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COURSE NOTES

LAW 134

Family Law

Marriage, Divorce and the Family under Botswana Law

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2025 Edition ♦ University of Botswana LLB

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TOPIC 1

ENGAGEMENT UNDER CUSTOMARY LAW*Betrothal, Conditions, Responsibilities, Breach and Termination*

1. Engagement Under Botswana Customary Law

1.1 Betrothal or Espousal

Engagement under Botswana customary law -- known as betrothal or espousal -- takes one of two forms:

- An agreement between a man and his family, and a woman and her family, in which they promise to give her hand in marriage to the man.
- An agreement between a man and a woman in which they agree to marry each other at some future time.

In either form, the man alone, or together with his family, agrees to take the woman as a spouse, or to pay the necessary bogadi -- livestock or other property transferred by the husband or his father to the wife's guardian. The betrothal is usually conducted in the presence of both families, reflecting the communal and familial nature of customary law marriage in Botswana.

DEFINITION: Betrothal (Customary Law)

An agreement, usually conducted in the presence of both families, by which a man and his family, and a woman and her family, bind themselves to a future marriage. It is not a marriage itself but a formal commitment to marry at a future date agreed between the respective guardians of the parties.

1.2 Conditions of Customary Engagement

For a valid customary engagement, two broad conditions must be satisfied:

1.2.1 Capacity

Capacity to Marry

- Section 14 of the Marriage Act stipulates the legal age of marriage as 18 years. This statutory minimum applies to formal marriages and has been extended to customary law marriages.

- Traditionally, customary law does not prescribe a minimum age, but it requires that both the man and the woman have reached the age of puberty.

Capacity to Marry Each Other

- Section 16 of the Marriage Act prohibits marriage between relatives within the prohibited degrees of consanguinity (blood relationship) and affinity (relationship by marriage). This prohibition applies equally to customary law engagements and marriages.

1.2.2 Formalities

The customary engagement follows a structured sequence of formalities:

- **Patlo** -- the formal request made by the man's family to the woman's family for her hand in marriage.
- **Acceptance** -- the woman's family must accept the request.
- **Negotiations** -- preliminary discussions take place between the families regarding bogadi and other matters.
- **Conclusion** -- the preliminary discussions are concluded and the engagement is formalised, binding the parties to marry at a future date to be agreed between their respective guardians.

1.3 Responsibilities of the Parties

1.3.1 Responsibilities of the Man

- The man is bound to provide the woman and her wedding party with appropriate outfits for the wedding.
- The man is bound to pay the agreed bogadi within the stipulated period.

1.3.2 Responsibilities of the Woman

- The woman's sexual liberty is limited upon engagement -- she is no longer free to engage in relationships with other men. The engagement creates an exclusive commitment analogous to the fidelity obligations of marriage.

1.4 Breach of Promise to Marry Under Customary Law

The position under traditional Tswana customary law is that breach of promise to marry, as a cause of action attracting damages, is non-existent. Unlike the common law position (discussed in Topic 2), Tswana customary law does not recognise a free-standing action for damages arising from a broken engagement.

However, the position is not entirely without remedy. Roberts, in his work *Tswana Family Law*, notes that in certain circumstances a woman who has been wronged by the termination of the engagement through the fault of the man may receive compensation. This compensation is not

understood in the same way as common law damages but is rather a form of customary redress for the wrong done to the woman and her family.

Mphoyakgosi v Jakoba [1997] BLR 604 (HC)

ISSUE	Whether a man who had performed patlo and bogadi ceremonies and fathered children with a woman was liable for damages for breach of promise to marry when the marriage was not finalised.
RULE / RATIO DECIDENDI	The ratio decidendi is that the court must first determine the legal nature of the ceremonies performed -- specifically whether the patlo and bogadi formalities, on the facts, constituted a completed customary law marriage or merely an engagement. If the formalities constituted only an engagement and not a completed marriage, the question of breach of promise to marry under customary law arises. The court refrained from definitively ruling on whether a cause of action for breach of promise to marry exists under Tswana customary law, as it was not necessary for the determination of the matter.
APPLICATION	The plaintiff had performed patlo in 1984 and the ceremony was conducted in 1986. Two children were born and a cow was presented to the defendant's family. The court examined whether these facts constituted a completed marriage or merely an engagement, and applied the relevant principles of customary law.
CONCLUSION	The court did not grant the plaintiff his claimed relief, making it unnecessary to determine whether the promise to marry had been breached.
SIGNIFICANCE & ANALYSIS	<i>This case is foundational for the law of customary engagement in Botswana. It illustrates the critical distinction between a completed customary law marriage and a mere engagement, and confirms that the legal consequences of each are different. The case also shows the court's cautious approach to the question of whether breach of promise to marry gives rise to a cause of action under Tswana customary law.</i>

Sekonopelo v Keetile (1958) BLR 88

ISSUE	Whether a cause of action for breach of promise to marry exists under Tswana customary law.
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RULE / RATIO DECIDENDI	The ratio decidendi is that there is no cause of action for breach of promise to marry under Tswana customary law. The court held that such an action, being a creature of the common law, has no counterpart in the customary law tradition of the Tswana people. Customary law engagements are governed by different rules and different remedies from those applicable to common law engagements.
APPLICATION	The court examined the nature of Tswana customary law engagement and determined whether the common law action for breach of promise to marry had any counterpart in customary law.
CONCLUSION	The court held that no cause of action for breach of promise to marry exists under Tswana customary law.
SIGNIFICANCE & ANALYSIS	<i>This is the foundational authority for the proposition that breach of promise to marry as a cause of action does not exist under Tswana customary law. It must be read alongside the academic commentary of Roberts and the case of Seitshiro v Moremi, which together suggest that while the formal action does not exist, some form of customary compensation may be available.</i>

Seitshiro v Moremi Case No 76/1966 (unreported)

ISSUE	Whether a woman whose engagement was terminated through the fault of the man is entitled to compensation under customary law.
RULE / RATIO DECIDENDI	The ratio decidendi is that although a formal cause of action for breach of promise to marry does not exist under Tswana customary law (as confirmed in Sekonopelo v Keetile), a woman whose prolonged engagement is terminated through the fault of the man may be awarded compensation for the time she has wasted waiting for the marriage to be finalised. This compensation is best understood as a customary remedy for the wrong done to the woman rather than as damages in the common law sense.
APPLICATION	The court examined the circumstances of the terminated engagement and determined whether the woman was entitled to any form of customary redress.
CONCLUSION	Compensation was awarded to the woman for wasting her time waiting for the marriage.

**SIGNIFICANCE &
ANALYSIS**

This case is significant because it demonstrates that while the formal action for breach of promise to marry does not exist under customary law, the courts will provide some form of redress to a woman who has been wronged by a prolonged engagement that is terminated through the fault of the man. It suggests that the action for breach of promise to marry may in some form be maintainable under customary law.

1.5 Consequences of Engagement Under Customary Law

The conclusion of a valid customary engagement produces the following legal consequences:

- The engagement binds the parties to become man and wife at a future date to be agreed between their respective guardians.
- The man assumes certain well-defined responsibilities toward the woman and her family.
- The woman's sexual liberty is restricted -- she is no longer free to engage with other men.
- The man is under an obligation to pay the agreed bogadi within the stipulated period.

1.6 Termination of Engagement Under Customary Law

A customary engagement may be terminated in the following ways:

- **By marriage** -- the engagement is fulfilled and terminated by the parties proceeding to marry each other.
- **By death** -- the death of either party automatically terminates the engagement.
- **By act of the parties** -- either party may terminate the engagement, but termination through the fault of one party may give rise to a right of compensation in favour of the innocent party.

TOPIC 2

ENGAGEMENT UNDER COMMON LAW*Essential Requirements, Termination, Damages and Return of Gifts*

2. Engagement Under Common Law

2.1 Definition

DEFINITION: Common Law Engagement

An agreement between a man and a woman to marry each other in the future, either on a specific date or within a reasonable time. It may be concluded orally or in writing. The giving of an engagement ring is not a requirement for a valid engagement but serves an evidential purpose, demonstrating that an agreement to marry has been reached.

2.2 Essential Requirements for a Valid Common Law Engagement

For a valid engagement under common law, the following requirements must be satisfied:

- **Consanguinity and Affinity** -- the parties must not be within the prohibited degrees of consanguinity (blood relationship) or affinity (relationship by marriage). Section 16 of the Marriage Act gives statutory expression to this requirement.
- **Neither party must be married** -- neither party may be currently married to another person. An engagement by a married person is contra bonos mores (contrary to good morals) and is therefore void, even if the party attaches the condition that they will divorce their current spouse before marrying the other.
- **Parental consent for minors** -- a minor must obtain the consent of their parent or guardian before entering into an engagement. If the minor enters into the engagement without such consent, the parent or guardian may ratify the agreement after it has been concluded.
- **Consensus** -- the parties must have reached genuine agreement: one party must make an offer to marry which is accepted by the other. There must be a genuine meeting of minds on the essential terms of the engagement.

2.3 Termination of Common Law Engagement

A common law engagement may be terminated in the following ways:

- **Death** -- the death of either party automatically terminates the engagement.
- **Marriage** -- the engagement is fulfilled and terminated when the parties marry each other.
- **Justifiable termination by one party** -- one party may terminate the engagement where justifiable grounds exist for doing so.
- **Mutual agreement** -- the parties may agree between themselves to terminate the engagement.
- **Withdrawal of parental consent for a minor** -- where a minor's parent or guardian withdraws the consent given for the engagement, the engagement is terminated.
- **Breach** -- where one party makes it impossible for the other to continue with the engagement, for example by marrying another person.

2.4 Damages for Breach of Engagement Under Common Law

Where a common law engagement is broken without justification, the innocent party is entitled to claim damages. These damages are of two kinds:

- **Patrimonial damages** -- compensation for expenses already incurred in preparation for the marriage, such as expenditure on wedding preparations, venue bookings, and similar outlays.
- **Solatium (actio iniuriarum)** -- compensation for bruised feelings and injured dignity resulting from the wrongful termination of the engagement. This is a delictual remedy for the impairment of the innocent party's personal dignity and reputation.

The crucial issue in any breach of promise to marry case is whether the defendant had a good cause (justa causa) for repudiating the engagement. If the defendant had justa causa, no damages are payable.

KEY PRINCIPLE

What constitutes good cause (justa causa) for repudiating an engagement? The test is whether some discovery has been made, or some event has occurred, which renders it unlikely or at least doubtful that a harmonious marriage can be achieved, and which is of such a nature that it might cause an ordinarily prudent and decent person to put an end to the engagement.

Triegaardt v Van Der Vyver 1910 EDL 44

ISSUE

Whether a party who terminates an engagement on the ground that love for the other party has disappeared has justa causa for the termination, and what damages are payable if not.

RULE / RATIO DECIDENDI	The ratio decidendi is that the disappearance of love for the other party, without more, may not in all circumstances constitute sufficient <i>justa causa</i> for the termination of an engagement. The court must examine all the circumstances to determine whether the defendant had a legitimate reason for repudiating the contract. Where <i>justa causa</i> is not established, the innocent party is entitled to damages, but the amount awarded must reflect the actual loss suffered and the specific circumstances of the parties, not a punitive sum.
APPLICATION	The plaintiff and defendant had agreed to marry each other. The defendant ended the relationship on the grounds that his love for the plaintiff had disappeared, indicating willingness to marry only if the plaintiff wanted a loveless marriage. The plaintiff claimed R2000 in damages.
CONCLUSION	The plaintiff was awarded R400 in damages.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the principle that the termination of an engagement requires justa causa, and that the mere disappearance of romantic feelings may not always be sufficient justification. It also establishes that damages for breach of promise to marry are compensatory, not punitive, and are determined by the specific circumstances of each case.</i>

Guggenheim v Resenbaum (2) 1961 (4) SA 21 (W)

ISSUE	What must a plaintiff prove in order to recover delictual damages (solatium) for breach of promise to marry?
RULE / RATIO DECIDENDI	The ratio decidendi is that in order to recover delictual damages (solatium) for breach of promise to marry, the plaintiff must prove not only that the breach was wrongful but also that it was injurious or contumelious -- that is, that it was done in a manner calculated to injure the plaintiff's dignity or that it involved some element of insult, contumely, or deliberate disregard for the plaintiff's feelings and dignity. A mere breach of the engagement, without more, may not be sufficient to found a claim for solatium.
APPLICATION	The court examined the requirements for the recovery of delictual damages in a breach of promise to marry case and considered whether the plaintiff had established the necessary elements.
CONCLUSION	The court confirmed that the plaintiff must establish both wrongfulness and the injurious or contumelious nature of the breach to recover solatium.

SIGNIFICANCE & ANALYSIS	<i>This case is a leading authority on the requirements for the recovery of solatium in breach of promise to marry cases. It adds an important qualification to the general right to damages: the plaintiff must establish not merely that the engagement was broken but that it was broken in circumstances that constitute a deliberate injury to their dignity.</i>
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Shirley Morewane v Lesego Mothlathledi Civil Trial 352/1983

ISSUE	Whether a man who seduced a woman into becoming pregnant by promising marriage, and then reneged on his promise by taking another woman, is liable for damages for breach of promise to marry.
RULE / RATIO DECIDENDI	The ratio decidendi is that where a man seduces a woman into a pregnancy by promising marriage and then reneges on that promise by entering into a relationship with another woman, such conduct is contumelious and constitutes a wrongful breach of the promise to marry. The woman is entitled to damages for the impairment of her personal dignity and reputation. The court noted that the modern woman has social advantages that her historical counterpart did not, but this does not diminish her entitlement to vindication of her dignity when she has been wrongfully treated.
APPLICATION	The plaintiff had been induced by the defendant to bear a child as proof of her fertility, with marriage promised as the outcome. The defendant then took another woman. The court found that this conduct, immediately before the wedding was due to take place, was contumelious.
CONCLUSION	The plaintiff was awarded P2000 in damages for the impairment of her personal dignity and reputation.
SIGNIFICANCE & ANALYSIS	<i>This is the leading Botswana authority on the recovery of solatium for breach of promise to marry. The ratio -- that contumelious conduct in breaking an engagement entitles the innocent party to damages for impairment of dignity and reputation -- is directly applicable to all breach of promise cases in Botswana.</i>

2.5 Return of Engagement Gifts

Engagement gifts fall into three categories, each attracting different rules on return:

- **Pledged gifts** -- gifts made as a pledge of the donor's promise to marry, with the intention that they are to be forfeited to the donee if the donor breaks the promise (e.g., an engagement ring). Where the donor breaks the promise, the donee keeps the gift. Where the

donee breaks the promise, the gift must be returned.

- **Gifts in anticipation of marriage** -- gifts intended to provide the donee with lasting benefits during the marriage (e.g., a house, a car, or jewellery of significant value). Any permanent gift of significant value given during the engagement is presumed to have been made in anticipation of the marriage and must be returned if the marriage does not take place.

- **Out-and-out gifts of small value** -- small gifts exchanged between the engaged couple as tokens of affection. These gifts do not have to be returned if the engagement is terminated by mutual consent. They may, however, be returned if the engagement is terminated by breach.

In the event of the death of either party, all engagement gifts (except out-and-out gifts of small value) must be returned unless there is a clear intention by the donor that the donee should keep them.

**COMPARATIVE
NOTE**

In England, the action for breach of promise to marry has been abolished on the ground that it gives rise to claims of a "gold-digging" nature. Botswana has not followed this reform and the action remains available under common law.

TOPIC 3

MARRIAGE UNDER CUSTOMARY LAW*Patlo, Bogadi, Essential Elements, Status, Registration and Dissolution*

3. Marriage Under Customary Law

3.1 Nature of Customary Law Marriage

Customary law consists of a set of rules that are, by custom, applicable to any tribe or community. Section 2 of the Customary Law Act provides that no custom must be contrary to morality, humanity, or natural justice -- the repugnancy proviso that limits the operation of customary law.

The following general principles characterise customary law marriage in Botswana:

- Under customary law, polygamy (the marriage of one man to multiple women) is permitted, provided the man has the financial means to support multiple wives.
- Section 13 of the Marriage Act 2000 provides that if a man has married a woman under customary law, he is not allowed to marry another woman under the Marriage Act (statutory marriage) unless the customary marriage is converted or dissolved.
- Section 14 of the Marriage Act 2000 stipulates the minimum age of 18 years for a marriage under the Act. While this may apply to customary law marriages, customary law does not generally prescribe a minimum age -- the requirement is that both parties have reached the age of puberty.
- Marriage under customary law fuses two families together -- it is a communal event that creates a legal and social bond not only between the spouses but between their respective families.

3.2 Essential Elements for a Valid Customary Law Marriage

The following elements are required for a valid customary law marriage:

- **Consent** -- the consent of the parties is required, but under customary law this consent is primarily the consent of the respective families rather than the individual parties. The communal character of customary law marriage means that family approval is central.
- **Capacity** -- the parties must have the capacity to marry (meeting the age requirement) and the capacity to marry each other (not being within the prohibited degrees of relationship).

- **Patlo (request)** -- there must be a formal request made for the woman by the man's family to the woman's family, and the woman's family must accept that request.
- **Bogadi (transfer of livestock)** -- there must be a transfer of livestock (or other property) from the man's family to the woman's family. The significance and validity consequences of bogadi are discussed below.

3.3 Patlo and Bogadi

3.3.1 Patlo

Patlo is the formal request made by the man's family for the woman's hand in marriage. It is the initiating ceremony of the customary law marriage process. Patlo is followed by the betrothal or engagement, which is followed by the acceptance by the woman's family. As part of the patlo ceremony, the man's family sends gifts or a cow to be slaughtered, symbolising the seriousness and formality of the request.

3.3.2 Bogadi -- Definition and Significance

Bogadi is the transfer of livestock or other property (including cash in modern practice) from the man's family to the woman's family in consideration of the marriage. It is one of the most significant and debated aspects of customary law marriage in Botswana.

There have been divergent views about bogadi and its relevance to the validity of marriage:

- According to Schapera, in Tswana law no marriage is regarded as complete unless the bogadi has been given by the husband's people to the wife's people.
- According to Roberts, "although the transfer or payment of bogadi is still recognised as part of the marriage formalities, failure to transfer it or non-payment does not affect the validity of the marriage." However, in some circumstances such transfer or payment serves an evidential purpose in determining whether a marriage has taken place.
- Under Ngwato customary law, the transfer or payment of bogadi was not an essential ingredient to a valid marriage, although many Ngwato people regard it as cementing the bond between the families.

3.3.3 Form of Bogadi

- Bogadi is traditionally presented in the form of cattle or other livestock, though it is now common to pay cash.
- According to Roberts, there is no fixed number of cattle. An even number is preferable in most tribal communities -- for example, the Kgatla prefer 6 cattle.
- The cattle given may be heifers, oxen, or cows and should be fairly young.
- At least one of the cattle must be a female to provide for the possibility of natural increase.

3.3.4 Significance of Bogadi

- A woman married with bogadi holds a far more honoured position in the tribe than a woman married without bogadi.
- Bogadi entitles the woman to the protection of the man's family in the event of ill-treatment. A woman for whom bogadi has not been paid has limited legal recourse against the actions of her husband.
- Tswana people themselves speak of bogadi as an expression of thanksgiving from the man's family to the woman's family.
- Bogadi is said to create a special bond between the two families.
- Payment of bogadi gives the children of the union certain privileges at the home of their mother's people which they would not otherwise enjoy.
- The main function of bogadi is the transfer of the reproductive position of the woman into that of her husband's family.
- After marriage, the woman must consummate the marriage.

3.3.5 Consequences of Non-Payment of Bogadi

- There does not appear to be any right to sue the husband's people for the payment of bogadi.
- As long as bogadi remains unpaid, the union between a man and a woman -- although considered regular if based on the approval and consent of both families -- is not held to be a complete marriage.
- The children of an uncompleted union are consequently not legally the children of the man but belong to the maternal uncle, who can claim them at any time.

Mphoyakgosi v Jakoba [1997] BLR 604 (HC)

ISSUE	Whether the performance of patlo and bogadi ceremonies constituted a completed customary law marriage or merely a customary law engagement.
RULE / RATIO DECIDENDI	The ratio decidendi is that the performance of patlo and bogadi ceremonies does not automatically constitute a completed customary law marriage. The court must examine all the circumstances, including the nature and extent of the formalities performed, the intention of the parties and their families, and the surrounding evidence, to determine whether the formalities amount to a completed marriage or merely an engagement. The distinction is critical because the legal consequences of a completed marriage differ significantly from those of a mere engagement under customary law.

APPLICATION	The plaintiff and defendant had conducted patlo in 1984 and 1986, had two children, and a cow was presented to the defendant's parents. The court was called upon to determine the legal nature of the relationship.
CONCLUSION	The court examined all the circumstances and applied the applicable principles of customary law to determine the nature of the relationship.
SIGNIFICANCE & ANALYSIS	<i>This case is essential for understanding the distinction between a customary law engagement and a completed customary law marriage. It confirms that the mere performance of some customary formalities does not automatically create a completed marriage -- the totality of the circumstances must be examined.</i>

3.4 Status and Consequences of a Customary Law Marriage

A customary law marriage produces the following status and consequences for the parties:

- The woman takes up the dignities and rank of her husband within the tribal community.
- The community regards the man as a fully responsible adult capable of facing the challenges of family life.
- The husband is the head of the household and is responsible for the care and maintenance of the family.
- There are reciprocal rights and duties between the parties, most of which are not directly enforceable by action in the courts of law -- they are governed primarily by customary norms and social pressure.
- The husband is required to provide love, care, and respect, a place of residence for the family, and to show the wife the fields where she will cultivate.
- The wife must be respectful and obedient in carrying out her domestic duties.

3.4.1 Economic Relations

Under customary law, there is a division of labour between husband and wife. The husband is responsible for providing the economic foundation of the household, while the wife manages the domestic affairs of the household.

3.4.2 Sexual Relations

- The man acquires the sole right to sexual relations with his wife upon marriage.
- After the marriage, both parties are expected to be faithful to each other.

3.4.3 Sterility and Impotence

Customary law has traditionally had mechanisms for dealing with sterility and impotence within marriage:

- If a woman is not bearing children, the family may become hostile toward her and may require her to bring a substitute -- typically a younger sister -- to bear children on her behalf.
- If a man discovers that he is sterile, he may, under customary practice, ask his wife to discreetly conceive children by another man, with children born of such an arrangement being deemed his children customarily.

3.5 Registration of Customary Law Marriage

The Marriage Act 2000, Part II (Sections 22-27) deals with the registration of customary law marriages:

- **Section 23(1)-(4)** -- provides for the registration of customary marriages. Either spouse may apply for registration and must furnish the Registrar of Marriages with the required details. Registration must be done within two months of contracting the marriage.
- **Section 24** -- provides for the Certificate of Registration. The certificate must record: (i) the identity of the spouses; (ii) the date of the marriage; (iii) the property (bogadi) in cash or kind that one prospective spouse undertakes to give to the other's family; and (iv) any other prescribed particulars.
- **Section 23(4)** -- prescribes a penalty for non-registration.

The Certificate of Registration constitutes prima facie evidence of the existence of the marriage and the particulars contained therein.

Effects of Non-Registration: The marriage is deemed to be voidable (valid until one of the parties takes legal action to avoid it). Given that customary marriages existed before the coming into effect of the Act without any registration requirement, it would be unduly harsh to treat non-registration as rendering a marriage void.

3.6 Contraction of Customary Law Marriage by a Person Not Subject to Customary Law

Section 5 of the Customary Law Act provides that where a matter arises between a tribesman and a non-tribesman, customary law shall apply where: (a) it appears from express agreement or from all relevant circumstances that each party intended or may reasonably be deemed to have intended the matter to be regulated by customary law; or (b) the parties expressly consent to customary law being applicable. The matter is therefore one of choice and agreement between the parties.

3.7 Legal Implications of Conversion of Customary Marriage into a Statutory Marriage

Section 13 of the Marriage Act 2000 provides that if a man marries a woman under customary law, he is not allowed to marry another woman under the Marriage Act. Section 10 of the Marriage Act 2000 provides that a customary law marriage is deemed to be monogamous in nature when registration has occurred.

A critical question arises: when the statutory marriage is dissolved, does the customary marriage also get affected? The legal position is that a decree of divorce dissolves the marriage status (the legal relationship) and not merely the marriage ceremony. Where the same parties have gone through both a customary and a statutory marriage, the dissolution of one may or may not dissolve the other, depending on the applicable law.

Ohochuku v Ohochuku [1960] 1 All ER 253

ISSUE	Whether a decree of divorce dissolving a monogamous statutory marriage also dissolves a pre-existing potentially polygamous customary marriage between the same parties.
RULE / RATIO DECIDENDI	The ratio decidendi is that a decree of divorce dissolves the marriage status and not merely the marriage ceremony. Where marriage ceremonies have been celebrated between the same parties on different dates, a decree of divorce granted in respect of the second (statutory) marriage may also dissolve the first (customary) marriage ceremony, because the parties had only one marriage status between them. However, the English court in this case held that it had no jurisdiction to dissolve the polygamous customary marriage, as only the English (monogamous) marriage was within its jurisdiction. The case suggests that two separate decrees may be necessary to terminate the two marriages where different courts have jurisdiction.
APPLICATION	The parties were married under Nigerian customary law (a potentially polygamous marriage) and subsequently went through a monogamous statutory marriage in England. The wife petitioned for divorce in England on grounds of cruelty.
CONCLUSION	The English court granted the decree, dissolving the English (statutory) marriage only, having no jurisdiction to dissolve the polygamous customary marriage.

SIGNIFICANCE & ANALYSIS

This case is directly relevant to the Botswana context under Section 13(2) of the Marriage Act. It illustrates the complexity that arises when parties have contracted both a customary law marriage and a statutory marriage, and raises the important question of how many decrees are needed to terminate both marriages. The case suggests that two decrees may be necessary.

3.8 Dissolution of Customary Law Marriage

A customary law marriage may be dissolved by:

- **Divorce** -- dissolution during the lifetime of the parties.
- **Death** -- the death of either party.

3.8.1 Dissolution by Divorce

Dissolution by divorce under customary law may be done by common consent or at the instance of the husband, or of the wife's guardian or father acting on her behalf. The divorce must be based on good cause (*justa causa*).

Conduct that does NOT constitute good cause (*justa causa*) for customary divorce:

- Adultery by either party (especially by the man).
- Desertion by the wife -- the husband will typically fetch her and bring her back.

Conduct that DOES constitute good cause (*justa causa*) for customary divorce:

- Pregnancy of the woman from another man prior to the marriage, especially where not condoned by the husband.
- Pregnancy during the marriage resulting from adultery by the woman, especially where she refuses to disclose the identity of her lover to the husband.
- Accusation of witchcraft against the wife by the husband -- a serious matrimonial offence.
- Flagrant ill-usage or excessive cruelty.
- Non-support by the husband.
- Barrenness of the woman.
- Non-performance of domestic duties by the wife.

Procedure for customary divorce:

- The parents of the couple come together to try to restore peace between the husband and wife.
- If reconciliation is not possible, the matter may go to the Chief's court.
- Domestic disputes are usually settled in the courts of the wife's people.
- When at the Chief's court, the matter is heard *de novo* (from the beginning).

- If the couple proves to the Chief that they do not want to reconcile, the Chief may order them to separate and make orders regarding the children.
- The Chief may impose penalties on the guilty party, including requiring the payment of damages in cattle.

3.8.2 Dissolution by Death

- Death of the wife dissolves the marriage. Bogadi must be restored to the husband if the wife has died without bearing children.
- If the husband has died, the wife remains a member of her husband's family group. Traditional customary law provides that she falls under the guardianship of the husband's heir.
- In some traditions, levirate practice applies: after the man's death, his relatives may decide to transfer the reproductive power of the late man (in the name of bearing more children) to his younger brother or relative.

3.8.3 Dissolution of Property on Customary Divorce

There is no community of property between the husband and wife under customary law -- there is no equal distribution of matrimonial property on divorce. The general rules are:

- The parties have absolute control of the properties they brought into the marriage and those acquired during the marriage.
- Personal belongings go to the respective parties.
- Corn in the granaries is divided between the husband and the wife.
- The husband takes all the cattle, including those he initially allotted to his wife.
- The wife takes the household utensils, but if the husband provided all household items, she may be asked to leave some of them.
- Important considerations in the division of property include the fault of the respective parties and the maintenance needs of the children.

ACADEMIC NOTE

Radigeng states: "Where the parties to a marriage accumulate property together, such property constitutes their joint estate, except property that the parties had before the marriage. On divorce, such property is to be shared equally." This academic position suggests a more equitable approach to customary property division than the traditional rules might imply.

Leswape v Leswape [1976] BLR 73

ISSUE	Whether the High Court has jurisdiction to review the division of matrimonial property by a customary court on divorce, and how customary law property division rules are applied.
RULE / RATIO DECIDENDI	The ratio decidendi is that the division of matrimonial property upon customary law divorce is a matter primarily for the customary courts, which apply the rules of customary law to determine which property should be allocated to which spouse. The High Court may review a customary court's division of property on appeal or by way of revision, but will generally defer to the customary court's application of the relevant customary law rules. Section 7 of the Married Persons Act governs the proprietary consequences of marriages of persons subject to customary law.
APPLICATION	The High Court dismissed the appeal of the husband against the revision by the District Commissioner of the customary court's division of matrimonial property. The division was referred to the customary court of the area where the parties resided.
CONCLUSION	The customary court's division of matrimonial property was upheld.
SIGNIFICANCE & ANALYSIS	<i>This case is a foundational authority on the proper forum for the resolution of customary law matrimonial property disputes and confirms that the customary courts have primary jurisdiction over the application of customary law property rules on divorce.</i>

3.8.4 Custody of Children on Customary Divorce

- Where bogadi was paid but no children resulted from the marriage, the husband is entitled to take back his bogadi payment.
- Where bogadi was paid and there are children, if the children are infants the woman may take them with her. The man retains legal rights over the children under customary law. If the woman has daughters, the wife may take some of them to help her with domestic work.

TOPIC 4

COHABITATION*Definition, Reasons, Legal Consequences and Universal Partnership*

4. Cohabitation

4.1 Definition

DEFINITION: Cohabitation

A relationship in which a man and a woman (or, in some contexts, two persons) live together as husband and wife without having gone through a legal ceremony of marriage. According to Michael Freeman, cohabitation is "a more or less stable, permanent relationship between two persons of the opposite sex who are not married to each other -- though one or both may be married to someone else." As far as the law is concerned, cohabitation is not a valid marriage and does not become one with the passage of time.

4.2 Reasons for Cohabitation

Persons may choose to cohabit for a variety of reasons:

- The parties may not be legally permitted to marry -- because they are related within the prohibited degrees, because one of them is already married, or because they are of the same sex.
- Young people who are ambivalent about formal commitment may enter into cohabitation as an alternative to marriage.
- Older couples who wish to avoid the consequences of a second divorce but still wish to maintain a companionate relationship may choose to cohabit while remaining financially independent.
- Many people drift into and remain in cohabiting relationships without consciously considering the legal implications of their arrangement.

4.3 Legal Consequences of Cohabitation

The general rule is that cohabitation does not give rise to any special legal consequences, no matter how long the relationship has endured. The law treats cohabitants as legal strangers for most purposes.

4.3.1 Property Rights

Cohabitation gives rise to no automatic property rights. However, the ordinary rules of contract and unjustified enrichment may be invoked by cohabitants to enforce rights acquired in each other's property.

The principal mechanism by which cohabitants may acquire property rights in each other's property is through the doctrine of **universal partnership**.

DEFINITION: Universal Partnership

A tacit or express partnership between cohabitants by which each party contributes something of value (money, labour, or skill) to a joint enterprise or household, with the object of sharing in the profits or benefits of that enterprise. Universal partnership may arise from an express or tacit agreement and is recognised by Botswana courts as the primary vehicle through which cohabitants may establish property rights in each other's assets.

To prove universal partnership, the party alleging it must establish:

- Each party brought something to the partnership -- whether money, labour, or skill.
- The business or enterprise was carried out for the joint benefit of both parties.
- The object of the business or enterprise was to make a profit or mutual benefit.
- The contribution of each party was of appreciable value.

Mohorosi v Mohorosi 2008 (1) BLR 105

ISSUE	Whether a cohabiting partner may establish a claim to property accumulated during the cohabitation on the basis of universal partnership.
RULE / RATIO DECIDENDI	The ratio decidendi is that a cohabiting partner may establish a claim to property accumulated during the cohabitation by proving the existence of a universal partnership. The requirements for establishing a universal partnership are: (1) each party must have brought something of value to the partnership; (2) the enterprise must have been for the joint benefit of both; (3) the object must have been mutual benefit or profit; and (4) each party's contribution must be of appreciable value. Where these requirements are met, the court will recognise the universal partnership and apportion the accumulated property equitably between the parties.
APPLICATION	The court examined the nature of the cohabiting relationship and assessed whether the elements of universal partnership had been established on the evidence.

CONCLUSION	The court recognised the universal partnership and determined the parties' respective property rights.
SIGNIFICANCE & ANALYSIS	<i>This case is a leading Botswana authority on the application of universal partnership in cohabitation disputes. It confirms that Botswana courts will recognise and give effect to the doctrine of universal partnership as the primary vehicle for establishing property rights between cohabitants.</i>

Omphile v Rasekawana 2003 (1) BLR 314

ISSUE	Whether a cohabiting partner who made contributions to the acquisition and maintenance of property may establish a property claim on the basis of universal partnership or unjustified enrichment.
RULE / RATIO DECIDENDI	The ratio decidendi is that where a cohabiting partner has made substantial contributions -- whether financial, through labour, or through the provision of services -- to the acquisition or improvement of property registered in the other partner's name, that partner may establish a claim to a share of that property on the basis of universal partnership or unjustified enrichment. The court will examine the nature, extent, and value of the contributions made by each party and determine an equitable apportionment of the property.
APPLICATION	The court examined the contributions made by each party to the cohabiting relationship and assessed the basis for any property claim.
CONCLUSION	The court determined the parties' property rights on the basis of the contributions established in evidence.
SIGNIFICANCE & ANALYSIS	<i>This case reinforces the principles established in Mohorosi v Mohorosi and confirms that both universal partnership and unjustified enrichment are available as legal bases for property claims by cohabitants in Botswana.</i>

4.3.2 Maintenance and Loss of Support

There is no reciprocal duty of support between cohabitants during their relationship or after its termination by death or otherwise. Neither party can bind the other in contract for household necessities (food, shelter, etc.) unless one has appointed the other as their agent. There is no action for damages for loss of support against a third party who unlawfully causes the death of a cohabitant who had been supporting their partner, even if the couple had contractually undertaken to support each other.

4.3.3 Common Home

- A cohabitant who is not the owner or lessee of the property has no special right to remain in the common home.
- The cohabitant who owns the property can sell it without the consent or knowledge of their partner and in disregard of any right that partner may have had to occupy the home.

4.3.4 Children

- A child born of a cohabitation relationship is illegitimate.
- The mother alone has parental control over the child.
- The child is given the mother's surname, except where both parties jointly apply to register the child under the father's surname and the father acknowledges paternity in writing.

Samsam v Seakarea 2004 (1) BLR 378

ISSUE	Whether a child born of a cohabitation relationship may be registered under the father's surname and what the legal status of such a child is.
RULE / RATIO DECIDENDI	The ratio decidendi is that a child born of a cohabitation relationship is illegitimate and is, in the absence of any formal acknowledgment of paternity, treated as the child of the mother alone. The child may be registered under the father's surname where both parents jointly apply for registration and the father acknowledges paternity in writing. The illegitimacy of the child does not affect the child's fundamental legal rights, including the right to maintenance from the biological father.
APPLICATION	The court examined the registration of the child born of the cohabitation relationship and the respective rights of the parties in relation to the child.
CONCLUSION	The court determined the registration and status of the child.
SIGNIFICANCE & ANALYSIS	<i>This case clarifies the legal status of children born of cohabitation relationships in Botswana and the mechanism by which such children may be registered under the father's surname.</i>

4.3.5 Succession

- Nothing prevents a cohabitant from leaving their estate to their partner by will. The testator's will must make it plain that the cohabiting partner is intended to benefit.
- There is no right of intestate succession between cohabitants -- where a cohabitant dies without a will, the surviving partner has no automatic right to inherit from the deceased's estate under the laws of intestate succession.

TOPIC 5

STATUTORY MARRIAGE*Definition, Legal Requirements, Formalities and Consequences***5. Marriage Under Common Law / Statutory Marriage****5.1 Definition of Statutory Marriage****DEFINITION: Statutory Marriage**

The voluntary union for life of a biological man and a biological woman to the exclusion of all others. This definition, derived from *Hyde v Hyde and Womansee* (1866), identifies the essential characteristics of a statutory (civil) marriage: it must be voluntary, it must be between a biological male and a biological female, it must be monogamous (to the exclusion of all others), and it must be intended to be for life.

This classical definition has been criticised on several grounds:

- "Marriage for life" -- in practice, marriages are terminable by divorce, which undermines the "for life" element.
- The requirement of biological male and female -- sex changes may occur, raising questions about the applicability of this requirement.
- The definition does not accommodate same-sex unions, which some jurisdictions have recognised as marriages.

Hyde v Hyde and Womansee (1866) LR 1 P&D; 130

ISSUE	What is the legal definition of marriage as understood in the common law tradition?
RULE / RATIO DECIDENDI	The ratio decidendi is that marriage, as understood in Christendom, may be defined as the voluntary union for life of one man and one woman to the exclusion of all others. This definition establishes the four essential characteristics of a statutory marriage: voluntary union, for life, between a man and a woman, and to the exclusion of all others (monogamy). A union that does not satisfy these characteristics will not be recognised as a marriage in the common law tradition.

APPLICATION	The court examined the nature of marriage in the common law tradition and provided a definitive judicial definition.
CONCLUSION	The court defined marriage as the voluntary union for life of one man and one woman to the exclusion of all others.
SIGNIFICANCE & ANALYSIS	<i>This is the foundational case defining statutory marriage in the common law tradition. The definition has been applied in Botswana and throughout the common law world as the starting point for understanding the nature of statutory marriage. Students must be able to identify and critically evaluate each element of this definition.</i>

Seedats Executors v The Master 1917 (SA) AD 302

ISSUE	Whether a potentially polygamous marriage contracted in another jurisdiction will be recognised as a valid marriage in South Africa (and by extension, Botswana).
RULE / RATIO DECIDENDI	The ratio decidendi is that marriage is a union of one man and one woman to the exclusion, while it lasts, of all others. No union will be regarded as a marriage in South Africa (and, by extension, in Botswana) even if it is recognised as a marriage in another country, if it was lawful for the parties to legally marry a second person during its subsistence. A potentially polygamous union therefore does not satisfy the monogamy requirement of statutory marriage and will not be recognised as a statutory marriage.
APPLICATION	The court examined whether a polygamous marriage contracted under the law of another jurisdiction should be recognised as a valid marriage in South Africa.
CONCLUSION	The court declined to recognise the polygamous union as a valid statutory marriage.
SIGNIFICANCE & ANALYSIS	<i>This case reinforces the monogamy requirement of statutory marriage and establishes the principle that potentially polygamous unions will not be recognised as statutory marriages even if validly contracted in another jurisdiction.</i>

5.2 Legal Requirements for a Valid Statutory Marriage

The following requirements must be satisfied for a valid statutory marriage:

- **Capacity to marry and capacity to marry each other** -- the parties must have attained the minimum age of 18 years (Section 14 of the Marriage Act 2000), must not be of unsound mind (see Section 14 of the Marriage Act, and Section 9 of the Mental Disorders Act), and must not be within the prohibited degrees of consanguinity or affinity (Section 16 of the Marriage Act 2000).
- **Voluntary agreement** -- both parties must freely and voluntarily consent to the marriage. Consent obtained by duress, undue influence, or fraudulent misrepresentation is not valid consent.
- **Compliance with formalities** -- the formalities laid down in the Marriage Act must be complied with, including the publication of banns (Section 4) or the obtaining of a special licence (Section 5), and the proper solemnisation of the marriage (Section 9).

Pheasant v Warne [1922] AD 481

ISSUE	Whether a party who lacks the mental capacity to understand the nature of the marriage ceremony has the capacity to contract a valid marriage.
RULE / RATIO DECIDENDI	The ratio decidendi is that a valid statutory marriage requires that the party has sufficient mental capacity to understand the nature and the ordinary responsibilities of the marriage ceremony and the institution of marriage. A party who lacks the understanding to appreciate what the marriage ceremony signifies and what obligations it creates does not have the capacity to give valid consent to marriage. Such a marriage is voidable for want of capacity.
APPLICATION	The court examined the mental capacity of one of the parties to the marriage and assessed whether they had sufficient understanding to consent to the marriage.
CONCLUSION	The court addressed the test for mental capacity required for a valid marriage.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the test for mental capacity required for a valid statutory marriage. It is directly relevant to the nullity provisions of the Matrimonial Causes Act and to the general rules governing capacity to marry.</i>

5.3 Consanguinity and Affinity

Section 16 of the Marriage Act 2000 provides that no person shall marry within the prohibited degrees of consanguinity and affinity:

- **Consanguinity** -- a blood relationship between two persons. Persons within the prohibited degrees of consanguinity (such as parent and child, or siblings) may not marry each other.
- **Affinity** -- a relationship created by marriage. Persons within the prohibited degrees of affinity (such as a person and their former spouse's parent) may not marry each other.

5.4 Formalities of Statutory Marriage

5.4.1 Section 3 -- Preliminaries of Marriage

Before a statutory marriage may be solemnised, the required preliminary steps must be completed. These include the publication of banns or the obtaining of a special licence.

5.4.2 Section 4 -- Publication of Banns

The publication of banns gives public notice of the intended marriage, enabling members of the public to notify the officiating officer of any legal impediment. The main reason for publishing banns is to allow the public to challenge the marriage before it takes place. Where an impediment is proved to exist, the publication of banns will be discontinued and the marriage plans will be aborted.

5.4.3 Section 5 -- Special Licence

Any person who does not wish to go through the procedure of publishing banns may apply for a special licence to the administrative officer. The administrative officer, if satisfied (if necessary by evidence under oath), may grant a special licence entitling the parties to marry without the necessity of publishing banns.

5.4.4 Section 9 -- Solemnisation of the Marriage

Solemnisation of the marriage may be done by a civil ceremony or a religious ceremony. Civil marriages are conducted at the courts registry by a marriage officer in the presence of two witnesses, between 6am and 6pm. Section 11 of the Marriage Act provides for the registration of all marriages.

Fitzgerald v Green [1911] EDL 458

ISSUE
Whether the failure to comply with the formal requirements for the solemnisation of a marriage renders the marriage void or merely irregular.

RULE / RATIO DECIDENDI	The ratio decidendi is that the courts must carefully distinguish between formal requirements whose non-compliance renders a marriage void and those whose non-compliance merely renders it irregular but valid. Not every procedural irregularity in the solemnisation of a marriage will result in the marriage being void; the court must consider the nature and purpose of the formal requirement and the consequences that the legislature intended to attach to non-compliance.
APPLICATION	The court examined the consequences of non-compliance with the formal requirements for the solemnisation of a statutory marriage.
CONCLUSION	The court addressed the distinction between mandatory and directory formal requirements for marriage.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the important principle that not all formal defects in the solemnisation of a marriage render the marriage void. Courts will distinguish between fundamental requirements (non-compliance with which voids the marriage) and procedural requirements (non-compliance with which merely renders the marriage irregular).</i>

TOPIC 6

LEGAL CONSEQUENCES OF MARRIAGE*Consortium, Change of Status, Duty of Support, Community of Property*

6. Legal Consequences of Marriage

6.1 Classification of Consequences

The legal consequences of statutory marriage may be classified as follows:

- **Invariable consequences** -- consequences that attach to all marriages regardless of the parties' wishes and cannot be excluded or modified by agreement. These relate primarily to the personal consequences of marriage, including consortium, change of status, and the reciprocal duty of support.
- **Variable consequences** -- consequences that the parties may modify or exclude by agreement, particularly by means of an antenuptial contract. These relate primarily to the proprietary consequences of marriage, including the matrimonial property regime (in or out of community of property).

6.2 Consortium

DEFINITION: Consortium (Consortium Omnis Vitae)

An imprecise legal concept that describes the totality of the mutual rights, duties, and advantages that accrue to spouses by virtue of their marriage. Consortium encompasses both intangible elements (such as loyalty, sympathetic care, affection, and concern) and more material elements (such as physical care and financial support). Section 15(1) of the Matrimonial Causes Act recognises the right to cohabit and to have the exclusive right to sexual intercourse with each other as part of consortium omnis vitae.

Peter v Minister of Law and Order 1990 (4) SA 61**ISSUE**

How should the concept of consortium be defined and what does it encompass in the context of marriage?

RULE / RATIO DECIDENDI	The ratio decidendi is that consortium is an abstraction comprising the totality of a number of rights, duties, and advantages accruing to spouses in a marriage. These embrace intangibles such as loyalty, sympathetic care, affection, and concern, as well as the more material needs of life such as physical care and financial support. A spouse who is wrongfully deprived of consortium by the act of a third party has a cause of action for damages for loss of consortium.
APPLICATION	The court examined the nature and scope of consortium and defined it in the context of a matrimonial damages claim.
CONCLUSION	The court defined consortium as comprising the totality of rights, duties, and advantages accruing to spouses in marriage.
SIGNIFICANCE & ANALYSIS	<i>This case provides the definitive judicial definition of consortium and confirms that it encompasses both the intangible and material aspects of the marital relationship. It is the foundational case on consortium in Southern African law.</i>

Grobbelaar v Havewga 1964 (3) SA 522

ISSUE	What elements constitute consortium in the context of marriage?
RULE / RATIO DECIDENDI	The ratio decidendi is that the elements of consortium include compassion, mutual services, sexual intercourse, love, and affection -- taken together, these constitute the consortium of a marriage. Each element is an integral part of the marital relationship and their combined enjoyment constitutes the consortium omnis vitae to which each spouse is entitled.
APPLICATION	The court examined the constituent elements of consortium in the context of a matrimonial matter.
CONCLUSION	The court confirmed that compassion, mutual services, sexual intercourse, love, and affection together constitute consortium.
SIGNIFICANCE & ANALYSIS	<i>This case elaborates on the elements of consortium identified in Peter v Minister of Law and Order and provides a more detailed account of what consortium encompasses.</i>

6.3 Change of Status

Marriage changes the legal status of the parties in several significant respects:

- A minor who marries automatically attains the status of a major (full legal capacity to act) and retains this majority status even if the marriage is subsequently terminated by death or divorce before they attain the age of majority.
- Spouses may inherit from one another without the necessity of a testamentary bequest -- they have intestate succession rights in each other's estates.
- Section 5 of the Abolition of Marital Power Act 2004 abolished the common law position of the husband as head of the family and removed the restrictions which the marital power placed on the legal capacity of a wife. The effect is to equalise the legal status of husband and wife as far as distribution of property and legal capacity are concerned.

Egner v Egner 1974 (2) BLR 5

ISSUE	What effect did marriage have on the domicile of a wife prior to the Abolition of Marital Power Act 2004, and how has Section 16 of that Act changed the position?
RULE / RATIO DECIDENDI	The ratio decidendi is that prior to the Abolition of Marital Power Act 2004, the common law provided that a wife acquired the domicile of her husband upon marriage and retained it throughout the marriage. This was known as the doctrine of unity of matrimonial domicile. Section 16 of the Abolition of Marital Power Act 2004 fundamentally changed this position: the domicile of a married woman shall no longer by virtue of the marriage be considered to be the same as that of her husband but shall be ascertained by reference to the same factors as apply to any individual capable of acquiring a domicile of choice.
APPLICATION	The court examined the domicile of a married woman in the context of matrimonial proceedings and considered the pre-Act common law position and the reform introduced by the Abolition of Marital Power Act.
CONCLUSION	The court applied the applicable law on domicile to the facts of the case.
SIGNIFICANCE & ANALYSIS	<i>This case is significant in the law of persons and family law as it illustrates the historical doctrine of unity of matrimonial domicile and confirms the fundamental reform introduced by Section 16 of the Abolition of Marital Power Act 2004, which grants married women full independent domicile.</i>

6.4 Reciprocal Duty of Support

One of the invariable legal consequences of statutory marriage is that the parties owe each other a reciprocal duty of maintenance and support. This duty applies whether the marriage is in or out of community of property.

The duty of support encompasses the provision of household necessities including food, clothing, shelter, and medical and dental attention.

Before the duty of support arises, the following conditions must be present:

- There must be a valid subsisting marriage between the parties.
- The party claiming support must actually be in need of it.
- The party from whom support is claimed must be in a position to provide it.

In assessing the appropriate level of support, courts consider the age of the parties, the duration of the marriage, the wife's contribution to the home, the financial needs of the parties, the respective earning capacities of the parties, and the standard of living of the parties during the marriage.

6.4.1 Authority to Bind Spouse in Contract for Necessities

A consequence of the reciprocal duty of support is that a spouse has the authority to bind the other spouse in contract for household necessities if the other spouse fails to provide them. This authority comes to an end when: (1) the marriage is dissolved by divorce or death; (2) the spouses separate and the common household ends; or (3) the court makes an appropriate order.

6.5 Marriage Out of Community of Property

Where spouses marry out of community of property (by means of an antenuptial contract), the proprietary consequences are as follows:

- Each spouse retains their own separate estate and has the power to deal with it as they see fit.
- The spouses are not liable for each other's debts incurred before or after the marriage.
- Section 15(1) of the Abolition of Marital Power Act provides that where spouses married out of community of property acquire property jointly, Part III of that Act shall apply as if the marriage is in community of property.

Advantages of marriage out of community of property:

- Each spouse retains an independent estate.
- The spouses are not liable for each other's pre-existing or post-marriage debts.

Disadvantages of marriage out of community of property:

- The parties have no legal right to share in the growth of each other's estate.
- The less financially secure spouse may be at a disadvantage if the marriage breaks down.

6.6 Marriage in Community of Property

Section 3 of the Married Persons Act provides that where spouses marry in community of property, all property acquired before and during the marriage is held in one common estate known as the joint estate. There is also a community of profit and loss -- all profits go into the joint estate and all debts are also paid out of it.

Certain assets are excluded from the joint estate, including assets given by a third party to one spouse only, or property bequeathed to either spouse with an express provision of exclusion.

Advantages of marriage in community of property:

- Spouses share in each other's financial gains irrespective of whether either contributed to the growth of the estate.
- The resources of both spouses are pooled for the joint benefit of the household.

Disadvantages of marriage in community of property:

- The spouses share each other's financial setbacks and debts.
- The arrangement leaves little scope for individual financial autonomy.

6.6.1 Equal Management of the Joint Estate

Section 7 of the Abolition of Marital Power Act provides that a husband and wife married in community of property shall have equal capacity to dispose of the assets of the joint estate, contract debts for which the joint estate is liable, and administer the joint estate. Sections 8, 9, 12, and 13 of the Act deal respectively with consent, obtaining consent before litigation, undue consent, and the capacity of spouses to litigate.

6.7 Marital Power

The marital power historically gave the husband three forms of power over his wife:

- Power as head of the family (invariable consequence).
- Control over the person of his wife (variable consequence).
- Control over the property of his wife (variable consequence).

Section 4 of the Abolition of Marital Power Act 2004 abolished the marital power in Botswana, equalising the legal status of husband and wife as far as the distribution of property and legal capacity are concerned. Section 16 addressed the domicile of married women and Section 17 addressed the domicile of minor children.

TOPIC 7

NULLITY OF MARRIAGE*Void and Voidable Marriages, Consummation, Wilful Refusal and Insanity***7. Nullity of Marriage****7.1 Distinction Between Void and Voidable Marriages**

The law of nullity distinguishes between two fundamentally different categories of invalid marriage:

Criterion	Void Marriage	Voidable Marriage
Nature	Treated by every court as never having taken place (void ab initio)	Valid and subsisting until annulled by a court decree
Who may challenge	Any person with an interest in the validity of the marriage	Only the parties to the marriage themselves
Court decree	No decree of annulment is strictly necessary (though may be obtained for practical purposes)	A court decree of annulment is essential to avoid the marriage
Time limit	Can be challenged even after the death of one of the parties	Action must be brought during the lifetime of both parties
Domicile	Wife does not automatically acquire husband's domicile	Wife automatically acquires husband's domicile
Effect of decree	Retrospective -- the marriage is treated as never having existed	Prospective -- takes effect from the date it became absolute

De Reneville v De Reneville [1948] P 111**ISSUE**

What is the distinction between a void and a voidable marriage, and what are the practical legal consequences of this distinction?

RULE / RATIO DECIDENDI	The ratio decidendi is that a void marriage is one that will be regarded by every court, in any case in which the existence of the marriage is in issue, as never having taken place. It can be treated as non-existent by both parties without the necessity of any decree annulling it. A voidable marriage, by contrast, is one that will be regarded by every court as a valid, subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction.
APPLICATION	The court examined the nature of the distinction between void and voidable marriages and articulated the practical legal consequences of each category.
CONCLUSION	The court articulated the definitive distinction between void and voidable marriages.
SIGNIFICANCE & ANALYSIS	<i>This is the foundational case on the distinction between void and voidable marriages in the common law tradition. The distinction drawn in this case is directly applied in Botswana under the Matrimonial Causes Act and must be precisely understood by students.</i>

7.2 Grounds Rendering a Marriage Void or Voidable

Section 22 of the Matrimonial Causes Act sets out the grounds on which a marriage may be declared a nullity. These grounds include incapacity to consummate, wilful refusal to consummate, and lack of valid consent.

Gaobotse v Gaobotse 1995 BLR 549

ISSUE	Whether Section 22 of the Matrimonial Causes Act provides a comprehensive basis for nullity applications and how the section should be applied.
RULE / RATIO DECIDENDI	The ratio decidendi is that Section 22 of the Matrimonial Causes Act serves as a blanket provision governing nullity applications in Botswana. The section must be read and applied in light of the general principles governing nullity of marriage, including the distinction between void and voidable marriages and the specific grounds recognised by the law. The court has a discretion in granting or refusing a nullity decree, and this discretion must be exercised judicially.
APPLICATION	The court examined an application for nullity and applied Section 22 of the Matrimonial Causes Act to the specific facts.

CONCLUSION	The court applied Section 22 and exercised its discretion in determining the nullity application.
SIGNIFICANCE & ANALYSIS	<i>This case confirms the primacy of Section 22 of the Matrimonial Causes Act in nullity applications in Botswana and affirms the court's discretionary jurisdiction.</i>

7.3 Consummation of Marriage

DEFINITION: Consummation

The first act of sexual intercourse after the celebration of the marriage. For an act to constitute consummation, it must be complete and not partial or incomplete. Sexual relations between the parties before the marriage do not constitute consummation. The act must involve full penetration for a reasonable length of time.

Snowman v Snowman 1934 (P) 186

ISSUE	What constitutes consummation of a marriage, and what is the standard required?
RULE / RATIO DECIDENDI	The ratio decidendi is that for sexual intercourse to constitute consummation of a marriage, there must be an erection and penetration for a reasonable length of time. The act must be complete and not merely partial or imperfect. A marriage is not consummated by an incomplete or partial act of sexual intercourse.
APPLICATION	The court examined the nature of the sexual contact between the parties and determined whether it constituted consummation of the marriage.
CONCLUSION	The court set out the standard required for consummation.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the standard of consummation required for the purposes of nullity law. It confirms that mere partial contact or incomplete penetration does not constitute consummation.</i>

S v S 1954 (3) All ER 736

ISSUE	Whether a wife's anatomical condition that made penetration difficult constitutes incapacity to consummate, and what the consequences are when the wife undergoes an operation to remedy the condition.
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RULE / RATIO DECIDENDI	The ratio decidendi is that incapacity to consummate may arise from a physical or anatomical condition that makes consummation practically impossible or unduly difficult. However, where the incapacity can be remedied by a medical operation that the wife is willing to undergo, the husband cannot rely on the pre-operation incapacity as grounds for nullity. Once the wife has undergone the operation and the impediment has been removed, the justification for the nullity action is rendered void.
APPLICATION	The husband claimed that the wife's thick hymen made penetration impossible and sought a nullity. The wife underwent an operation to remedy the condition.
CONCLUSION	The husband's grounds for nullity were rejected as the wife had remedied the condition.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the principle that where incapacity to consummate can be remedied by an operation that the incapacitated party is willing to undergo, the court will not grant a nullity decree on grounds of that incapacity.</i>

7.4 Wilful Refusal to Consummate

Where a party wilfully refuses to consummate the marriage, the other party may apply for a nullity decree. For wilful refusal to be established, there must be:

- A request for sexual intercourse by either of the parties, whether direct or implied.
- An opportunity to comply with such a request.
- A deliberate and settled decision by the refusing party not to comply, without just cause.

Horton v Horton [1947] 2 All ER 871

ISSUE	What constitutes wilful refusal to consummate a marriage for the purposes of a nullity application?
RULE / RATIO DECIDENDI	The ratio decidendi is that wilful refusal to consummate a marriage requires a settled and definite decision by the refusing party not to consummate the marriage, arrived at without just cause. The refusal must be deliberate and persistent, not merely a temporary reluctance or a postponement for legitimate reasons. There must be a certain and deliberate decision come to without just cause.
APPLICATION	The court examined the nature of the refusal to consummate and applied the test for wilful refusal.

CONCLUSION	The court set out the test for wilful refusal to consummate.
SIGNIFICANCE & ANALYSIS	<i>This is the leading case on wilful refusal to consummate for the purposes of nullity. The definition -- a settled and definite decision arrived at without just cause -- is directly applied in Botswana.</i>

Baxter v Baxter [1948] AC 274

ISSUE	Whether a wife's insistence on the use of a contraceptive during sexual intercourse constitutes wilful refusal to consummate or negates consummation.
RULE / RATIO DECIDENDI	The ratio decidendi is that the use of a contraceptive during sexual intercourse does not constitute wilful refusal to consummate a marriage, nor does it negate consummation. Where both parties are willing to engage in sexual intercourse but one party insists on the use of contraception, this does not amount to a refusal to consummate. Consummation does not require the possibility of procreation; it requires only the performance of the act of sexual intercourse in the normal sense.
APPLICATION	The wife refused to have sexual intercourse without contraception. The husband sought a nullity on grounds of wilful refusal to consummate or failure of consummation.
CONCLUSION	The court held that both parties had willingness to consummate; the insistence on contraception did not negate this willingness.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the important principle that consummation does not require the possibility of procreation and that the use of contraception does not constitute a failure of consummation or wilful refusal. It draws a clear distinction between the act of consummation and the procreative purpose of marriage.</i>

Kaur v Singh [1972] 1 All ER 292

ISSUE	Whether a party has just cause for not consummating a marriage where the other party refuses to arrange a religious ceremony that was agreed to as a condition of consummation.
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RULE / RATIO DECIDENDI	The ratio decidendi is that where the parties have agreed, as a condition of their marriage, that consummation will not take place until a religious ceremony has been completed, and one party then refuses to make the necessary arrangements for the religious ceremony, the other party has just cause for not consummating the marriage. In such circumstances, the refusal to consummate is not wilful but is justified by the other party's failure to fulfil a condition agreed between them.
APPLICATION	The parties had gone through a civil marriage and agreed not to consummate it until a religious ceremony had been performed. The husband refused to arrange the religious ceremony, and the wife sought a nullity on the grounds of her justified refusal to consummate.
CONCLUSION	The wife was granted a nullity decree.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the principle that just cause for not consummating a marriage may include the other party's failure to fulfil an agreed condition. It illustrates the flexibility of the courts in assessing what constitutes wilful refusal and just cause.</i>

7.5 Insanity and Nullity

Where one of the parties to a marriage was insane at the time of the marriage, the marriage may be voidable on grounds of lack of capacity to consent. Two tests must be applied:

- **Test of mental capacity** -- did the party understand the normal responsibilities of marriage?
- **Self-management** -- could the party manage their own affairs?

These two tests were laid down in the case of *In the Estate of Park* and are applied in Botswana.

7.6 Legal Restrictions on the Granting of a Nullity Decree

Section 22(4) of the Matrimonial Causes Act provides that the High Court shall not grant a declaration of nullity in certain cases unless it is satisfied that: (a) the plaintiff was ignorant of the facts alleged at the time of the marriage; (b) proceedings were instituted within one year from the date of the marriage; and (c) marital intercourse with the consent of the plaintiff has not taken place since the plaintiff discovered the grounds for a decree.

TOPIC 8

DIVORCE*Jurisdiction, Domicile, Grounds, Adultery, Behaviour, Desertion and Bars*

8. Divorce

8.1 Jurisdiction

The High Court has jurisdiction to entertain divorce matters by virtue of Section 95(1) of the Constitution, which provides that the High Court has unlimited jurisdiction to hear and determine any civil or criminal matter. Section 5 of the Matrimonial Causes Act provides for designated subordinate courts with limited jurisdiction in matrimonial causes.

8.1.1 Jurisdiction over Customary Law Marriages

Sections 11, 13(b), 14, and 15 of the Customary Courts Act 1968 give customary courts jurisdiction to hear suits for divorce of customary marriages.

Mafokate v Mafokate [2000] 2 BLR 430

ISSUE	Whether the High Court has jurisdiction at first instance to entertain an action for the divorce of a customary law marriage.
RULE / RATIO DECIDENDI	The ratio decidendi is that while the High Court has unlimited jurisdiction under Section 95(1) of the Constitution to hear and determine any civil matter, the dissolution of customary marriages is best suited to the customary courts, which are generally faster, less expensive, and more familiar with the applicable customary law. The appropriate court to hear an action for the divorce of a customary marriage is the customary court, subject to the right of appeal to the High Court by any party dissatisfied with the decision. Section 5 of the Common Law and Customary Law Act 1969 enjoins the courts of Botswana to apply customary law in all cases and proceedings where customary law is the proper law.
APPLICATION	The court examined which court had the appropriate jurisdiction to hear an action for the divorce of a customary law marriage.
CONCLUSION	The customary court was identified as the appropriate forum for the dissolution of customary marriages.

**SIGNIFICANCE &
ANALYSIS**

This case is a leading authority on jurisdiction in customary marriage divorce proceedings. It establishes the principle that while the High Court has theoretical unlimited jurisdiction, the customary courts are the appropriate forum for customary law divorces.

8.1.2 Jurisdiction over Statutory Marriages

Sections 2 and 5 of the Matrimonial Causes Act 1973 confer jurisdiction on the High Court and designated subordinate courts in matrimonial causes. The designated subordinate courts have limited jurisdiction and do not have jurisdiction to: (a) pronounce on the validity of any marriage or divorce; or (b) make an order of presumption of death and dissolution of marriage. These courts are restricted to cases where both parties are ordinarily resident within the court's jurisdiction, or where one party has filed consent to submit to that court's jurisdiction.

8.2 Domicile and Residence as Jurisdictional Bases

Section 7(1) of the Matrimonial Causes Act provides that a court shall have jurisdiction to try an action for divorce or judicial separation if, at the date of the institution of proceedings, either spouse is domiciled in Botswana or has been resident within Botswana for a continuous period of three years immediately preceding the date of the institution of proceedings.

8.2.1 Residence

Ordinary residence connotes residence in a place with some degree of continuity. Continuous residence is a question of fact to be determined by taking into account all the circumstances of the case. A temporary absence from Botswana does not necessarily break the continuity of residence, provided the absence is not of such duration as to amount to an abandonment of residence in Botswana.

Ntwana v Ntwana 1995 (unreported)

ISSUE

Whether a plaintiff's one-year absence from Botswana breaks the continuity of residence required for jurisdiction under Section 7(1) of the Matrimonial Causes Act.

**RULE / RATIO
DECIDENDI**

The ratio decidendi is that a temporary absence from Botswana does not necessarily prevent a party from being continuously resident in Botswana for the purposes of Section 7(1) of the Matrimonial Causes Act. If the break in physical presence in Botswana is not of such duration as to amount to an abandonment of residence in Botswana, temporary absences will not break the continuity of residence. The onus of proving residence is on the plaintiff.

APPLICATION	The court examined whether the plaintiff's one-year absence from Botswana interrupted the continuity of her residence for jurisdictional purposes.
CONCLUSION	The court held that the plaintiff's absence did not break the continuity of her residence in Botswana.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the flexible approach to continuous residence for jurisdictional purposes under Section 7(1), confirming that temporary absences do not necessarily interrupt continuity of residence.</i>

8.2.2 Intention (Animus Manendi)

In order to prove the animus manendi (intention to remain), the proof must be established on a balance of probabilities. The animus manendi requires an intention to reside in Botswana permanently or for an indefinite period, rather than for a fixed period or for a particular purpose. The following principles have been derived from the case law:

- The burden of proof of a change of domicile is on the person asserting it, and they must satisfy the court with credible evidence that such a change has taken place.
- The proof required is on a balance of probabilities.
- The evidence of the propositus (the person whose domicile is in question) is relevant and, where prima facie credible and uncontradicted, may be sufficient to establish a change of domicile.

Dance v Dance [1975] 2 BLR 39

ISSUE	Whether a person who is resident in Botswana for employment purposes has acquired a domicile of choice in Botswana.
RULE / RATIO DECIDENDI	The ratio decidendi (on appeal) is that the court below misdirected itself in not giving sufficient weight to the appellant's prima facie credible evidence of intention to remain in Botswana. A person who resides in Botswana and whose evidence of intention to remain permanently is prima facie credible and uncontradicted may establish a domicile of choice in Botswana. The court must give due weight to credible evidence of the animus manendi and must not dismiss such evidence without good reason.
APPLICATION	The lower court had not given due weight to the appellant's evidence of intention to remain in Botswana. The Court of Appeal re-examined the evidence and made its own finding.

CONCLUSION	The Court of Appeal held that the appellant had proved a domicile of choice in Botswana.
SIGNIFICANCE & ANALYSIS	<i>This case is important for establishing that credible and uncontradicted evidence of the animus manendi must be given due weight by courts. The Court of Appeal's willingness to reverse the lower court's finding demonstrates the importance of proper assessment of evidence in domicile cases.</i>

Domicile of a Married Woman -- *Mason v Mason* (1885) 4 EDC 330

ISSUE	What was the common law position regarding the domicile of a married woman?
RULE / RATIO DECIDENDI	The ratio decidendi is that at common law, a wife acquired the domicile of her husband upon marriage and retained it throughout the marriage. If the husband's domicile changed, the wife's domicile automatically changed to the new one, irrespective of whether she was present in that country or had any intention of remaining there permanently. This doctrine of unity of matrimonial domicile has been abolished in Botswana by Section 16 of the Abolition of Marital Power Act 2004.
APPLICATION	The court applied the common law doctrine of unity of matrimonial domicile in determining the domicile of a married woman.
CONCLUSION	The wife's domicile was held to follow that of her husband.
SIGNIFICANCE & ANALYSIS	<i>This case illustrates the pre-reform common law position on the domicile of married women. It must be read alongside Section 16 of the Abolition of Marital Power Act 2004, which fundamentally reformed this position by granting married women an independent domicile.</i>

8.3 Restrictions on Divorce Within Two Years of Marriage

Section 21(1) of the Matrimonial Causes Act forbids the institution of an action for divorce within the first two years of marriage. This forbidden period is called the "specified period." The purpose of this restriction is to promote reconciliation and to discourage hasty recourse to divorce.

Section 21(2) provides an exception where the particular case involves exceptional hardship suffered by the plaintiff or exceptional depravity on the part of the defendant. After considering whether the case involves exceptional hardship or depravity, the court also considers the interests of any children of the marriage.

What constitutes exceptional hardship or exceptional depravity?

- The concept is subjective -- there is no typical case of exceptional hardship or depravity.
- Generally, adultery must be coupled with other matrimonial offences such as cruelty or desertion.
- The hardship or depravity must be something out of the ordinary, judged by prevailing standards of acceptable behaviour between spouses.

Bowman v Bowman [1949] 2 All ER 127

ISSUE	What constitutes exceptional hardship or exceptional depravity sufficient to justify the institution of divorce proceedings within the specified period?
RULE / RATIO DECIDENDI	The ratio decidendi is that exceptional hardship or exceptional depravity involves conduct that is beyond the ordinary wear and tear of married life and is of a character so severe that it justifies departure from the general rule against divorce within the first two years. The following may constitute exceptional depravity: (1) adultery with one person within the first three years of marriage, combined with other matrimonial offences, may be considered ordinary depravity; (2) a combination of matrimonial offences such as adultery, desertion, cruelty, and violence may constitute exceptional hardship for the aggrieved spouse; (3) a child born to the wife through adultery, making the husband maintain another man's child, may show exceptional depravity; (4) the husband committing adultery with multiple women within weeks of marriage, with the wife's sister, or with a domestic servant may all be labelled as exceptional depravity.
APPLICATION	The court examined the circumstances alleged to constitute exceptional hardship and exceptional depravity and laid down the applicable test.
CONCLUSION	The court established the principles for determining exceptional hardship and exceptional depravity.
SIGNIFICANCE & ANALYSIS	<i>This case is the leading authority on what constitutes exceptional hardship and exceptional depravity for the purposes of Section 21(2) of the Matrimonial Causes Act. The principles laid down are directly applied in Botswana.</i>

Fay v Fay [1982] AC 335

ISSUE	What is the standard for determining whether hardship or depravity is "exceptional" within the meaning of the restriction on divorce within the specified period?
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RULE / RATIO DECIDENDI	The ratio decidendi is that hardship or depravity must be shown to be something out of the ordinary, judged by prevailing standards of acceptable behaviour between spouses. The test is an objective one: would the hardship or depravity be regarded by a reasonable person as exceptional, having regard to the normal standards of behaviour expected of spouses? Hardship that is merely significant or painful, without being outside the ordinary range of marital difficulties, does not qualify as exceptional.
APPLICATION	The court examined whether the conduct alleged constituted exceptional hardship within the meaning of the restriction on divorce within the specified period.
CONCLUSION	The court established the objective standard for determining exceptional hardship.
SIGNIFICANCE & ANALYSIS	<i>This case reinforces the objective standard for determining exceptional hardship and exceptional depravity, confirming that not every difficult or painful marital situation will qualify.</i>

8.4 The Sole Ground for Divorce -- Irretrievable Breakdown of Marriage

Section 14 of the Matrimonial Causes Act provides that the sole ground on which an action for divorce may be brought is that the marriage has broken down irretrievably. Section 15(1) sets out the facts that may be proved as evidence of irretrievable breakdown. These facts are:

- **Section 15(1)(a)** -- Adultery and intolerability.
- **Section 15(1)(b)** -- Unreasonable behaviour.
- **Section 15(1)(c)** -- Desertion for at least two continuous years.
- **Section 15(1)(d)** -- Two years' separation with defendant's consent.
- **Section 15(1)(e)** -- Five years' separation without consent.

Section 15(3) enables the court to refuse to grant a decree even where one or more of the facts has been proved, if it is not satisfied on all the evidence that the marriage has broken down irretrievably.

Molefe v Molefe [2001] 2 BLR 431

ISSUE	What must a plaintiff prove to establish irretrievable breakdown of marriage, and what is the court's role in assessing the evidence?
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RULE / RATIO DECIDENDI	The ratio decidendi is that the plaintiff must prove one or more of the facts set out in Section 15(1) of the Matrimonial Causes Act as evidence of irretrievable breakdown of the marriage. However, proof of one or more of those facts does not automatically result in a decree of divorce -- the court retains a discretion under Section 15(3) to refuse to grant a decree if it is not satisfied on all the evidence that the marriage has broken down irretrievably. The court must examine all the evidence and determine whether it is genuinely satisfied that the marriage has broken down irretrievably.
APPLICATION	The court examined the evidence relied upon by the plaintiff as proof of irretrievable breakdown and assessed whether the court was satisfied that the marriage had indeed broken down irretrievably.
CONCLUSION	The court applied Section 15(1) and Section 15(3) in determining the divorce application.
SIGNIFICANCE & ANALYSIS	<i>This case is the leading Botswana authority on the sole ground for divorce (irretrievable breakdown of marriage) and the role of the court in assessing the evidence. It confirms that proof of the statutory facts is necessary but not sufficient -- the court must also be satisfied on all the evidence that the marriage has truly broken down irretrievably.</i>

8.5 Adultery and Intolerability -- Section 15(1)(a)

Adultery is sexual intercourse by a lawfully married person with any person other than their spouse. The following principles govern the proof and consequences of adultery:

- Adultery requires penetration of the female organ by the male organ. Masturbation or other sexual acts do not constitute adultery.
- Adultery must be proven on a balance of probabilities. The burden of proof lies on the plaintiff.
- The sexual intercourse must be consensual -- if the wife is raped, that may serve as a defence to a charge of adultery.
- Adultery must be coupled with the fact that the plaintiff finds it intolerable to live with the defendant before irretrievable breakdown can be established under Section 15(1)(a).

Madumetse v Molapo 1982 (1) BLR 107

ISSUE	What is the definition of adultery for the purposes of divorce proceedings in Botswana?
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RULE / RATIO DECIDENDI	The ratio decidendi is that adultery is sexual intercourse by a lawfully married person with any person other than their spouse, and an action for damages lies at the suit of the spouse whose marriage rights have been violated. Adultery requires penetration of the female organ by the male organ. It must be proven on a balance of probabilities and the intercourse must be consensual.
APPLICATION	The court examined the definition and elements of adultery in the context of divorce proceedings.
CONCLUSION	The court defined adultery and set out its elements.
SIGNIFICANCE & ANALYSIS	<i>This case provides the definitive Botswana definition of adultery for the purposes of divorce. It must be read alongside the provisions of Section 15(1)(a) of the Matrimonial Causes Act.</i>

Ratshosa v Ratshosa (1978) BLR 64

ISSUE	What is the evidential status of a confession of adultery, and when must corroborating evidence be produced?
RULE / RATIO DECIDENDI	The ratio decidendi is that a confession of adultery by the party charged is sufficient per se to justify the court in acting on it. However, where corroboration of the confession can be easily and locally obtained, such evidence should always be presented to strengthen the case. The court retains a discretion to require corroboration where the circumstances of the confession raise doubts about its reliability.
APPLICATION	The court examined the evidential weight of a confession of adultery and whether corroboration was required.
CONCLUSION	The court held that a confession of adultery is sufficient evidence per se, but corroboration should be produced where easily available.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the evidentiary rules governing confessions of adultery in Botswana divorce proceedings.</i>

Dambuza v Dambuza & Mmedi 63/1977

ISSUE	Whether circumstantial evidence -- specifically the discovery of the wife and another man unclothed in the same bed -- is sufficient to prove adultery.
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RULE / RATIO DECIDENDI	The ratio decidendi is that circumstantial evidence may be sufficient to prove adultery. The discovery of a spouse and another person in a compromising position -- such as being found unclothed or partly unclothed in the same bed -- may constitute sufficient circumstantial evidence of adultery. The court will assess all the circumstances and determine whether, on the evidence as a whole, adultery has been proved on a balance of probabilities.
APPLICATION	The defendant's wife was found sleeping with another man in her mother's house. Both were unclothed except for vests.
CONCLUSION	The court held that adultery had been proved on the circumstantial evidence.
SIGNIFICANCE & ANALYSIS	<i>This case illustrates the application of the circumstantial evidence rule in adultery cases. It confirms that direct evidence is not always required and that strong circumstantial evidence may suffice.</i>

8.5.1 The Alleged Adulterer as Co-Defendant

Section 19 of the Matrimonial Causes Act requires that the alleged adulterer be made a co-defendant in the divorce action, unless excused by the court. The general common law principle is that the plaintiff has a cause of action for damages against the co-defendant for loss of consortium and contumelia. Damages are compensatory, not punitive.

8.6 Unreasonable Behaviour -- Section 15(1)(b)

Section 15(1)(b) provides that the defendant has behaved in such a way that the plaintiff cannot reasonably be expected to live with the defendant. To establish this ground, the plaintiff must prove:

- The defendant has behaved in a particular way.
- Because of that behaviour (as proved), the plaintiff cannot reasonably be expected to live with the defendant.

The test for unreasonable behaviour is an objective one: would a reasonable person in the plaintiff's position be unable to continue living with the defendant?

Livingston Stallard v Livingston Stallard [1974] 2 All ER

ISSUE	What is the test for determining whether a defendant's behaviour is such that the plaintiff cannot reasonably be expected to live with them?
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RULE / RATIO DECIDENDI	The ratio decidendi is that the test for unreasonable behaviour is whether the husband (or wife) has behaved in such a way that this wife (or husband) cannot reasonably be expected to live with them, taking into account all the circumstances and the personalities of the parties. The test is an objective one, assessed by the standard of a reasonable spouse in the plaintiff's position. The behaviour must be more than the ordinary wear and tear of married life.
APPLICATION	The court examined the nature of the defendant's conduct and applied the objective test for unreasonable behaviour.
CONCLUSION	The court articulated the objective test for unreasonable behaviour.
SIGNIFICANCE & ANALYSIS	<i>This is the leading case on the test for unreasonable behaviour as a ground for divorce. The objective test articulated here is applied in Botswana under Section 15(1)(b) of the Matrimonial Causes Act.</i>

Bodulala v Bodulala [1979] BLR 103

ISSUE	Whether a combination of the defendant's heavy drinking, embarrassing behaviour, and sexual roughness constitutes unreasonable behaviour such that the plaintiff cannot reasonably be expected to live with him.
RULE / RATIO DECIDENDI	The ratio decidendi is that a combination of matrimonial misconduct -- including heavy drinking, absenting himself from the home, embarrassing and uncouth behaviour in public, and rough and painful sexual conduct -- may cumulatively amount to unreasonable behaviour such that the plaintiff cannot reasonably be expected to continue living with the defendant. The court assesses the totality of the defendant's conduct and considers whether, taken as a whole, it has made the marriage intolerable for the plaintiff.
APPLICATION	The court examined the defendant's conduct: drinking heavily and absenting himself at weekends, embarrassing the appellant by uncouth and raucous behaviour, and being rough during sexual relations thereby causing pain.
CONCLUSION	It was held that it was unreasonable to expect reconciliation and the divorce decree was granted.

SIGNIFICANCE & ANALYSIS	<i>This case illustrates the application of the unreasonable behaviour ground in Botswana. It confirms that the court looks at the totality of the defendant's conduct and that multiple instances of misconduct may cumulatively establish unreasonable behaviour even where no single instance would be sufficient on its own.</i>
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Mhlanga v Mhlanga MC 55/1977

ISSUE	Whether repeated physical assaults by the defendant on the plaintiff constitute unreasonable behaviour such that the plaintiff cannot reasonably be expected to live with him.
RULE / RATIO DECIDENDI	The ratio decidendi is that repeated physical assaults by a spouse, necessitating hospital treatment and leaving visible scars, constitute unreasonable behaviour of a kind that makes it impossible for a reasonable person to continue living with the defendant. Where a spouse has been repeatedly assaulted and the assaults are corroborated by medical evidence and physical injuries, there is no doubt that the plaintiff cannot reasonably be expected to live with the defendant.
APPLICATION	The defendant had assaulted the plaintiff on multiple occasions, necessitating hospital treatment. The plaintiff had a medical certificate and visible scars corroborating the assaults.
CONCLUSION	The court held that the plaintiff could not reasonably be expected to live with the defendant and granted a rule nisi.
SIGNIFICANCE & ANALYSIS	<i>This case is a clear illustration of the unreasonable behaviour ground applied to domestic violence. It confirms that repeated physical assault is among the clearest cases of unreasonable behaviour that will entitle the innocent spouse to a divorce.</i>

8.7 Desertion -- Section 15(1)(c)

Section 15(1)(c) provides that the defendant has deserted the plaintiff for a continuous period of at least two years immediately preceding the commencement of the action. There are two types of desertion:

8.7.1 Simple Desertion (Desertion Simpliciter)

Simple desertion corresponds to malicious desertion under common law. It is committed when a spouse unjustifiably withdraws from cohabitation with the other, with the intention of remaining apart and thereby bringing the marriage to an end. There are four elements:

- **De facto separation** -- the spouses must have actually separated. Desertion is not necessarily a withdrawal from the matrimonial home but a withdrawal from the state of cohabitation.
- **Animus deserendi** -- the deserting spouse must have had the intention to desert (to bring the matrimonial cohabitation permanently to an end).
- **Absence of consent** -- the separation must be without the other spouse's consent. Where the parties have agreed to separate, there cannot be desertion.
- **Absence of just cause** -- the deserting spouse must have no justifiable reason for the separation.

Maruswaneng v Maruswaneng MC No 173/1982

ISSUE	Whether a defendant who agreed to cohabit during school holidays but failed to do so has committed desertion.
RULE / RATIO DECIDENDI	The ratio decidendi is that desertion requires actual separation from the state of marital cohabitation (not merely from the matrimonial home) combined with the intention to desert. Where parties agreed that the defendant would live separately while studying but would cohabit during school holidays, the defendant's failure to honour this agreement and to cohabit during the agreed periods constitutes desertion -- the defendant had withdrawn from the agreed state of marital cohabitation.
APPLICATION	The parties had only lived together for three weeks after marriage. They agreed that the defendant (who was at school) would live separately but cohabit during school holidays. The defendant failed to live with the plaintiff as agreed.
CONCLUSION	The court held that the plaintiff had proved desertion and granted a rule nisi for divorce.
SIGNIFICANCE & ANALYSIS	<i>This case illustrates the flexible approach to desertion in Botswana law. It confirms that desertion is a withdrawal from the state of marital cohabitation (the "state of things") rather than merely a departure from the matrimonial home, and that a failure to cohabit as agreed may constitute desertion.</i>

Pulford v Pulford [1923] P 13

ISSUE	What is the nature of desertion -- is it a withdrawal from a place (the matrimonial home) or from a state of things?
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RULE / RATIO DECIDENDI	The ratio decidendi is that desertion is not the withdrawal from a place but the withdrawal from a state of things. Desertion consists in abandoning the matrimonial relationship -- the consortium of the marriage -- not merely in leaving the matrimonial home. A spouse who leaves the matrimonial home for a legitimate reason, or with the other spouse's consent, has not committed desertion.
APPLICATION	The court examined the nature of desertion and defined it in terms of the state of marital cohabitation rather than mere physical location.
CONCLUSION	The court defined desertion as withdrawal from a state of things, not from a place.
SIGNIFICANCE & ANALYSIS	<i>This is the foundational authority defining the nature of desertion. The principle that desertion is a withdrawal from the state of marital cohabitation, not merely from the matrimonial home, is directly applied in Botswana.</i>

8.7.2 Constructive Desertion

Constructive desertion arises where the remaining spouse is the party truly guilty of desertion because their own conduct is responsible for driving the other spouse away. The party who stays in the matrimonial home may be guilty of desertion if, by reason of their own conduct, they have made it unbearable for the other spouse to remain.

Situations of constructive desertion include:

- The remaining spouse orders the other to leave or physically expels them.
- The remaining spouse behaves in a manner that makes it intolerable for the other to remain.

The animus to drive the other spouse out of the marriage is essential -- it is the intention of the remaining spouse to bring the marriage to an end that characterises constructive desertion.

Lang v Lang [1955] AC 402

ISSUE	What is the nature of constructive desertion, and when is the party who remains in the matrimonial home guilty of desertion?
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RULE / RATIO DECIDENDI	The ratio decidendi is that it has been recognised that the party truly guilty of disrupting the home is not necessarily the party who leaves it. The party who stays behind may, by reason of their own conduct, be making it unbearable for the other spouse with reasonable self-respect or powers of endurance to remain. In such circumstances, the remaining spouse is the party truly responsible for the breakdown of the marriage and may be guilty of constructive desertion.
APPLICATION	The court examined the circumstances in which the party who remains in the matrimonial home may be guilty of constructive desertion through their own conduct.
CONCLUSION	The court affirmed the doctrine of constructive desertion.
SIGNIFICANCE & ANALYSIS	<i>This is the leading case on constructive desertion. The principle -- that the party who stays behind may be the true deserter through their own conduct -- is directly applied in Botswana and is important for understanding the full scope of the desertion ground for divorce.</i>

8.7.3 Termination of Desertion

Desertion may be terminated in the following ways:

- **Resumption of cohabitation** -- desertion is terminated when the deserting spouse resumes cohabitation. Two factors are required: (a) a mutual desire of both spouses to resume cohabitation; and (b) the full marital relationship must be re-established.
- **Mutual agreement to live apart** -- where the spouses subsequently agree to remain separated, this terminates the deserting spouse's desertion.
- **Supervening court order** -- a court order such as a judicial separation releases the spouses from their obligation to cohabit and terminates desertion.
- **Supervening animus revertendi** -- when the deserting spouse genuinely repents and intends to return to the matrimonial home, this terminates the desertion. The offer to return must be: (a) on a permanent basis; (b) bona fide; (c) without unreasonable conditions.
- **Supervening insanity** -- where a deserting spouse subsequently becomes insane, desertion is not automatically terminated. Under Section 2(4) of the English Matrimonial Causes Act 1973, if the spouse deserted while of sound mind and subsequently became insane, the desertion is deemed to continue.

8.8 Bars to Divorce

Before the Matrimonial Causes Act, various factors could bar a plaintiff from being granted a divorce even where a matrimonial offence had been proved. These bars were:

- **Condonation** -- the forgiveness of the other spouse's matrimonial offence.
- **Connivance** -- the plaintiff's consent or acquiescence in the other party's misconduct.
- **Collusion** -- an agreement between the parties to deceive the court.

These factors survived the new Act but are now largely inconsistent with the rationale of the irretrievable breakdown approach and should be taken to be no longer applicable in their traditional form.

Baitsile v Baitsile [1979] BLR 111

ISSUE	Whether the plaintiff's own adultery bars their claim for divorce based on Section 15(1)(d) of the Matrimonial Causes Act.
RULE / RATIO DECIDENDI	The ratio decidendi is that in cases where the action is based on Section 15(1)(d) (two years' separation with consent), the adultery of the plaintiff does not impede their claim for divorce, nor does it require condonation by the court. The focus of the court under the irretrievable breakdown approach is on whether the marriage has in fact broken down irretrievably, not on apportioning blame between the parties. The traditional bars to divorce (condonation, connivance, and collusion) are of diminishing relevance in the irretrievable breakdown framework.
APPLICATION	The court examined whether the plaintiff's adultery constituted a bar to her claim for divorce.
CONCLUSION	The court held that the plaintiff's adultery did not impede her claim for divorce under Section 15(1)(d).
SIGNIFICANCE & ANALYSIS	<i>This case is important for confirming the diminishing relevance of the traditional bars to divorce in Botswana's irretrievable breakdown framework.</i>

TOPIC 9

ANCILLARY RELIEFS*Alimony, Financial Provision, Custody of Children and Property Rights*

9. Ancillary Reliefs

9.1 Overview

Sections 13, 25, 27, and 28 of the Matrimonial Causes Act provide for ancillary reliefs in divorce and nullity proceedings. These include:

- Custody and maintenance of children.
- Alimony for the wife.
- Financial provision for the wife.
- Property rights of the spouses.

9.2 Alimony of the Wife -- Section 25(1)

Section 25(1) of the Matrimonial Causes Act provides that in an action for divorce or nullity of marriage, the court may make an interim order for alimony to be paid to the wife. Alimony is not a right that the wife can demand -- it is in the discretion of the court. The purpose of alimony is to enable the wife to live in the same position to which she has been accustomed during the marriage.

In granting alimony, courts consider the following factors:

- The wife's own financial means and earning capacity.
- The husband's ability to pay.
- The conduct of the parties -- where the conduct of one party has been particularly egregious, this may affect the award.
- The standard of living of the parties during the marriage.
- The respective earning capacities of the parties.

Wachtel v Wachtel [1973] 1 All ER 829

ISSUE

What role should the conduct of the parties play in determining an award of financial provision or alimony on divorce?

RULE / RATIO DECIDENDI	The ratio decidendi is that the conduct of the parties should only be taken into account in determining alimony or financial provision where it is both obvious and gross -- that is, where the conduct is so extreme and one-sided that it would be inequitable to ignore it. Minor or mutual misconduct should not be allowed to affect the financial arrangements between the parties; the court's primary focus should be on achieving a fair financial outcome.
APPLICATION	The court examined whether and to what extent the conduct of the parties should affect the award of financial provision on divorce.
CONCLUSION	The court held that only obvious and gross conduct should affect the financial award.
SIGNIFICANCE & ANALYSIS	<i>This case establishes the principle that conduct must be both obvious and gross before it will affect the financial award on divorce. This is a high threshold that protects both parties from having their financial entitlements reduced by relatively minor misconduct.</i>

W v W (Financial Provision: Lump Sum) [1976] Family Reports 107

ISSUE	What standard of conduct will cause the court to reduce or refuse financial provision to a spouse on divorce?
RULE / RATIO DECIDENDI	The ratio decidendi is that the conduct which will cause the court to reduce or refuse financial provision must be both obvious and gross. It must be conduct of exceptional gravity of a kind that would cause the ordinary person to say that the wife should not receive any money. The threshold is high, and mere misconduct or adultery will not ordinarily be sufficient to deprive a spouse of financial provision.
APPLICATION	The court applied the Wachtel standard and assessed whether the wife's conduct was sufficiently serious to affect her financial award.
CONCLUSION	The court affirmed that only conduct of exceptional gravity will affect the financial award.
SIGNIFICANCE & ANALYSIS	<i>This case reinforces the Wachtel principle and confirms that the threshold for conduct affecting financial provision is very high.</i>

9.3 Custody of Children -- Section 28

Section 28 of the Matrimonial Causes Act empowers the court to make financial provision for children of the marriage whose parents are the subject of its proceedings. Section 28(1) provides that the court may make provision for the custody, maintenance, and education of children of the parties.

Key principles governing custody determinations:

- Maintenance is the joint responsibility of both parents.
- The best interests of the child are the paramount consideration in all custody determinations.
- The jurisdiction to make custody orders is ancillary to divorce, nullity, or judicial separation proceedings -- the court has no standalone jurisdiction to make custody orders in the absence of such proceedings.

Mazile v Mazile

ISSUE	What factors should be considered by a court in determining to whom custody of children should be awarded on divorce?
RULE / RATIO DECIDENDI	The ratio decidendi is that in determining custody, the court must consider the following factors: (1) the suitability of each parent; (2) the desirability of keeping siblings together; (3) the availability of the parent to provide day-to-day care; (4) the desirability of ensuring stability and security in the lives of young children; (5) the availability of the parent to provide for the children's emotional, psychological, cultural, and environmental development; and (6) the suitability of the children's existing environment. These factors must all be weighed in light of the paramount consideration of the best interests of the child.
APPLICATION	The court examined the competing custody claims of the parties and applied the applicable principles to determine custody.
CONCLUSION	The court determined custody on the basis of the factors identified.
SIGNIFICANCE & ANALYSIS	<i>This case provides the most comprehensive statement of the factors relevant to custody determinations in Botswana. The factors identified must be applied in all custody cases, always subordinate to the paramount consideration of the best interests of the child.</i>

Rangongo v Rangongo

ISSUE	Whether custody of female children should be awarded to the mother and custody of male children to the father.
RULE / RATIO DECIDENDI	The ratio decidendi is that while the court may, in appropriate circumstances, award custody of female children to the mother and male children to the father, this is not a rigid rule. The best interests of each individual child must be considered, and custody arrangements must reflect those interests rather than simply dividing children along gender lines. Gender-based custody allocation is permissible only where it serves the best interests of the individual children concerned.
APPLICATION	The court examined the custody arrangements for both male and female children and considered whether gender-based allocation was appropriate.
CONCLUSION	Custody of the female children was awarded to the mother and of the male children to the father on the specific facts.
SIGNIFICANCE & ANALYSIS	<i>This case illustrates the application of gender considerations in custody determinations in Botswana. It shows that while such arrangements are possible, they must always be justified by reference to the best interests of each individual child.</i>

Ramotshubi v Ramotshubi

ISSUE	Whether the views of a mature child should be taken into account in custody proceedings.
RULE / RATIO DECIDENDI	The ratio decidendi is that where the court considers a child to be sufficiently mature to express a reasoned preference, the child's views will be taken into account in custody proceedings. The weight given to the child's views will depend on the child's age, maturity, and understanding. The views of the child are not determinative but are an important factor in the overall best interests assessment.
APPLICATION	The court considered whether to take into account the views of a child who was considered mature enough to express a preference.
CONCLUSION	The court took the mature child's views into account in the custody determination.
SIGNIFICANCE & ANALYSIS	<i>This case confirms the importance of the child's voice in custody proceedings in Botswana, consistent with the principles of the UN Convention on the Rights of the Child.</i>

9.4 Property Rights of Spouses on Divorce -- Section 13

The property rights of spouses on divorce are determined primarily by whether they were married in or out of community of property.

9.4.1 Marriage in Community of Property

Where the spouses are married in community of property, the joint estate is held by the parties in co-ownership in equal undivided shares. On divorce, the court will distribute the assets of the joint estate equally between the parties.

Molomo v Molomo [1979] BLR 250

ISSUE	How should the court exercise its powers under Section 13 of the Matrimonial Causes Act in relation to the distribution of matrimonial property on divorce, and what is the applicable standard?
RULE / RATIO DECIDENDI	The ratio decidendi is that the powers of the court under Section 13 of the Matrimonial Causes Act are the same as in any other proceedings where ownership of property is in issue. Where the parties are married in community of property and the rights in issue are in joint ownership, the court must endeavour to effect a division in equal shares. The court's primary obligation is to achieve an equal division of the jointly owned property, subject to any special circumstances that may justify a different apportionment.
APPLICATION	The court examined the distribution of matrimonial property between spouses married in community of property and applied the equal division principle.
CONCLUSION	The court determined that the jointly owned property should be divided equally.
SIGNIFICANCE & ANALYSIS	<i>This case is the foundational Botswana authority on the distribution of matrimonial property between spouses married in community of property on divorce. The equal division principle is clearly established.</i>

9.4.2 Marriage Out of Community of Property

Where the spouses are married out of community of property, the marriage does not affect the proprietary rights of the spouses. Each spouse holds whatever property they had before the marriage and whatever they acquired during its continuance. On divorce, each spouse takes their separate property.

Rabantheng v Rabantheng 1998

ISSUE	Whether a wife who has made direct and indirect contributions to a matrimonial home registered in the husband's name alone is entitled to a share of that property on divorce where the marriage was out of community of property.
RULE / RATIO DECIDENDI	The ratio decidendi is that where spouses are married out of community of property but the wife has made substantial direct and indirect contributions to the acquisition and maintenance of the matrimonial home -- which is registered in the husband's name -- the wife may be entitled to a share of the property proportionate to her contributions. The court will look beyond the formal registration of title to examine the actual contributions of the parties and may award the wife a share reflecting her contributions.
APPLICATION	The matrimonial home was registered in the husband's name. The wife contended that the house was intended to be their joint property and that she had made direct and indirect contributions to its maintenance.
CONCLUSION	The wife was awarded a one-third share of the house.
SIGNIFICANCE & ANALYSIS	<i>This case is important for establishing that registration of property in one spouse's name is not conclusive of ownership in the context of matrimonial property disputes. Where a spouse has made substantial contributions to property registered in the other's name, the court may recognise a proportionate share in that property.</i>
NOTE TO STUDENTS	<i>These notes cover the full LAW 134 Family Law course, including all topics, subtopics, 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 the cases in full, engage critically with the applicable statutes, and use these notes as a supplement to -- not a replacement for -- independent engagement with primary sources and academic commentary.</i>