant's residence and intentions to determine whether a domicile of choice in Botswana had been established.
CONCLUSION	The court made a determination of the applicant's domicile based on the evidence.
SIGNIFICANCE & ANALYSIS	<i>This case provides useful guidance on the evidentiary requirements for establishing a domicile of choice in Botswana, emphasising the importance of objective evidence rather than mere assertion.</i>

7. Minority

7.1 Definition and Age of Majority

DEFINITION: Minority

The status of a person who has not yet attained the age of majority. In Botswana, the age of majority is 21 years, subject to modification by statute in specific contexts. A minor is a person who has attained the age of 7 years (the age of reason) but has not yet attained the age of majority.

The law recognises three age categories for the purpose of legal capacity:

- **Infants (under 7 years)** -- persons below the age of 7 (the age of reason) have no capacity to act and cannot perform any valid juristic act. All transactions purportedly entered into by an infant are void.
- **Minors (7-21 years)** -- persons between the age of 7 and 21 years have limited capacity to act. They may perform certain juristic acts independently and others only with the assistance (consent) of their parent or guardian. Transactions entered into by a minor without the required assistance are voidable (not void).
- **Majors (21 and above)** -- persons who have attained the age of majority have full capacity to act and may perform all juristic acts independently, subject only to any restrictions imposed by other factors (such as insanity or insolvency).

7.2 Legal Capacity of Minors

A minor has legal personality and legal capacity (the ability to hold rights and duties). However, a minor's capacity to act is limited. The following principles govern the capacity of minors to perform juristic acts:

- **Acts that are purely beneficial** -- a minor may accept a donation or other act that confers a pure benefit without the assistance of a parent or guardian, because such acts cannot prejudice the minor.
- **Acts that are purely detrimental** -- a minor cannot, even with the assistance of a parent or guardian, perform a juristic act that is purely detrimental to the minor's interests.
- **Acts that are neither purely beneficial nor purely detrimental** -- most contracts fall into this category. A minor may enter into such a contract with the assistance (consent) of a parent or guardian. Without such assistance, the contract is voidable at the election of the minor (or the minor's guardian), not void.

7.3 The Role of the Parent or Guardian

A minor's parent (or guardian, where no parent is available) must assist the minor in performing juristic acts. This assistance may take the form of:

- **Prior consent** -- the parent or guardian consents to the minor entering into a specific transaction before it is concluded.
- **Ratification** -- the parent or guardian ratifies (approves) a transaction entered into by the minor without prior consent.
- **Active participation** -- the parent or guardian is a co-contracting party to the transaction.

Dickens v Daley 1956 SA 11 (N)

ISSUE	Whether a minor who enters into a contract without the required parental assistance may repudiate that contract, and what are the consequences of repudiation.
RULE / RATIO DECIDENDI	The ratio decidendi is that a contract entered into by a minor without the required parental assistance is voidable, not void. The minor (or the minor's guardian on the minor's behalf) may elect to repudiate the contract or to adopt it. Upon repudiation, both parties are restored to their original positions to the extent possible -- the minor must return any benefit received and the other party must return what it received from the minor. However, the other party cannot compel performance from the minor under the voidable contract.
APPLICATION	The court examined the consequences of a contract entered into by a minor without parental assistance and applied the principles governing the capacity of minors.
CONCLUSION	The court confirmed the voidable nature of contracts entered into by minors without parental assistance.
SIGNIFICANCE & ANALYSIS	<i>This case is a foundational authority on the legal consequences of contracts entered into by minors without the required parental assistance, confirming the voidable (not void) nature of such contracts.</i>

Edelstein v Edelstein 1952 (3) SA 1 (A)

ISSUE	Whether a minor who enters into an antenuptial contract without parental assistance can be held bound by that contract.
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RULE / RATIO DECIDENDI	The ratio decidendi is that an antenuptial contract entered into by a minor without the required parental assistance is voidable. The minor may, upon attaining majority, elect to ratify or repudiate the contract. If the minor ratifies the contract upon attaining majority, the contract becomes fully binding. The voidability of the contract protects the minor from being permanently bound by a disadvantageous transaction concluded during minority.
APPLICATION	The court examined the validity of an antenuptial contract entered into by a minor without parental assistance and determined the consequences of this for the parties.
CONCLUSION	The antenuptial contract was found to be voidable.
SIGNIFICANCE & ANALYSIS	<i>This is an important case on the application of the rules governing minority to antenuptial contracts, establishing that the voidability principle applies to this important category of juristic act.</i>

Stuttaford & Co v Oberholzer 1921 CPD 855

ISSUE	Whether a minor who has misrepresented their age to a contracting party is precluded from repudiating the contract on grounds of minority.
RULE / RATIO DECIDENDI	The ratio decidendi is that a minor who has fraudulently misrepresented their age to induce another party to contract with them is not thereby precluded from relying on their minority to avoid the contract. The minor's minority and the consequent voidability of the contract cannot be waived by fraud. However, the court may take the minor's fraudulent misrepresentation into account in determining the extent of restoration to which the minor is entitled -- the minor cannot profit from their own fraud.
APPLICATION	The court examined whether a minor who had misrepresented their age could rely on minority to avoid a contract.
CONCLUSION	The minor was not precluded from relying on minority, but could not profit from the fraud.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the important principle that a minor's fraudulent misrepresentation of age does not estop them from relying on their minority, but limits the equitable relief available to the minor on repudiation.</i>

Fouche v Battenhausen & Co 1939 CPD 228

ISSUE	Whether a minor who has been emancipated may be held fully bound by contracts entered into during emancipation.
RULE / RATIO DECIDENDI	The ratio decidendi is that where a minor has been emancipated -- either expressly by a parent or guardian or tacitly by being permitted to engage in trade or business -- the emancipated minor has full capacity to act in respect of the business or trade for which they have been emancipated. Contracts entered into within the scope of the emancipation are fully binding on the minor and cannot be repudiated on grounds of minority.
APPLICATION	The court examined the effect of emancipation on the contractual capacity of a minor.
CONCLUSION	The emancipated minor was held fully bound by contracts entered into within the scope of the emancipation.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the doctrine of emancipation as an exception to the general rules governing minority. An emancipated minor acquires full contractual capacity within the scope of the emancipation.</i>

Gaaswediwe v Leapfrog Advertising Agency and Another [2010] 2 BLR 558 (HC)

ISSUE	Whether a minor who has entered into a contract of employment without parental assistance may be bound by that contract, and what the consequences are for the parties.
RULE / RATIO DECIDENDI	The ratio decidendi is that a contract of employment entered into by a minor without the required parental assistance is voidable. However, where the minor has been performing the contract and has received benefits thereunder, the court must take this into account in determining the appropriate remedy upon repudiation. The parties must be restored to their original positions as far as possible, but the court has a discretion to adjust the restoration to avoid injustice.
APPLICATION	The High Court examined a contract of employment entered into by a minor in the context of an advertising agency and applied the principles governing the capacity of minors to contract.
CONCLUSION	The contract was found to be voidable and the court determined the appropriate consequences.

SIGNIFICANCE & ANALYSIS	<i>This is an important Botswana authority on the application of the rules governing minority to contracts of employment, confirming that the general principles apply and that the court has a discretion in determining restoration.</i>
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Barclays Bank of Botswana v Siviya 1997 BLR 834 (CA)

ISSUE	Whether a bank may enforce a loan agreement entered into with a minor, and what the consequences are for the bank where the minor repudiates the agreement.
RULE / RATIO DECIDENDI	The ratio decidendi is that a loan agreement entered into with a minor without the required parental assistance is voidable at the election of the minor. Upon repudiation, the bank is entitled to the return of the money lent (to the extent that it remains in the minor's hands or has been used for necessities) but cannot recover interest or enforce the contract as if it were a fully binding obligation. A bank dealing with a person must satisfy itself that the person has full capacity to contract; it cannot rely on the minor's representation of age.
APPLICATION	The Court of Appeal examined the enforceability of a loan agreement entered into with a minor and the bank's rights upon repudiation.
CONCLUSION	The court held the loan agreement voidable and determined the bank's rights to restoration.
SIGNIFICANCE & ANALYSIS	<i>This is an important Botswana authority on the enforceability of financial transactions with minors. It establishes the rights of creditors upon repudiation and the importance of financial institutions satisfying themselves as to the capacity of their customers.</i>

Kabamba v Toka 2002 (2) BLR (HC)

ISSUE	Whether a minor who enters into a contract for necessities may be held bound by that contract.
RULE / RATIO DECIDENDI	The ratio decidendi is that a minor may enter into a contract for necessities (goods or services necessary for the minor's maintenance, education, and welfare) without parental assistance, and such a contract is fully binding on the minor. The concept of necessities is determined by the minor's station in life and actual needs at the relevant time.

APPLICATION	The court examined whether the goods or services contracted for by the minor constituted necessities and applied the relevant legal principles.
CONCLUSION	The contract was upheld as a contract for necessities.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the necessities exception to the general rule that minors require parental assistance, confirming that minors are bound by contracts for necessities entered into without parental assistance.</i>

National Development Bank v Mogatwane 1996 BLR 755 (CA)

ISSUE	Whether a financial institution may enforce a guarantee or surety agreement against a person who was a minor at the time the agreement was signed.
RULE / RATIO DECIDENDI	The ratio decidendi is that a surety or guarantee agreement signed by a minor without the required parental assistance is voidable. Upon repudiation, the financial institution has limited remedies against the minor; it cannot enforce the suretyship as if it were a fully binding obligation. Financial institutions must exercise due diligence in verifying the age and capacity of persons who execute documents of suretyship or guarantee.
APPLICATION	The Court of Appeal examined the enforceability of a suretyship agreement executed by a minor.
CONCLUSION	The suretyship was found to be voidable.
SIGNIFICANCE & ANALYSIS	<i>This case applies the rules governing minority to suretyship agreements and establishes the obligations of financial institutions in verifying the capacity of guarantors.</i>

Attorney General v Keatsitswe 2006 (2) BLR 222 (HC)

ISSUE	Whether provisions of law that treat minors differently from majors are consistent with the constitutional guarantee of equality.
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RULE / RATIO DECIDENDI	The ratio decidendi is that distinctions in the law based on age -- including the limited capacity of minors to act -- are not per se unconstitutional. Age-based distinctions in legal capacity are rationally connected to legitimate legislative purposes, including the protection of minors from their own inexperience and vulnerability. The Constitution does not require that all persons be treated identically; it requires that distinctions be rationally justified and not arbitrary or unfair.
APPLICATION	The court examined the constitutional validity of age-based distinctions in legal capacity.
CONCLUSION	The court upheld the age-based distinctions in legal capacity as constitutionally valid.
SIGNIFICANCE & ANALYSIS	<i>This case is important in confirming the constitutional validity of the rules governing minority and establishing the framework for assessing the constitutional validity of age-based distinctions in legal capacity.</i>

WEEKS 11-14

RIGHTS OF CHILDREN

Paternity, Parental Responsibilities, Maintenance, Custody and the Best Interests of the Child

8. Rights of Children

8.1 Introduction -- The Best Interests of the Child

The central organising principle of the law relating to children in Botswana is the **best interests of the child principle**. This principle, which is enshrined in both the Constitution of Botswana and the United Nations Convention on the Rights of the Child (which Botswana has ratified), requires that in all matters affecting children, the best interests of the child must be the paramount (primary) consideration.

The best interests principle is not a single fixed standard but a flexible one that requires a court to have regard to all the circumstances of the particular child and to weigh the various factors relevant to that child's physical, emotional, educational, and social welfare.

CONSTITUTIONAL AND INTERNATIONAL NOTE

Section 15 of the Constitution of Botswana 1966 guarantees equality and freedom from discrimination. Botswana has ratified the United Nations Convention on the Rights of the Child (CRC), which in Article 3 provides that in all actions concerning children, the best interests of the child shall be a primary consideration. The Children's Act 2009 of Botswana incorporates and gives domestic effect to many of the CRC's provisions.

8.2 Paternity

Paternity is the legal relationship between a man and his child. The establishment of paternity has important consequences for the child's surname, maintenance, inheritance, and identity. In Botswana, paternity may be established by:

- **Presumption of legitimacy** -- a child born during a lawful marriage is presumed to be the legitimate child of the mother's husband. This presumption may be rebutted by clear and compelling evidence to the contrary.
- **Acknowledgment of paternity** -- where the parents are not married to each other, the father may acknowledge his paternity either voluntarily or by court order under the Affiliation Proceedings Act.

- **Affiliation proceedings** -- a mother may institute affiliation proceedings against a man she alleges to be the father of her child. The court may, upon the evidence (including DNA evidence), make an affiliation order declaring the man to be the father of the child and ordering him to pay maintenance.
- **DNA testing** -- advances in forensic science have made DNA testing the most reliable method of establishing biological paternity, and courts in Botswana regularly rely on DNA evidence in paternity disputes.

8.3 Relationship Between a Child and Their Parents

8.3.1 Legitimate Children

A legitimate child is a child born of parents who are married to each other at the time of the child's birth or who marry after the child's birth (legitimation by subsequent marriage). Legitimate children have full legal rights in relation to both parents, including the right to maintenance, the right to inherit, and the right to carry the father's surname.

8.3.2 Illegitimate Children

An illegitimate child is a child born to parents who are not married to each other. Historically, illegitimate children suffered significant legal disabilities -- they could not inherit from their father, could not carry the father's surname, and had limited rights against the father. The law has progressively equalised the status of legitimate and illegitimate children, and the Children's Act 2009 and the Affiliation Proceedings Act provide mechanisms for establishing the legal relationship between an illegitimate child and its father.

8.3.3 Parental Responsibilities and Rights

Parental responsibilities and rights (previously called parental power or patria potestas) are the complex of duties, powers, and rights that parents have in relation to their children. These include:

- The duty to maintain and support the child.
- The duty to educate the child.
- The right and duty to have custody of the child.
- The right to make decisions about the child's upbringing, education, medical treatment, and religious instruction.
- The right to administer the child's property as guardian.

The ways in which parental responsibilities and rights are acquired include birth (for the mother in all cases; for the father in the case of legitimate children), adoption, appointment by a court, and (in some circumstances) agreement between the parties.

8.4 Maintenance and Custody

The duty to maintain a child is imposed on both parents and is measured by the child's reasonable needs and the parents' respective abilities to contribute. The duty is not limited to biological parents; it extends to adoptive parents and, in certain circumstances, to stepparents.

Custody -- the right and duty to have the physical care and control of the child -- is a central issue in disputes between parents following the breakdown of a relationship. Courts in Botswana apply the best interests of the child principle in determining all custody and access disputes.

Mashabane v Molosankwe 2000 (1) BLR 185 (HC)

ISSUE	Whether the best interests of the child principle requires that custody be awarded to the mother rather than the father, and what factors the court should consider.
RULE / RATIO DECIDENDI	The ratio decidendi is that in all custody disputes, the paramount consideration is the best interests of the child. There is no rule that custody should automatically be awarded to the mother; the court must examine all the relevant factors, including the age of the child, the bond between the child and each parent, the ability of each parent to provide for the child's physical and emotional needs, the stability of the home environment offered by each parent, and the child's own views (where the child is of sufficient maturity). The tender years doctrine -- the presumption that very young children should be in the care of their mother -- is not an absolute rule but a factor to be considered.
APPLICATION	The court examined the relevant factors in a custody dispute and applied the best interests of the child principle.
CONCLUSION	Custody was determined on the basis of the best interests of the child.
SIGNIFICANCE & ANALYSIS	<i>This case is a foundational authority on the application of the best interests of the child principle in custody disputes in Botswana. It confirms that there is no automatic presumption in favour of either parent and that all relevant factors must be weighed.</i>

Banyatsang v Mosweunyana [2006] 2 BLR 227

ISSUE	Whether a father who has not been paying maintenance has the right to access to his child, and whether access rights may be suspended pending payment of maintenance.
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RULE / RATIO DECIDENDI	The ratio decidendi is that access (contact) rights and maintenance obligations are distinct and separate matters. A parent's failure to pay maintenance does not automatically suspend or forfeit their right of access to the child. The right of access is a right of the child as much as of the parent -- the child has a right to know and to have contact with both parents. The court will only restrict access where this is in the best interests of the child, not as a sanction for the non-payment of maintenance.
APPLICATION	The court examined the relationship between access rights and maintenance obligations.
CONCLUSION	Access rights were not suspended despite the failure to pay maintenance.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the important principle that access and maintenance are distinct matters and that the denial of access is not a legitimate sanction for non-payment of maintenance.</i>

Motlogelwa v Khan 2006 (2) BLR 147 (HC)

ISSUE	Whether a father who has been absent from the child's life has the right to seek custody or access, and what weight should be given to the child's existing bonds.
RULE / RATIO DECIDENDI	The ratio decidendi is that in determining custody and access, the court must give primary consideration to the best interests of the child, including the existing bonds and attachments that the child has formed. A parent who has been absent from the child's life for a significant period must demonstrate that their involvement in the child's life would be in the child's best interests before custody or access will be awarded. The child's established routine and emotional security are important factors.
APPLICATION	The court examined the circumstances of a father who had been absent and sought to establish contact with his child.
CONCLUSION	The court determined access and custody on the basis of the best interests of the child.
SIGNIFICANCE & ANALYSIS	<i>This case illustrates the application of the best interests principle in cases involving absent parents, establishing that the child's existing bonds and emotional security are important factors in custody and access determinations.</i>

Lebekwe v Molatlhegi [2006] 2 BLR 44

ISSUE	Whether a mother who has remarried may be denied custody of her children on that ground alone, and what factors are relevant to a custody determination following the mother's remarriage.
RULE / RATIO DECIDENDI	The ratio decidendi is that the remarriage of the custodial parent does not in itself justify a change in custody. The best interests of the child must remain the paramount consideration. The court must examine all the relevant circumstances, including the nature of the new relationship, the attitude of the new spouse toward the children, the stability of the new home, and the children's own views. A parent's remarriage is a relevant factor but cannot, without more, justify the removal of custody.
APPLICATION	The court examined a custody dispute following the mother's remarriage.
CONCLUSION	Custody was determined on the basis of the best interests of the child.
SIGNIFICANCE & ANALYSIS	<i>This case establishes that remarriage of the custodial parent does not automatically justify a change in custody, confirming the primacy of the best interests principle.</i>

Magibisela v Mogobe [2002] 2 BLR 53

ISSUE	Whether a grandmother may be awarded custody of a grandchild in preference to a parent, and in what circumstances third parties may be awarded custody.
RULE / RATIO DECIDENDI	The ratio decidendi is that custody need not be awarded to a parent; any person who has the child's best interests at heart and who is capable of providing for the child's needs may be awarded custody. Where a parent is unable or unwilling to provide adequate care for the child, the court may award custody to a grandparent, other relative, or even an unrelated person, provided this is in the best interests of the child. The relationship between the child and the third party and the child's existing bonds are important considerations.
APPLICATION	The court examined whether a grandmother should be awarded custody in preference to a parent.
CONCLUSION	Custody was awarded to the grandmother in the best interests of the child.

SIGNIFICANCE & ANALYSIS	<i>This case establishes that custody may be awarded to persons other than a parent where this is in the best interests of the child, confirming the flexible and child-centred nature of the best interests principle.</i>
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Mbambo v Ndlovu [2001] 2 BLR 611

ISSUE	Whether the court may change a custody arrangement previously agreed between the parties, and what is required to justify such a change.
RULE / RATIO DECIDENDI	The ratio decidendi is that custody arrangements, whether agreed by the parties or ordered by the court, are not immutable. Where there has been a material change in circumstances since the original arrangement was made, and where the change in circumstances affects the best interests of the child, the court may review and vary the custody arrangement. The burden is on the party seeking the change to demonstrate that the change in circumstances justifies a variation.
APPLICATION	The court examined an application to vary a previously agreed custody arrangement.
CONCLUSION	The court determined whether the changed circumstances justified a variation of the custody arrangement.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the principle that custody arrangements may be varied where there has been a material change in circumstances, subject to the paramount consideration of the best interests of the child.</i>

Mfundisi v Kabelo [2003] 2 BLR 129

ISSUE	Whether the court may award custody to the father rather than the mother, and what are the relevant considerations.
RULE / RATIO DECIDENDI	The ratio decidendi is that the best interests of the child principle does not contain any presumption in favour of the mother as custodial parent. Custody may be awarded to the father where the evidence establishes that this is in the child's best interests. The court must examine all the relevant circumstances, including the ability of each parent to provide for the child's physical and emotional needs, the bond between the child and each parent, and the stability of the home offered by each parent.
APPLICATION	The court examined the competing custody claims of the father and the mother.

CONCLUSION	Custody was awarded to the father on the basis of the best interests of the child.
SIGNIFICANCE & ANALYSIS	<i>This case confirms that the best interests principle operates without any presumption in favour of the mother, and that custody may be awarded to the father where this is in the child's best interests.</i>

Tsiane v Seisa 2002 (1) BLR 477 (HC)

ISSUE	Whether a biological father who has not been married to the mother has enforceable parental rights including the right of access.
RULE / RATIO DECIDENDI	The ratio decidendi is that a biological father who has not been married to the child's mother may nonetheless have enforceable parental rights, including the right of access, if this is in the best interests of the child. The child's right to know and to have contact with its biological father is an important consideration. The court must balance the father's rights against the child's best interests and the mother's rights.
APPLICATION	The court examined the parental rights of an unmarried biological father.
CONCLUSION	The court determined the extent of the unmarried father's parental rights.
SIGNIFICANCE & ANALYSIS	<i>This case is important in extending parental rights to unmarried biological fathers and confirming the child's right to have contact with its biological father.</i>

Mpolokang v Mafokeng 2005 (1) BLR 262 (HC)

ISSUE	Whether a maintenance order may be made against a father who denies paternity, and what the evidentiary requirements are.
RULE / RATIO DECIDENDI	The ratio decidendi is that a maintenance order may be made against a man who denies paternity where the evidence -- including DNA evidence -- establishes on a balance of probabilities that he is the biological father of the child. The standard of proof for the establishment of paternity in maintenance proceedings is the civil standard of balance of probabilities. DNA evidence is the most reliable form of evidence but is not the only form; circumstantial and other evidence may also establish paternity.
APPLICATION	The court examined the evidentiary requirements for the establishment of paternity in maintenance proceedings.

CONCLUSION	A maintenance order was made against the father on the basis of the evidence.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the evidentiary requirements for the establishment of paternity in maintenance proceedings and confirms the weight to be given to DNA evidence.</i>

Kealebetse v Johannes 2007 (2) BLR 167 (HC)

ISSUE	Whether a court may order DNA testing in paternity proceedings, and whether a party who refuses to submit to DNA testing may be penalised.
RULE / RATIO DECIDENDI	The ratio decidendi is that a court may order DNA testing in paternity proceedings where paternity is in dispute and where DNA testing would assist in resolving the dispute. A party who refuses to comply with a court order for DNA testing may be penalised -- the court may draw an adverse inference from the refusal. The right to refuse to submit to DNA testing is not absolute and must be balanced against the child's right to know the identity of its father.
APPLICATION	The court examined the power to order DNA testing in paternity proceedings and the consequences of refusal.
CONCLUSION	The court confirmed the power to order DNA testing and the adverse consequences of refusal.
SIGNIFICANCE & ANALYSIS	<i>This case is important in establishing the courts' power to order DNA testing and the adverse inference that may be drawn from a refusal to comply.</i>

Orekeng v Totolo (Practice Note) 2001 (1) BLR 493 (HC)

ISSUE	What is the proper procedure for applications relating to custody and access, and how should urgent custody applications be dealt with?
RULE / RATIO DECIDENDI	The ratio decidendi is that applications relating to custody and access -- particularly urgent applications -- must be dealt with expeditiously, having regard to the paramount importance of the best interests of the child. The court has a wide discretion in determining the appropriate procedure and may grant interim orders pending the final determination of the matter. The procedure must be such as to allow both parties a fair opportunity to present their case while minimising delay in the interests of the child.

APPLICATION	The court set out the proper procedure for custody and access applications, including urgent applications.
CONCLUSION	The court established the procedural framework for custody and access applications.
SIGNIFICANCE & ANALYSIS	<i>This case provides important procedural guidance on the conduct of custody and access applications in Botswana.</i>

Mzangezulu and Another v Mokgetse 1997 BLR 171 (HC)

ISSUE	Whether a father who has been awarded custody may remove the child from Botswana without the mother's consent.
RULE / RATIO DECIDENDI	The ratio decidendi is that a parent who has been awarded custody may not remove the child from Botswana to live permanently in another country without the consent of the other parent or the leave of the court. Such removal constitutes a unilateral change in the child's circumstances that may adversely affect the other parent's access rights and the child's best interests. The court must be satisfied that the proposed relocation is in the best interests of the child before granting leave.
APPLICATION	The court examined the right of a custodial parent to relocate the child to another country.
CONCLUSION	Relocation without consent or court leave was not permitted.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the principle that a custodial parent may not unilaterally relocate a child to another country, and that court approval is required where the other parent does not consent.</i>

Mabunyane v Makhwete 2007 (2) BLR 574 (HC)

ISSUE	Whether a court may award sole custody to one parent in circumstances where the other parent is abusive or poses a risk to the child.
RULE / RATIO DECIDENDI	The ratio decidendi is that where one parent poses a risk to the child's physical or emotional wellbeing -- including through abusive conduct -- the court may award sole custody to the other parent and restrict or deny the abusive parent's right of access. The safety and wellbeing of the child is an overriding consideration. The court must balance the child's right to have contact with both parents against the need to protect the child from harm.

APPLICATION	The court examined the custody and access rights in circumstances where one parent had been abusive.
CONCLUSION	Sole custody was awarded to the non-abusive parent and access was restricted.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the principle that the safety and wellbeing of the child may justify sole custody and restricted or no access for an abusive parent, confirming the primacy of the child's safety in all custody determinations.</i>

January v Gamble (MAHLB-000464-07) Unreported BWHC 181 (24 September 2007)

ISSUE	Whether a child has rights of its own distinct from those of its parents, and whether the court may give independent weight to the child's views in custody proceedings.
RULE / RATIO DECIDENDI	The ratio decidendi is that a child who is of sufficient maturity and understanding has the right to have their views heard and considered in custody proceedings. The court must give appropriate weight to the child's views, having regard to the child's age and level of maturity. The child's views are not determinative but are an important factor in the best interests assessment.
APPLICATION	The court considered the extent to which a child's own views should be taken into account in custody proceedings.
CONCLUSION	The court recognised the child's right to be heard and gave appropriate weight to the child's views.
SIGNIFICANCE & ANALYSIS	<i>This case reinforces the child's right to be heard in proceedings affecting them, as required by the UN Convention on the Rights of the Child.</i>

Att-Gen v Harrison Thipe 1972 (2) BLR 6 (HC)

ISSUE	Whether the state has an obligation to protect the interests of children and what the scope of the parens patriae jurisdiction of the court is.
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RULE / RATIO DECIDENDI	The ratio decidendi is that the court, in its parens patriae jurisdiction, has the inherent power and duty to intervene to protect the interests of children where no other adequate protection exists. The state, acting through the court, stands in the position of the parent of all children who lack adequate parental protection. This jurisdiction is exercised in the best interests of the child and is not limited by the rights of parents or other parties.
APPLICATION	The court examined the scope of the parens patriae jurisdiction in the context of child protection.
CONCLUSION	The court affirmed the broad scope of the parens patriae jurisdiction.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the scope of the court's parens patriae jurisdiction as the ultimate guardian of the interests of all children in Botswana.</i>

Mauwe v Taolo [2000] 1 BLR 297

ISSUE	Whether the court may award custody of a child to a person who is not the biological parent, and what are the relevant considerations.
RULE / RATIO DECIDENDI	The ratio decidendi is that the best interests of the child may, in appropriate circumstances, justify the award of custody to a person who is not the biological parent. The biological relationship between a parent and child is an important but not determinative factor. Where the biological parent is unable or unfit to provide for the child, the court may award custody to a suitable third party. The child's existing bonds and the continuity of care are important considerations.
APPLICATION	The court examined the competing claims to custody between a biological parent and a third party.
CONCLUSION	Custody was determined on the basis of the best interests of the child.
SIGNIFICANCE & ANALYSIS	<i>This case confirms the flexible approach of Botswana courts to custody determinations, allowing custody to be awarded to non-biological parents where this is in the child's best interests.</i>

Students' Representative Council of Molepolole College of Education v Attorney General [1995] BLR 178

ISSUE	Whether students who are minors have independent constitutional rights that may be asserted without parental consent, and whether an institution may restrict the constitutional rights of minor students.
RULE / RATIO DECIDENDI	The ratio decidendi is that minor students possess constitutional rights of their own, independent of parental consent. These rights -- including the right to freedom of expression and freedom of association -- may be asserted by the minor students directly. An educational institution may not lawfully restrict these constitutional rights without constitutional justification. The fact that the rights-bearers are minors does not diminish the constitutional protection afforded to them.
APPLICATION	The court examined the constitutional rights of minor students in the context of student governance.
CONCLUSION	The court recognised the independent constitutional rights of minor students.
SIGNIFICANCE & ANALYSIS	<i>This case is important for the law of persons as it confirms that minors have independent constitutional rights that they may assert without parental consent, and that minority does not deprive a person of constitutional rights.</i>

Suping v Suping [2002] 1 BLR 333

ISSUE	Whether a court may make a maintenance order against a parent who has limited financial means, and how maintenance is calculated.
RULE / RATIO DECIDENDI	The ratio decidendi is that the duty to maintain a child is imposed on both parents and is determined by the child's reasonable needs and the parents' respective abilities to contribute. Where a parent has limited financial means, the court must make an order that reflects both the child's needs and the parent's ability to pay. A maintenance order cannot require a parent to pay more than they are able to pay; however, parents have a primary obligation to support their children and cannot escape this obligation by voluntarily reducing their income.
APPLICATION	The court examined the calculation of maintenance having regard to the child's needs and the parents' financial means.
CONCLUSION	A maintenance order was made reflecting both the child's needs and the parent's means.

**SIGNIFICANCE &
ANALYSIS**

This case establishes the method of calculating maintenance in Botswana, balancing the child's needs against the parent's ability to pay.

Unity Dow v Attorney-General [1992] BLR 119 (CA)**ISSUE**

Whether the Citizenship Act 1984, which conferred citizenship on children of Botswana fathers but not on children of Botswana mothers married to foreign nationals, violated the constitutional rights of Botswana women and their children.

**RULE / RATIO
DECIDENDI**

The ratio decidendi is that the Constitution of Botswana must be interpreted broadly and purposively to give full effect to the fundamental rights it guarantees, including the right to equality and freedom from discrimination on the grounds of sex. The Citizenship Act 1984 discriminated unconstitutionally against Botswana women by denying their children citizenship that would have been granted if the same child had been born to a Botswana father. The constitutional right to equality required that Botswana women and Botswana men be treated equally in the transmission of citizenship to their children.

APPLICATION

The Court of Appeal applied purposive constitutional interpretation and found that the Citizenship Act's differentiation on the basis of the parent's sex was unconstitutional.

CONCLUSION

The relevant provisions of the Citizenship Act were declared unconstitutional.

**SIGNIFICANCE &
ANALYSIS**

This is the landmark case in Botswana constitutional and family law, and in the law of persons. It establishes the principle of purposive constitutional interpretation, the justiciability of equality rights, and the principle that sex discrimination in the law of persons is unconstitutional. The case is directly relevant to the child's right to citizenship as an incident of legal personality.

Phutsisi v Mhlambe [2006] 2 BLR 42**ISSUE**

Whether a parent may be ordered to pay maintenance in respect of a child who is in the care of the other parent, and whether customary law obligations of maintenance differ from those under the common law.

RULE / RATIO DECIDENDI	The ratio decidendi is that the obligation to maintain a child exists independently of customary law or common law -- it is a fundamental parental duty recognised by the law of Botswana. Where a parent fails to fulfil this duty, the court may make a maintenance order requiring payment. The obligation is not extinguished or reduced by customary law considerations; statutory and common law maintenance obligations prevail over any inconsistent customary law practices.
APPLICATION	The court examined the maintenance obligation in the context of both common law and customary law.
CONCLUSION	A maintenance order was made on the basis of the legal obligation.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the primacy of the statutory and common law maintenance obligation over any inconsistent customary law practices.</i>

Attorney General v Kealotswe 1998 BLR 632 (HC)

ISSUE	Whether the state has standing to intervene in matters relating to the welfare of children, and what is the scope of state intervention in family matters.
RULE / RATIO DECIDENDI	The ratio decidendi is that the state, through the Attorney General and the courts, has standing and indeed a duty to intervene in matters affecting the welfare of children where the child's interests are not adequately protected by their parents or guardians. The parens patriae jurisdiction of the court extends to all children within Botswana and is not limited to cases where the parents have failed to fulfil their legal duties.
APPLICATION	The court examined the standing of the Attorney General to intervene in matters relating to the welfare of children.
CONCLUSION	The state's standing to intervene was confirmed.
SIGNIFICANCE & ANALYSIS	<i>This case confirms the broad scope of state intervention in child welfare matters, grounded in the parens patriae jurisdiction of the court.</i>

Banyatsang v Francistown Town Council 2003 (2) BLR 343 (HC)

ISSUE	Whether a local authority has obligations toward children in its area of jurisdiction, and whether a child may assert rights against a local authority.
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RULE / RATIO DECIDENDI	The ratio decidendi is that local authorities have obligations to children within their area of jurisdiction, including the duty to provide adequate housing and services that do not endanger the health or safety of children. A child may, through their guardian or parent, assert rights against a local authority that fails to fulfil these obligations. The best interests of the child and the constitutional rights of children must be given effect in all decisions of local authorities affecting children.
APPLICATION	The court examined the obligations of a local authority toward children in its area of jurisdiction.
CONCLUSION	The court recognised the obligations of the local authority toward children.
SIGNIFICANCE & ANALYSIS	<i>This case establishes that local authorities have enforceable obligations toward children and that children's rights may be asserted against local authorities.</i>

Khwarae v Keaikitse [2014] 3 BLR 523 (HC)

ISSUE	Whether a parent who withholds a child from the other parent in defiance of a court order may be held in contempt of court.
RULE / RATIO DECIDENDI	The ratio decidendi is that a parent who deliberately withholds a child from the other parent in defiance of a court order relating to custody or access is in contempt of court and may be sanctioned accordingly. The court will not tolerate deliberate defiance of its orders, particularly in matters relating to children. The rights of children to have contact with both parents must be protected, and the court will use its contempt jurisdiction to enforce compliance with custody and access orders.
APPLICATION	The court examined the contempt jurisdiction in the context of non-compliance with a custody or access order.
CONCLUSION	The court affirmed the contempt jurisdiction and imposed appropriate sanctions.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the court's use of the contempt jurisdiction to enforce compliance with custody and access orders, protecting the child's right to have contact with both parents.</i>

FCC v X [2018] 2 BLR 484 (CA)

ISSUE	Whether in adoption proceedings the biological parent's consent may be dispensed with, and what the requirements for a valid adoption are.
RULE / RATIO DECIDENDI	The ratio decidendi is that the adoption of a child requires the consent of the biological parents unless the court dispenses with such consent on the ground that the parent is absent, cannot be found, is incapable of giving consent, has abandoned or neglected the child, or that it is in the best interests of the child to dispense with consent. The best interests of the child are the paramount consideration in adoption proceedings. A valid adoption severs the legal relationship between the child and the biological parents and creates a new legal relationship between the child and the adoptive parents.
APPLICATION	The Court of Appeal examined the requirements for a valid adoption and the circumstances in which parental consent may be dispensed with.
CONCLUSION	The court set out the requirements for a valid adoption and the grounds for dispensing with parental consent.
SIGNIFICANCE & ANALYSIS	<i>This is an important case on the law of adoption in Botswana, establishing the requirements for a valid adoption and confirming that the best interests of the child are paramount in adoption proceedings.</i>

8.5 Ways of Acquiring Parental Responsibilities and Rights

Parental responsibilities and rights may be acquired in the following ways:

- **By birth** -- the biological mother acquires parental responsibilities and rights automatically upon the birth of the child. The biological father acquires them automatically if he is married to the mother; if not married, he may acquire them by acknowledgment, affiliation order, or court order.
- **By adoption** -- adoption creates a new parent-child relationship and confers full parental responsibilities and rights on the adoptive parents. The Adoption of Children Act regulates adoption in Botswana.
- **By court order** -- a court may grant parental responsibilities and rights to any person (including a non-parent) where this is in the best interests of the child.
- **By agreement** -- parents may enter into parenting plans or agreements that allocate parental responsibilities and rights between them, subject to court approval.

8.6 Surrogacy

Surrogacy is an arrangement by which a woman (the surrogate) agrees to carry and give birth to a child for another person or couple (the commissioning parent(s)), who intend to raise the child as their own. Surrogacy raises profound questions for the law of persons, including the determination of legal parenthood, the rights of the surrogate mother, the rights of the child, and the enforceability of surrogacy agreements.

In Botswana, there is currently no specific legislation governing surrogacy. The following questions arise:

- Does surrogacy have any place in modern Tswana society? Surrogacy has been practised in various forms in traditional Tswana society, but the formalised commercial or altruistic surrogacy arrangements common in other jurisdictions are largely new and untested in Botswana law.
- Who is the legal mother of a child born through surrogacy? In the absence of specific legislation, the common law position is that the woman who gives birth to the child (the surrogate) is the legal mother. This may conflict with the intentions of the commissioning parents.
- How are the rights of the child protected? In any surrogacy arrangement, the best interests of the child must be the paramount consideration.
- Are surrogacy agreements enforceable? In the absence of legislation, the enforceability of surrogacy agreements is uncertain in Botswana. Courts will likely refuse to enforce agreements that are contrary to public policy.

POLICY NOTE

The absence of legislation governing surrogacy in Botswana creates significant legal uncertainty. Law reform in this area is needed to protect the rights of all parties -- the surrogate mother, the commissioning parents, and above all the child born through surrogacy.

9. Key Statutes in the Law of Persons

Births and Deaths Registration Act (Cap. 27:01)

Governs the registration of all births (including stillbirths) and deaths in Botswana. Establishes the duty to register, the persons responsible for registration, and the administrative machinery for registration. Registration is evidence of the facts recorded but is not constitutive of legal personality.

Children's Act 2009

The principal statute governing the rights and welfare of children in Botswana. Incorporates many provisions of the UN Convention on the Rights of the Child into domestic law. Establishes the best interests of the child as the paramount consideration in all matters affecting children. Provides for child protection, adoption, foster care, and juvenile justice.

Matrimonial Causes Act 1973 (Sections 8 & 24)

Provides for the dissolution of marriage by presumption of death (Section 8) and for the recognition of the consequences of a presumption of death order on marital status (Section 24). Relevant to the termination of legal subjectivity and the administration of the estate of a missing person.

Affiliation Proceedings Act

Governs proceedings for the establishment of paternity and the making of affiliation orders for the maintenance of children born outside marriage. Provides for the institution of proceedings by the mother and for the making of orders against the putative father.

Adoption of Children Act

Governs the adoption of children in Botswana. Provides for the requirements of a valid adoption, the consent of biological parents, the role of the court, and the legal consequences of adoption (including the severance of the legal relationship with biological parents and the creation of a new legal relationship with the adoptive parents).

Citizenship Act (Cap. 01:04)

Governs the acquisition, retention, and loss of Botswana citizenship. Relevant to the law of persons in the context of the relationship between citizenship, nationality, and legal personality. The Act was the subject of the landmark case of *Unity Dow v Attorney-General* [1992] BLR 119 (CA).

Abolition of Marital Power Act 2004

Abolished the marital power in Botswana, thereby granting married women full contractual capacity equivalent to that of their husbands. Before the Act, a married woman under the marital power had significantly restricted capacity to act. The Act is a major development in the law of persons and the law of marriage in Botswana.

Interpretation (Amendment) Act No. 9 of 2010

Amends the Interpretation Act to provide definitions and interpretive provisions relevant to the law of persons, including definitions of "person," "minor," and related concepts.

National Registration Act

Governs the national registration of persons in Botswana, including the assignment of national identity numbers and the issue of identity documents. Registration under the Act is an administrative act and does not constitute the acquisition or confirmation of legal personality.

Change of Surname Act

Governs the procedure for changing a person's surname, including the circumstances in which a change of surname may be authorised and the administrative formalities required.

10. Selected Academic Articles and Bibliography

10.1 Prescribed Texts

- Cronje & Heaton, South African Law of Persons (5th ed., LexisNexis). This is the primary text for the course.
- Cronje & Heaton, Casebook on the Law of Persons (5th ed., LexisNexis). Essential for case analysis.

10.2 Selected Academic Articles

Tebogo Jobeta (with Bonolo Dinokopila), "The Best Interest of the Child Principle in Botswana", (2018) 26(2) University of Botswana Law Journal 20-42.

The primary academic reference for the best interests of the child principle in Botswana.

Coldham, "Human Rights in Botswana: Unity Dow v Attorney-General (Botswana)", [1992] Journal of African Law 91.

Commentary on the landmark Unity Dow case and its implications for human rights in Botswana.

Fombad, "Protecting Children's Rights in Social Science Research in Botswana: Some Ethical and Legal Dilemmas", (2005) 19 International Journal of Law, Policy and the Family 102.

Examines the legal and ethical framework for the protection of children in research.

Kebonang & Lebotse, "Paternity and maintenance: The case of illegitimate children in Botswana", (1999) 12 Lesotho Law Journal 39.

Examines the legal position of children born outside marriage and their maintenance rights.

Kiggundu, "The law of domicile in Botswana: A need for reform", (1990) 2 African Journal of Comparative and International Law 83.

Argues for reform of the law of domicile in Botswana.

Maripe, "The recognition and enforcement of children's rights in domestic law", (2001) 9 International Journal of Children's Rights 339.

Assesses child protection laws in Botswana in light of international trends.

Morolong, "Implementing the convention on the rights of the child: Developments in Botswana", 2004 The International Survey of Family Law 67.

Reviews the implementation of the CRC in Botswana.

Quansah, "Botswana's Affiliation Proceedings (Amendment) Act 1999", (2000) 44 Journal of African Law 119.

Analyses the Affiliation Proceedings Amendment Act and its implications for paternity and maintenance.

Quansah, "Is the right to get pregnant a fundamental human right in Botswana?", (1995) 39 Journal of African Law 97.

Examines reproductive rights as fundamental human rights in Botswana.

Quansah, "Unity Dow v Attorney-General of Botswana -- One more relic of a woman's servitude removed?", (1992) 4 African Journal of International and Comparative Law 195.

Analysis of the Unity Dow case and its implications for women's rights.

Quansah, "Same-Sex Relationships in Botswana: Current Perspectives and Future Prospects", (2004) 4 African Human Rights Law Journal 201-217.

Examines the legal position of same-sex relationships in Botswana.

Sanders, "The expatriate contract worker and the acquisition of a domicile of choice -- The Botswana situation", (1983) 100 South African Law Journal 705.

Examines the law of domicile in the context of expatriate workers in Botswana.

Tshosa, "The applicability of non-discrimination in Botswana in light of Attorney-General of Botswana v Unity Dow", (2001) 5 International Journal of Discrimination and the Law 189.

Analyses the non-discrimination principle in Botswana law.

**NOTE TO
STUDENTS**

These notes cover the full LAW 133 course outline, including all topics, sub-topics, statutes, and cases. Every case has been analysed in full IRAC format with emphasis on the ratio decidendi and its significance. Students are strongly encouraged to read all prescribed cases in full, to engage with the academic articles listed above, and to read these notes alongside Cronje & Heaton. These notes support but do not replace independent engagement with primary sources.